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20 P.—22 P.

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3 Cal. Unrep. 39

McCormick *v.* Sheridan. (No. 11,339.)

(*Supreme Court of California.* December 10, 1888.)

In bank. On proceedings against C. H. Parker for contempt.
For opinion in the matter of the contempt of Waterman, see *ante*, 24.

Per Curiam. It appearing to this court, from the statements of the respondents in open court, that C. H. Parker had nothing to do with the preparation of the petition for a rehearing herein, and that he is in nowise to blame for anything contained therein, it is ordered that the order heretofore made herein, citing respondents to show cause why he should not be punished for contempt is, as to said C. H. Parker, discharged.

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3 Cal. Unrep. 39

McCormick *v.* Sheridan. (No. 11,339.)

(*Supreme Court of California.* December 20, 1888.)

In bank. In the matter of the contempt of F. H. Waterman.
For opinion on adjudication of contempt, see *ante*, 24.

Per Curiam. In the matter of the contempt of F. H. Waterman, committed in the above-entitled cause, said Waterman having filed a written statement acknowledging the propriety and justice of the judgment of this court in imposing a fine of $200, with the alternative of imprisonment in default of payment of such fine, and it appearing from such statement and from the representations of the intimate friends of said Waterman that he is unable to pay such fine, and that his physical condition is such that imprisonment may endanger his health, and the said F. H. Waterman having paid the cost herein, to-wit, $10, it is now, therefore, ordered that the fine of $200 imposed upon said Waterman be, and the same is hereby, remitted.

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77 Cal. 483

Adams *v.* Andross *et al.* (No. 12,620.)

(*Supreme Court of California.* December 11, 1888.)

Injunction—Action on Bond—Pending Appeal.

The supreme court of California will not grant an order restraining the prosecution of an action on a bond given on the issuing of a restraining order, pending an appeal by the obligor from the action of the court in vacating his restraining order, and denying his application for injunction.

In bank. Appeal from superior court, city and county of San Francisco; William T. Wallace, Judge.

Whittemore & Sears, for appellant. *Roger Johnson* and *F. W. Van Reynegom*, for respondents.

Sharpstein, J. Application for an order restraining the further prosecution of an action entitled *P. H. Andross* v. *Grove Adams et al.*

The facts are as follows: On November 18, 1887, William Adams commenced an action to restrain the sale of certain real estate by the sheriff of San Diego county in the action of *P. H. Andross* v. *E. P. Gray*, and on that day obtained a restraining order and an order to show cause why an injunction should not issue. On the granting of said restraining order, William Adams gave a bond, with said Grove Adams and C. S. Boise as sureties, in the sum of $500, to the effect that the said William Adams would pay to said Andross *et al.* such damages as he might sustain if said court should finally decide that said William Adams was not entitled to said restraining order. On December 18, 1887, said restraining order was vacated, and the application for an injunction denied. On the 13th of February, 1888, said William Adams appealed from said order to this court, and executed an undertaking on appeal. Said appeal is now pending in this court. On April 20, 1888, the action of *Adams* v. *Andross* was dismissed by the court in which it was pending, and on April 26, 1888, Andross commenced an action upon the bond given on the issuing of said restraining order, and we are now asked for an order staying further prosecution of that action until the appeal pending here is finally disposed of. We are not satisfied that the power to issue such an order has been conferred upon this court, and therefore must decline to issue it.

Application denied.

We concur: SEARLS, C. J.; THORNTON, J.; MCFARLAND, J.

PATERSON, J. I concur. The petition shows that a motion for a new trial is pending in the superior court. If the evidence given at the trial shows that it has not been finally decided that the plaintiff in the injunction suit was not entitled to the injunction, (section 529, Code Civil Proc.,) I presume the court will grant the motion, and hold that the suit on the undertaking was prematurely brought.

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77 Cal. 636

PEOPLE v. LEONG YUNE GUN. (No. 20,412.)

(*Supreme Court of California.* December 28, 1888.)

1. HOMICIDE—ASSAULT WITH INTENT TO KILL—PRESENT ABILITY.
Although under Pen. Code Cal. § 240, an essential element of the crime of assault with intent to commit murder is "a present ability" to do it, yet where the evidence shows, without conflict, that whoever committed the assault for which defendant is indicted did have the present ability to inflict, and in fact did inflict, the injury, an omission to instruct as to such element is harmless.

2. NEW TRIAL—NEWLY-DISCOVERED EVIDENCE—DILIGENCE.
Where, on application for a new trial on the ground of newly-discovered evidence, it does not appear that defendant might not, with reasonable diligence, have discovered the evidence in time for trial, or that such evidence would induce a different verdict, it is not an abuse of discretion to refuse the application. Following *People* v. *Howard*, 16 Pac. Rep. 394.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Wilson & Trout and *Frank H. McNally*, for appellant. *Geo. A. Johnson*, Atty. Gen., (*Robert Ferral*, of counsel,) for respondent.

FOOTE, C. The defendant was convicted of an assault with intent to commit murder. From the judgment of conviction and an order denying a new trial he has appealed. The point of objection made to the instructions of the court is that they omit to inform the jury that one of the elements constituting the crime charged against the defendant must be "a present ability" to do it. Conceding, under section 240 of the Penal Code, that this element is essential to make out the crime, yet the evidence in this case without conflict shows that whoever shot at and wounded the prosecuting witness, Jare Hoy, in the head with a pistol-ball, had the present ability to inflict, and did inflict, that injury. There was no dispute whatever but what the prosecuting witness was so shot at the time charged in the information, and that the person doing the injury had the present ability to accomplish it; the dispute was as to who did it, the defendant endeavoring to show that he was not the individual. The jury had no need to consider whether or not the defendant had the present ability to commit the act complained of; such ability was conceded to exist, if he should be proved to have done the shooting. And the defendant made no request that an instruction be given covering the omission. If the omission was error, it was harmless.

The affidavits as to newly-discovered evidence show that such evidence comes clearly within the rules laid down in *People* v. *Sutton*, 73 Cal. 243, 15 Pac. Rep. 86; *People* v. *Howard*, 16 Pac. Rep. 394; Hayne, New Trials & App. § 88; and a new trial was properly refused. There was no error in refusing the defendant's motion for a continuance. There was no legal showing made, and the court did not abuse its discretion in the premises.

No prejudicial error appearing, the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

78 Cal. 15

Comptoir D'Escompte de Paris *v.* Dresbach *et al.* (No. 12,468.)

(*Supreme Court of California.* December 29, 1888.)

1. Payment—By Check—Express Agreement.
Where payment by check is alleged, it is error to refuse to charge that, when a check is given in payment of a debt, it is only accepted on condition that the check be paid, and, if dishonored, the creditor may resort to his original claim. It is error to charge that the acceptance of a check of a third person by the creditor's voluntary act as payment and in satisfaction will establish payment, as such instruction eliminates the necessity of an express agreement to take the check in absolute payment.[1] Paterson, J., dissenting.

2. Same—Conditional.
Where the creditor at the time the check was given was requested not to present it immediately, as the drawer's account was not good, the creditor's testimony that he took it in payment must be construed to mean that he took it as conditional payment, and is no evidence that he took it in absolute payment. Paterson, J., dissenting.

3. Same—Receipts—Explanation—Ratification.
Where, of a series of receipts given by defendant's book-keeper to a third person a part ran to the third person, and the remainder ran to plaintiff, and there was evidence that the latter were given merely as *memoranda* to enable the third person to keep his accounts properly, and were not intended to acknowledge the receipt of anything from plaintiff, a charge that, if they were given for such purpose without defendant's consent or ratification, defendant is not liable upon them, is proper.

4. Factors and Brokers—Evidence of Relation.
Where the dispute was as to whether a third person, in dealing with plaintiff, acted as principal or a broker for defendant, and plaintiff had given evidence that, in a transaction with others, the third person acted as a broker, and that he was doing a general brokerage business, evidence that in the latter transaction the third person acted as principal is admissible.

5. Appeal—Review—Weight of Evidence.
A verdict will not be disturbed where the evidence is conflicting.

In bank. Appeal from superior court, city and county of San Francisco; T. K. Wilson, Judge.

Wilson & Wilson and *Soughborough & Newhall*, for appellant. *Pillsbury & Blanding*, (*F. C. Lusk*, of counsel,) for respondents.

Thornton, J. Appeal by plaintiff from the judgment and order denying its motion for a new trial. The action was brought by plaintiff to recover of respondents the sum of $52,401.60 and interest for money lent and advanced to the latter by the former. The action was commenced against William Dresbach and Hugh J. Glenn, as copartners under the firm name of William Dresbach, but in consequence of the death of Glenn, and also of the first administrator of his estate, N. D. Rideout, the second administrator, was substituted as a party, and the action came to be against Dresbach, and Rideout, administrator of the estate of Glenn, deceased. It is argued that the evidence was insufficient to justify the verdict. We have read and considered the argument of the counsel for plaintiff on this point, and have weighed the testimony, and are of the opinion that the evidence is of such a character as to forbid this court from sustaining this contention. There is evidence tending to prove that plaintiff dealt with Helmrich & Hansen as principals, and that their loans were made to them, and not to Dresbach & Glenn; and there is also evidence tending to show that Dresbach & Glenn were principals, and that Helmrich & Hansen were their brokers and intermediaries, and obtained these loans for their account. In other words, the evidence on this point is conflicting, and, under the well-settled rule of this court, it cannot interfere with the verdict on the ground urged.

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[1] The acceptance of a check for a precedent indebtedness operates only as a conditional payment, unless the check is afterwards actually paid to the acceptor, or is expressly accepted as absolute payment. See Bank v. Bornman, (Ill.) 10 N. E. Rep. 552, and note; Woodburn v. Woodburn, (Ill.) 5 N. E. Rep. 82, and note; Good v. Singleton, (Minn.) 40 N. W. Rep. 359.

The defendants contend—*First*, that Dresbach & Glenn transacted the business matters involved herein with Helmrich & Hansen as principals, and not through Helmrich & Hansen as the agents of Dresbach and his partner; and, *secondly*, that if the business was transacted between the plaintiff with Dresbach & Glenn, through Helmrich & Hansen as their agents, the indebtedness sued for herein was paid. It appears that the indebtedness sued for herein was contracted by advances made on wheat shipped by Dresbach & Glenn on the ship Scandia. The business was carried on in this way: Dresbach would put the wheat on board the Scandia, bound to a foreign port, in parcels of several thousand sacks. For each parcel so placed on board, the mate of the vessel would give a receipt, specifying the number of sacks, and that they were received of Dresbach. The latter would hand over these receipts to Helmrich & Hansen, who would take them to the plaintiff, and on these receipts, which were retained by plaintiff as security, it would make the advances. The advances seem to have been made on each parcel of wheat, for which a receipt was issued by checks drawn payable to the order of Helmrich & Hansen. When the ship was fully laden, or it had received all the wheat to be shipped on it, Helmrich & Hansen would obtain from the plaintiff the mate's receipts, and deliver them over to the master, who would give a bill of lading in their place, and take up or retire the mate's receipts. A bill of exchange would then be drawn by Dresbach against the wheat shipped and delivered to Helmrich & Hansen along with the bill of lading and other documents. The bill of lading and other documents would be attached to the bill of exchange, and go forward with it. Helmrich & Hansen would then sell the bill of exchange, and with the proceeds derived from its sale return to the plaintiff the amount of its advances. Sometimes the bill of exchange was sold to the plaintiff. In such case it would retain the amount of its advances, and, if the amount of such proceeds was not sufficient to reimburse plaintiff, Helmrich & Hansen would pay the balance due in money. In case the proceeds exceeded the amount due for advances, the plaintiff would pay the surplus to Helmrich & Hansen.

In the case of the shipment by the Scandia, the master was ready to deliver the bill of lading on the 25th of September, 1882. On that day Hansen, who attended to the outdoor business of his firm, called on the plaintiff, and procured from it the mate's receipts on which advances had been made, took them away with him, and returned with the bill of exchange drawn as usual, and with the bill of lading and other documents. The plaintiff, for the reason that it then held as many bills on the house on which the bill on the shipment per Scandia was drawn as it was willing to take, declined to purchase this bill. Hansen then had to sell the bill, and with its proceeds return the advances. A settlement was on the day above mentioned had between the plaintiff and Hansen, and it was found that there was due for the advances per Scandia a sum of $44,000. On the same day the plaintiff sold to Helmrich & Hansen a bill or bills of exchange on Hong-Kong, for £4,000, for $19,739.30, and delivered this exchange to Hansen.

For the sums above mentioned, amounting to $63,739.30, Hansen drew in the name of his firm a check on the Pacific Bank, and delivered it to the plaintiff. This check was received about 3 P. M., or about three minutes before, at an hour too late to present it for payment at the Pacific Bank on that day, but some time on that afternoon the plaintiff sent this check to the bank for certification, which was refused. The check was on the next day deposited to credit of plaintiff with the Bank of British Columbia. Hansen informed the manager of the plaintiff that the check would not be paid, and asked for further time. Hansen requested that plaintiff take up the check, and grant further time, and the plaintiff, on this request, sent its check on the Bank of British Columbia for $63,000 to the Pacific Bank, to be passed to the credit of Helmrich & Hansen, that the check of the latter for $63,739.30 might be paid.

The Pacific Bank then paid the check of Helmrich & Hansen, and returned it to the plaintiff, who delivered it to Helmrich & Hansen. It does not appear that the latter ever paid anything on this check, but that it was in fact taken up by plaintiff. Nor was any portion of the advances made by the plaintiff on the wheat shipped per Scandia ever paid to it by any one, unless the check drawn by Hansen on the 25th of September, 1882, was received by the plaintiff in absolute payment and discharge of such advances.

In reference to this payment by check the plaintiff, by its counsel, requested the court to direct the jury as follows: "When a check is given in payment of a debt, it is only accepted on condition that the check be paid, but, if dishonored, the creditor may resort to his original claim, on the ground that there has been a failure of the condition on which the check was taken." The court refused to give the foregoing, and gave to the jury the following: "If a promissory note, bill, or check of a third person be accepted by a creditor by his own voluntary act or choice, as payment and in satisfaction of a debt, such acceptance would establish payment of such a debt." The plaintiff excepted to the refusal of the court to give the requested direction, and also excepted to the giving of the instruction just above set forth.

The court below clearly erred in refusing plaintiff's request. The check in this case was dishonored. If it was not presented to the Pacific Bank for payment, but only to be certified, it distinctly appears that it was not presented for payment, because the plaintiff was told by Hansen more than once on the day following its date that it would not be paid. It was said in *Smith* v. *Harper*, 5 Cal. 330: "When the holder of a note accepts a draft or note in payment, it has usually been held that he is not bound to give up the note before payment of the draft or check." It has been repeatedly held by this court that the acceptance of a note for a debt does not discharge the debt unless expressly agreed to be payment; that in such case, the right of action on the debt is suspended until the maturity of the note given, and suit may be brought on the original debt in place of the non-payment of the accepted note. See *Brewster* v. *Bours*, 8 Cal. 501; *Griffith* v. *Grogan*, 12 Cal. 317; *Higgins* v. *Wortell*, 18 Cal. 330; *Crary* v. *Bowers*, 20 Cal. 89; *Smith* v. *Owens*, 21 Cal. 11; *Brown* v. *Cronise*, Id. 386; *Welch* v. *Allington*, 23 Cal. 322; *Mitchell* v. *Hockett*, 25 Cal. 542; *Brown* v. *Olmsted*, 50 Cal. 162; *Crawford* v. *Roberts*, Id. 236.

The language used in the opinions is, unless it is expressly agreed that the note is accepted as payment, it is not payment, and the debt is not extinguished. As in *Griffith* v. *Grogan*, *supra*, it was said by FIELD, J., speaking for the court in regard to a note: "Unless received by express agreement as payment, it did not extinguish the debt." Subsequently, in the same opinion, he cites *Tobey* v. *Barber*, 5 Johns. 68, as "the leading American authority on the point," and quotes the rule of the opinion in that case as follows: "The taking of the note was no extinguishment of the debt due for the rent. It is a rule well settled and repeatedly recognized in this court that taking a note either of the debtor or of a third person for a pre-existing debt is no payment, unless it be expressly agreed to take the note as payment, and to run the risk of its being paid; or unless the creditor parts with the note, or is guilty of laches, in not presenting it for payment in due time. He is not obliged to sue upon it; he may return it when dishonored, and resort to his original demand. It only postpones the time of payment of the old debt until a default be made in the payment of the note."

That a check is only provisional or conditional, and not absolute, payment of the debt for which it is given, in the absence of an agreement to that effect, we consider clearly established law. We find the law on this question admirably well stated in *Blair* v. *Wilson*, 28 Grat. 171, 172, *et seq.* It is there said: "The giving of a check for an antecedent debt is not an absolute payment and extinguishment of the debt, in the absence of an agreement giving it that effect. Ordinarily it is only a means of payment, and the debt will not be extinguished unless and until the check be paid, or unless loss be sustained by the drawer in consequence of the laches of the holder, in which case the debt will be discharged in proportion to the loss sustained. If the check be not paid, and the payee is without fault, his right of action against the drawer for the debt, which has been merely suspended by the giving of the check, revives, and he may have recourse to the drawer either upon the debt or upon the check, at his option." This rule is thus stated in 2 Benj. Sales, § 1083. (See edition with notes by Corbin, Amer. Ed.) "A check is accepted as a particular form of cash payment, and, if dishonored, the vendor may resort to his original claim, on the ground that there has been a defeasance of the condition on which it was taken." It makes no difference that the check is that of a third person. The authorities to sustain this rule are cited in notes *n* and 19 to section 1083, above cited; note *n* containing the English, and note 19 the American, cases. Any more particular reference to the cases is entirely unnecessary.

The instruction above quoted, which was given, in our view, eliminates from the rule above stated any agreement between the debtor and creditor that the check was taken in absolute payment. The voluntary act of the plaintiff alone is referred to, and the jury are told that if, in their opinion, the creditor by his acts disclosed his will to accept the check "as payment, and in satisfaction of a debt, such acceptance would establish payment of such debt." There is not the least evidence that there was any express agreement between the drawers of the check and the plaintiff when it was delivered by the drawers to the latter. Nothing was said at that or any other time in regard to such acceptance of the check. In fact, what occurred at that time disproves that any such agreement was made, and nothing then occurred from which any such agreement could be implied. On the contrary, Hansen, at the time when he delivered this check, requested the plaintiff's manager not to send it to the Pacific Bank on that day, stating at the same time that he had not made his account good,—had not sold the exchange on the cargo per Scandia. Hansen testified that he said to the manager of the plaintiff, De Guigne, with whom he was transacting this business: "Now, Mr. De Guigne, it is now two minutes to 3, or 3 o'clock. Don't put the check through to-day, because I have not made my account good—sold the bill of exchange." We find no evidence of an agreement, express or implied, made between the parties to this transaction that the check was accepted as payment in full, and absolutely. As to any delay in presenting this check, it may be conceded that there is no evidence of it, and such as there was, was advised and consented to by Dresbach.

It may be further said that, when one accepts a check in absolute payment, he takes all the risk of the payment of the security so taken. Is it to be supposed that Hansen would have asked De Guigne to accept the check as absolute payment, and take the risk of its payment, when he had informed the plaintiff's manager that his balance in the bank on which he drew the check was insufficient to meet it? Or that De Guigne, under such a state of facts, would have thought of accepting the check in payment, and taken all the risks of its being paid? It is manifest that the idea of an agreement of any kind, either express or implied, that the check should be accepted in absolute payment, finds no support in the evidence, and was not even mentioned in the whole transaction. The instruction seems to have been based on some answers of De Guigne to questions put to him on cross-examination by counsel for defendants, in which he spoke of the check, and used the word "payment" in connection with it.

We insert here the questions and answers which are quoted in respondents' (defendants') brief. De Guigne is asked as to the check, and by whom it was signed, to which he answers: "Signed by Mr. Hansen, in payment of these mate's receipts partially, and partially in payment of a draft for four thousand pounds that he had bought of me on the Hong-Kong and Shang-Hai Bank. *Question.* When you say in payment of the mate's receipts, do you mean the payment of advances by you on the mate's receipts? *Answer.* Yes, sir." And again, speaking of the check, he (De Guigne) said: "Mr. Hansen told me that the check he had given me in payment for these mate's receipts could not be paid." Speaking of the bill on Hong-Kong, which the plaintiff had sold Hansen's firm, and delivered to Hansen, and the amount to be paid for it, he is asked: "*Question.* And you added that right into this check? *Answer.* In payment for it; yes, sir. *Q.* Then you took this check in payment of that exchange, didn't you? *A.* Yes, sir. *Q.* As you have stated before, you took the check in payment of advances on mate's receipts and in payment of exchange; that is what you said? *A.* Yes, sir; I said so." With reference to the amount due for the Hong-Kong bill, and the advances on the wheat shipped per Scandia, the witness is asked: "And the two were put together. He gave you, in payment for both, this check for $63,739.30? *Answer.* Yes, sir."

This is the character of evidence on which the above instruction was given. We say it was given on this evidence for the reason that we find no other evidence, and no other has been called to our attention on which it could have been based.

We have seen that the rule of law is that a check is not considered absolute payment of a debt unless it is expressly agreed to be taken as such, and in case of such agreement the creditor takes the risk of the payment of the check from the time of his acceptance of it. The language of the witness on this point amounts to no more than this: that he took or accepted the check in the usual manner in which a check is taken, in payment of the advances and of the amount due on the bill of exchange; that is, as a conditional and provisional payment. Payment does not necessarily mean absolute payment.

We have seen that, where a check or note is accepted in payment of an antecedent debt, the presumption is that it is taken as conditional or provisional payment; that it is payment founded on the condition that the check or note is paid. If the check is not paid when regularly presented, or the note is not paid when it matures, there is no payment of the debt. Under the facts of the case before us, the language of the witness (De Guigne) should not be construed as signifying anything more than provisional payment. This is the ordinary and popular meaning of the word, when applied to a transaction like the one before us. It would be doing great injustice to the witness to hold that he intended, by the use of the words which appear in his testimony above quoted, to put the bank of which he was manager in the position of taking upon itself the risk of this check's being paid on presentation, or that he meant anything more than the provisional or conditional payment presumed by the law when a check is received in payment of a debt, and nothing further is said.

In *Tobey* v. *Barber*, 5 Johns. 68, a receipt was given by plaintiff to defendant, in these words: "Received of Ralph Barber $163, on account of the within lease, and in full for the second and third quarters' rent." The action was brought to recover the rent mentioned in the receipt. It appeared in evidence that the payment for which the receipt was given was, in part, a note of one Coffin, which defendant had procured to be given to plaintiff; that Coffin became insolvent, and the note was not paid. The court, after stating the rule of law, which is quoted in a former part of this opinion, proceeded to say: "There is no evidence in this case that the plaintiff agreed to run the risk of the solvency of Coffin, and to take the note as absolute payment, except it be the inference arising from the receipt itself, and that is not enough to establish such a positive agreement." Reference is then made to the case of *Murray* v. *Gouverneur*, 2 Johns. Cas. 438, (decided by the court of errors of New York,) where it was held that a receipt of a bill as cash was not sufficient evidence that the bill was taken as an absolute payment. See, also, on the point, the following cases: *McMurray* v. *Taylor*, 30 Mo. 267; *Glenn* v. *Smith*, 2 Gill. & J. 493; *Muldon* v. *Whitlock*, 1 Cow. 306; *Putnam* v. *Lewis*, 8 Johns. 389.

A receipt in full means in full payment, or payment in full. If such a receipt, so drawn, does not establish an agreement for an absolute payment, we cannot see how the language used by the witness De Guigne in this case can establish any such payment, or anything more than a conditional payment, when a check is accepted as payment in the usual course of business. We are of opinion that the instruction under consideration was abstract, as there was no evidence to base it on, that it was calculated to mislead the jury, and that the court erred in giving it.

We will add here that the verdict in this case was general for defendants, and it does not appear, nor can we ascertain, whether the jury rested their verdict on the fact found by them that the plaintiff's dealings were with Helmrich & Hansen as principals, or on the fact that plaintiff dealt with Dresbach and his partner as principals, through Helmrich & Hansen as agents, and that the debt sued for had been paid by the acceptance of the check above mentioned. If it had appeared that the verdict was based on the last ground, we would have ordered a new trial for insufficiency of the evidence to justify it. But as it might have been based on the ground first above stated, on which the evidence was conflicting, we have denied the new trial asked for insufficiency of the evidence.

It is urged by plaintiff that the court below erred in giving the following instruction: "A receipt is always open to explanation, and the purpose for which it is given may be shown. If you believe from the evidence that the five receipts in evidence were given by the book-keeper of defendants as mere *memoranda* or vouchers, to be used as such by Helmrich & Hansen, and were so given without the knowledge, authority, consent, or subsequent ratification of the defendants, then the defendants are not liable thereon."

It appears from the testimony of Mehlert that these receipts for money which were paid to Dresbach by Helmrich & Hansen were previously drawn, "Received of Helmrich & Hansen." They were given to the parties just named, when Dresbach received money of them, which was procured on the mate's receipts. Mehlert was the principal clerk and book-keeper of Dresbach, and the signing of these receipts was in the line of his duties. These receipts were given and signed, "WILLIAM DRESBACH, MEHLERT," or "by MEHLERT." At one time some of these receipts came back to Dresbach's office. They were drawn, "Received of Comptoir D'Escompte de Paris," and not, as formerly, of Helmrich & Hansen. Mehlert noticed that there was stamped on them, "Received of the Comptoir," and he kept them, and soon after he saw Helmrich, and asked him why this change was made, to which he replied: "Oh, well, I have a certain reason. It don't amount to anything. They are only memorandum. I keep them here in the office." Owing to this explanation he went on and signed them as before. He understood from Helmrich that they were *memoranda* to be kept in the office of his firm to enable them to keep track of their business for the convenience of keeping their accounts and books. He never asked Dresbach for authority to sign these receipts. He did not regard them as of importance. They were mere routine business. Did not think the change in the receipts made any change in the business, and therefore did not ask Dresbach for any authority to sign them when changed, but signed them as he did before. The change had been made from previously to September, 1882. There was evidence tending to show that Dresbach did not know of the change in the receipts. This change was in the five receipts referred to in the instruction.

The first part of the instruction enunciates a well-established legal rule. The counsel for plaintiff do not controvert this rule. But they say that these were not ordinary receipts; that "they were express admissions in writing of the receipt of so much money from plaintiff." That these receipts purport on their face to be such admissions there can be no doubt. Such is the character of all receipts. They are, or purport to be, admissions of the receipt of money, or property of some kind, but they are, as all admissions usually are, explainable by parol testimony. The plaintiff put these receipts in evidence to show an admission by Dresbach that he had received so much money from plaintiff. The evidence of Mehlert was to show the contrary; that they were not given as such admissions, but as *memoranda* to be retained by Helmrich & Hansen in their office to enable them to keep track of their business so as to keep properly their books and accounts; that they were not intended to show any change in their business; or that they were getting money from any other person than Helmrich & Hansen. The testimony of Mehlert on these points was not objected to by plaintiff. We can see no error in this instruction. The court merely said, in substance, that if the jury believed this explanation, and that the receipts had been given in the form used without the knowledge, authority, consent, or subsequent ratification of defendants, that the defendants are not liable on them. We think the court was correct in this view of the law,—that if the explanation given by Mehlert of those receipts was true, that plaintiff could not charge defendants on the admissions appearing on their face.

We see no error in allowing the questions put to Waterman and Corde. This evidence was offered to show that Helmrich & Hansen, as principals, had furnished money to Waterman & Co., and not as brokers; and was admissible to rebut the testimony of De Guigne, a witness for plaintiff, and plaintiff's manager, that Helmrich & Hansen furnished money to Waterman & Co. as brokers, and not as principals; and to rebut also, the following testimony of Helmrich, offered by plaintiff: "We [referring to the firm of Helmrich & Hansen] were doing a general brokerage business. We were not furnishing Waterman and others money at the same time as principals. We did not furnish money as principals." We think that for this purpose the questions were properly allowed.

We have in the foregoing passed on all the points discussed by counsel in their briefs.

For the errors above pointed out the judgment and order must be reversed, and the cause remanded for a new trial in accordance with the views herein expressed. Ordered accordingly.

We concur: SEARLS, C. J.; McFARLAND, J.; SHARPSTEIN, J.; WORKS, J.

PATERSON, J., (*dissenting.*) I am unable to agree with the majority of the court in the conclusion reached in this case. The instruction given by the court below embodies substantially, in my opinion, the principle of law enunciated in the opinion. There must be an express understanding or agreement that the note, bill, or check is given and accepted in payment and satisfaction of the debt. The mere taking or receiving of the check, and giving of a receipt by the payee, is not sufficient. The court told the jury that, if the check was "accepted by a creditor by his own voluntary act or choice as payment in satisfaction of a debt, such acceptance would establish payment of such debt." There can be no acceptance without a proposal. Acceptance is defined to be "an agreeing to terms or proposals by which a bargain is concluded and the parties bound; * * * an agreeing to the act or contract of another by some act which binds the person in law. * * * To receive describes simply the act of taking; to accept denotes the taking, * * * for the purposes for which a thing is offered." Webst. Dict. "Accept," "Receive." I cannot see that the phrase, "by his own voluntary act or choice," qualifies or restricts this clear and well-understood meaning of the word "accepted."

I do not think the court erred in refusing to give the instruction asked by plaintiff, and quoted in the opinion of the court. It in effect, if given, would have said to the jury that there could be no acceptance, except upon the condition that the check be paid.

So far as the question of the sufficiency of the evidence to support the instructions given to the jury is concerned, it seems to me that we cannot, without invading the province of the jury, say that it is insufficient. I do not understand that it is necessary there should have been express words used by the parties agreeing that the check should be taken in absolute payment. The circumstances, the language and conduct of the parties, all taken together, may show an express understanding between the parties that the check is taken in satisfaction of the debt. This seems to be peculiarly a case in which the facts ought to be left to a determination by the jury.

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78 Cal. 1

PEOPLE *v.* VON. (No. 20,416.)

(*Supreme Court of California.* December 29, 1888.)

CRIMINAL LAW—APPEAL—MATTERS NOT APPARENT OF RECORD.

Where an appeal is taken in a criminal case upon the judgment roll alone, and the record shows that oral instructions, not made part of it, were given, the judgment will not be reversed for the erroneous refusal to give instructions requested, as the same propositions may have been covered by the oral instructions. THORNTON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Information against Mary Von for murder. She appeals from a conviction of murder in the first degree, and a sentence of imprisonment for life.

J. T. Rogers and *Wickliffe Matthews,* for appellant. *George A. Johnson,* Atty. Gen., for the People.

MCFARLAND, J. The information charges defendant with the murder of one Bishop. The jury convicted her of murder in the first degree, and fixed her punishment at imprisonment for life, and she appeals from the judgment. There is no bill of exceptions or statement, and appellant brings the case here on the judgment roll alone. In addition to the charge of murder, there was put into the information (unwisely, we think, though we cannot say erroneously) another charge of having previously suffered a conviction of felony, to-wit, an assault with a deadly weapon; and the main ground taken by appellant for a reversal of the judgment is the refusal of the court to give the third instruction asked by defendant's counsel, which included the proposition (evidently correct) that the jury, in determining whether defendant was guilty of the murder of Bishop, should disregard the evidence introduced to establish her conviction of the previous felony. Whether or not the said third instruction was, as a whole, correct, is, perhaps, a doubtful question; but it is a question which, under our view of the law, it is not necessary to determine.

Section 1127 of the Penal Code provides as follows: "Either party may present to the court any written charge, and request that it be given. If the court thinks it correct and pertinent, it must be given; if not, it must be refused. Upon each charge presented, and given or refused, the court must indorse and sign its decision." And section 1207 provides that the judgment roll or record shall consist of the following: "(1) The indictment or information, and a copy of the minutes of the plea or demurrer; (2) a copy of the minutes of the trial; (3) the charges given and refused, and the indorsements thereon; (4) a copy of the judgment." Now, while the judgment roll in the case at bar contains the written charges presented and indorsed "given" or "refused," it also shows that there were other oral instructions given by the court to the jury, but does not show what those instructions were. We are asked, therefore, to reverse the case because a particular written instruction presented by appellant is marked "refused," while we are informed that there were other instructions not in the record, and are not informed that the instruction refused (or that part of it which was correct) was not given in those instructions. An appellant must show error affirmatively and clearly. It might be argued that the prosecution should have shown that the "refused" instruction was given elsewhere. But how could the prosecution have done so? The defendant had entire control of the appeal, and chose to make it upon the judgment roll alone. Over the judgment roll, which appellant brings up, respondents had no control, except to see that there was no diminution. If the appellant had submitted a draft of a bill of exceptions or statement, and had put into it what was claimed to be all the instructions, then respondents would have had an opportunity to propose amendments: and, in that event, it might be well argued that respondents should have seen to it that all the instructions were in. But when a defendant in a criminal case seeks to reverse a judgment because a proper instruction "presented" by him is found in the judgment roll marked "Refused," he must either show that it was not given elsewhere, or he must have given the people an opportunity to show that it was. Otherwise it would be an easy matter to obtain new trials in cases in which no errors had actually been committed. There are objections to the refusal of the court to give one or two other instructions, but they are in the same category with said third instruction. There is in the transcript brought here, attached to the judgment roll, some manuscript purporting to be the oral charge of the court; but it is not incorporated in a bill of exceptions, or authenticated in any way provided by law. It therefore cannot be considered. The judgment is affirmed.

We concur: **SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.**

THORNTON, J., dissents.

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77 Cal. 84

PEOPLE *v.* ROZELLE. (No. 20,460.)

(*Supreme Court of California.* December 31, 1888.

1. INDICTMENT—DESCRIPTION OF OFFENSE—ACCESSORIES.
Pen. Code Cal. § 971, abrogates the distinction between an accessory before the fact and a principal in felony, and provides that they shall be prosecuted as principals, "and no other facts need be alleged * * * against such an accessory than are required * * * against his principal." By section 950, an information must contain "a statement of the acts constituting the offense in ordinary and concise language," and, by section 960, is not insufficient by reason of defect in matter of form. *Held*, that an information alleging that defendant did encourage and advise, and also that he did aid, assist, and procure one G. to commit a felony, but without alleging whether he was present at its commission, is sufficient, as it shows facts constituting defendant an accessory at common law, and hence a principal under the statute.

2. CRIMINAL LAW—APPEAL—RECITALS IN RECORD.
In the absence of evidence to the contrary, a recital in a judgment that it was corrected when defendant was present in person and by counsel will be held to be true.

3. WITNESS—ACCUSED IN CRIMINAL CASE—COMPETENCY—CROSS-EXAMINATION.
Pen. Code Cal. § 1323, provides that defendant in a criminal action cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined as to all matters about which he was examined in chief. Defendant testified that he did not commit the acts charged in the information. *Held*, that he could be asked, on cross-examination, whether a letter shown him, which contained statements tending to contradict his denial, was in his handwriting. MCFARLAND, J., dissenting.

4. SAME.

Defendant having denied all knowledge of any intent to commit the injury charged, or that he advised or participated in the same, may, under the above act. be asked, on cross-examination, if he did not have a conversation with a certain person in which he made threats against the person injured.[1]

In bank. Appeal from superior court, Los Angeles county; W. O. GARDINER, Judge.

Hugh J. & Wm. Crawford, and *Wells, Van Dyke & Lee*, for appellant.
Geo. A. Johnson, Atty. Gen., for the People.

WORKS, J. The appellant is charged by the information with the crime of aiding and abetting his wife, Grettie Rozelle, in willfully and maliciously throwing vitriol upon the person of another, with the intent to injure the flesh and disfigure the body of such person, was tried by a jury, found guilty, and sentenced to imprisonment in the state-prison for nine years. There was a demurrer to the information on the ground that the offense charged was not set forth therein with sufficient certainty, and that it did not conform to sections 951–953, Pen. Code, which demurrer was overruled. There was also a motion in arrest of judgment on substantially the same grounds, which was denied.

The charging part of the indictment is as follows: "The said W. F. Rozelle, on the 11th day of May, A. D. 1887, at the county and state aforesaid, did unlawfully, willfully, wickedly, maliciously and feloniously encourage, advise, aid, and assist, and procure one Grettie Rozelle, his wife, to throw, place, and pour a caustic chemical, corrosive acid, and burning substance, commonly called and known as 'vitriol,' upon the person of another, to-wit, one C. R. Petrie, with the intent to injure the person and disfigure the body of said C. R. Petrie, and did, on divers dates, and at sundry and several times before said date and time, so as aforesaid, advise, encourage, and assist, and on said date did procure, said Grettie Rozelle, his wife, to throw and pour said substance, on said 11th day of May, upon the person of said Petrie, with said intent; and on said 11th day of May aforesaid she, the said Grettie Rozelle, did unlawfully, wickedly, willfully, maliciously, and feloniously place, put, pour, and throw upon the head, face, and person of C. R. Petrie a caustic, chemical, corrosive acid, and burning substance, commonly called and known as 'vitriol,' with the intent then and there to injure the flesh and disfigure the person and body of the said C. R. Petrie, in pursuance of, and by reason of, and through and on account of, the encouragement, assistance, advice, aid, and procurement of the said W. F. Rozelle."

The specific objection to the information, as disclosed in appellant's brief, is that it does not charge whether the defendant was absent or present at the time of the commission of the offense.

The information charges the defendant in such manner as would at common law, and the earlier provisions of the Penal Code, if the facts were well pleaded, have constituted him an accessory before the fact. Pen. Code, § 31, provides: "All persons concerned in the commission of a crime, whether it be a felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed." The following section provides who shall be accessories. Pen. Code, § 32.

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[1] Respecting the examination and cross-examination of the accused when he offers himself as a witness, see The Anarchists' Case, (Ill.) 12 N. E. Rep. 865, and note 6; Radford v. Com., (Ky.) 5 S. W. Rep. 343; State v. Brooks, (Mo.) Id. 257; Peck v. State, (Tenn.) 6 S. W. Rep. 389, and cases cited; Lockard v. Com., (Ky.) 8 S. W. Rep. 266, and note.

There are two classes of cases mentioned in section 31: (1) Where the person shall aid and abet in the commission of the offense; and (2) where, not being present, he shall have advised and encouraged its commission.

The information must contain "a statement of the acts constituting the offense, in ordinary and concise language, and in such manner as to enable a person of common understanding to know what is intended." Pen. Code, § 950. The distinction between an accessory before the fact and a principal is abrogated, and one who would formerly have been an accessory before the fact must now be prosecuted, tried, and punished as a principal. Pen. Code, § 971. If the defendant is not charged in general terms as a principal, but it is attempted to allege the facts showing the offense to have been committed by another, and that he aided and abetted, or encouraged and advised, the perpetration of the crime, such facts must be stated as would formerly have constituted the defendant an accessory. *People* v. *Schwartz*, 32 Cal. 160, 164; *People* v. *Trim*, 39 Cal. 75, 79; *People* v. *Campbell*, 40 Cal. 129. The information in this case charges that the defendant did encourage and advise, and also that he did aid, assist, and procure one Grettie Rozelle to commit the offense, but whether being present he aided and abetted, or not being present he advised and encouraged, is not alleged.

In the case of *People* v. *Schwartz*, *supra*, this court said: "Where a party is proceeded against as an accessory, it is better to pursue the course attempted in this case, and charge him as such, rather than as principal; because such a course, if not absolutely necessary, is certainly more consistent with our system of pleading, which favors a statement of the facts constituting the offense, as near as may be, precisely as they occurred. But care should be taken to state the acts of the defendant as fully as they are stated in the statute. When that has been done there can be no question as to the sufficiency of the indictment on that score, as this court has repeatedly held. Now, without undertaking to say that this indictment is positively bad where it charges the acts which made the defendant an accessory, we think it is not in that respect what it ought to be. It does not fully come up to the language of the statute which defines an accessory. 'An accessory is he or she who stands by, and aids, abets, or assists; or who, not being present aiding, abetting, or assisting, hath advised and encouraged the perpetration of the crime.' Act concerning crimes, § 11. Here are two modes of action, either of which renders the actor an accessory. If the former be the true one in a given case, let the indictment follow the statute, and allege that the defendant 'stood by, aided, abetted, and assisted,' etc., and so as to the latter. If it be doubted as to which of the two modes is the true one, let both be charged, and all questions of variance between the allegations of the indictment and the testimony will then be avoided." The question was left open, however, the indictment having been held to be bad on other grounds. The question was again presented in *People* v. *Campbell*, 40 Cal. 129, in which the rule as laid down in *People* v. *Schwartz* was approved.

The defendant might properly have been charged directly as a principal. In other words, it might have been charged, in direct terms, that he committed the act. Pen. Code, § 971. And this is much the better and safer practice. *People* v. *Outeveras*, 48 Cal. 19. Under section 971 of the Penal Code, "all persons concerned in the commission of a felony, whether they directly commit the act constituting the offense, or aid and abet in its commission, though not present, shall hereafter be prosecuted, tried, and punished as principals, and no other facts need be alleged in any indictment or information against such an accessory than are required in an indictment or information against his principal." It seems to be imperatively required by the section referred to that, in the prosecution of an offense such as is attempted to be charged here, the defendant must be accused and tried as a principal; and, as no other facts need be stated than are required in an indictment or information against the principal, he might properly have been charged directly with having himself committed the act. *People* v. *Outeveras, supra; Baxter* v. *People*, 3 Gilman, 381. But the Code expressly provides that the distinction between an accessory before the fact and a principal, in cases of felony, is abrogated. Pen. Code, § 971. In other words, one who, at common law, would have been guilty as an accessory, is, under the statute, guilty as a principal. This being the case, an information which states facts sufficient to constitute a defendant an accessory at common law shows him to be guilty as a principal under the statute. Therefore, to allege such facts as would have been sufficient to show his guilt as an accessory at common law is to charge him "as a principal" under the statute.

It may be further said that, under the liberal provisions of the Penal Code, designed to avoid technicality and promote justice, the particularity of averment necessary at common law is no longer required. *People* v. *Cronin*, 34 Cal. 208; *People* v. *King*, 27 Cal. 511. It is only necessary that the substantial facts constituting the crime shall appear in the information with sufficient certainty to enable the court to pronounce a proper judgment, and the party to defend against the charge. Pen. Code, § 959; *People* v. *Dolan*, 9 Cal. 576, 583; *People* v. *Ah Woo*, 28 Cal. 205. And this court has frequently held it to be sufficient to charge the offense in the language of the statute, without stating the acts necessary to constitute the offense. *People* v. *Murray*, 67 Cal. 103, 7 Pac. Rep. 178. So it is provided that no indictment is insufficient, nor can the trial, judgment, or other proceeding thereon be affected, by reason of any defect or imperfection in matter of form, which does not tend to the prejudice of a substantial right of the defendant. Pen. Code, § 960; *People* v *Ferris*, 56 Cal. 442; *People* v. *Hong Ah Duck*, 61 Cal. 387.

The objection urged here against the information is that it does not allege whether the defendant was present, aiding and abetting, or, not being present, advised and encouraged, the perpetration of the crime, and therefore it does not set out the acts constituting the offense with sufficient certainty to enable the defendant to defend against the charge. Viewing the information in the light of the authorities above cited, we must hold it to be sufficient. As we have seen, the defendant might have been charged as a principal. This would have given him no notice of the fact that acts showing the actual commission of the offense by another, and that he merely aided and abetted in the perpetration of the crime, would be relied upon for his conviction, and yet this court has held that, under such an information, such acts might be proved. *People* v. *Outeveras, supra*. If so, the information in the present case was more specific than the law required. It did inform him that his alleged crime consisted, not in the perpetration of the offense by his own hand, but in aiding, abetting, and procuring some one else to perpetrate it. The fact that the information did not go further, and allege whether he was present or absent from the scene of the crime, at the time of the commission of the alleged acts on his part, could not affect his substantial rights, and is a matter about which he has no cause to complain.

Besides, it may be fairly said that the information shows that some of the acts committed by him were not done at the time and place of the perpetration of the crime, as it is alleged that he did on divers dates, and at sundry and several times before said date, encourage and assist. It might with equal propriety be said to charge that he was also present at the time and procured the commission of the offense, as it is alleged that he did, on said date, procure said Grettie Rozelle to throw and pour said substance upon the person of said Petrie. We think the information was sufficiently specific and certain, and that the demurrer to it was properly overruled.

It is urged that the judgment was corrected in the absence of the defendant, and that this was error. The record itself shows directly to the contrary. As corrected, it recites that the defendant was present in person and by counsel.

There is nothing to controvert the truth of this recital, and we must be bound by it.

The defendant was examined as a witness in his own behalf, and denied, in general terms, that he aided, abetted counseled, or encouraged the commission of the offense charged. On cross-examination a letter was shown him, and he was asked whether it was in his handwriting. Objection was made that it was not a proper cross-examination. The objection was overruled. The defendant then declined to answer, on the ground that it would have a tendency to degrade his character, and no answer was required of him. It is said in the briefs that the letter was subsequently proved to be in his handwriting, and admitted in evidence; but, as the contents of the letter shown the defendant were not disclosed, we do not know from the record before us that it is the same. But, conceding the letter finally introduced to have been the one about which the defendant was questioned, we are clear that the court committed no error in overruling the objection. The defendant had denied explicitly that he had committed the offense charged. The letter introduced in evidence contained statements tending to contradict this denial, and to show that he had perpetrated the crime. If the witness had not been the defendant on trial, there could be no question as to the competency of the evidence on cross-examination, as it tended directly to contradict his evidence in chief. It is contended that because he was the defendant on trial a different rule must prevail; that the cross-examination must, under the Code, be confined to the subject-matter of the examination in chief. The Code provides:

"Sec. 1323. A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself, but, if he offers himself as a witness, he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief."

The impression seems to prevail that the section quoted has the effect to confine the examination of a defendant to narrower limits than in the case of any other witness. We do not so understand it. He can only be cross-examined as to matters about which he was examined in chief. The rule is precisely the same as to any other witness. So far as other witnesses are concerned, however, the court is allowed some discretion as to the extent and scope of the cross-examination that might not be allowed in case of the defendant. But no such question arises here. It must be remembered, also, that the fact that a defendant offers himself as a witness as to a particular matter does not give the prosecution the right to make him a witness for the people, and examine him generally. *People* v. *O'Brien*, 66 Cal. 602, 6 Pac. Rep. 695. The questions put must be in cross-examination, and can go no further. It is contended by counsel that the defendant was not asked about a letter, in his examination in chief, and therefore it was not a "matter" about which he could be cross-examined. This would be giving the statute a construction so narrow as in many cases to cut off, almost entirely, the important right of cross-examination. The matter about which the defendant was examined in chief was whether or not he had committed the acts charged in the information. The inquiry was such that he could cover the whole case with a denial. The matter to be tested by a cross-examination was the truth or falsity of this denial. Suppose the defendant had been asked, "Did you on a certain day have a conversation with A.?" and it had been proposed to prove by him, on such cross-examination, that he expressly admitted to A., in such conversation, that he did commit the act charged. Counsel might have said, "He has not been asked about a conversation in his examination in chief; therefore you cannot inquire about it on cross-examination. It is not a matter about which he has testified." It would hardly be seriously contended, we think, that such a conversation could not be asked for on cross-examination, under the circumstances of this case. Now, can it make any difference that, instead of asking him for such a conversation, a letter is handed him, containing the same or similar statements, and he is asked, "Did you write this letter?" Certainly not. The fact that, in order to avoid the effect of such evidence, he is driven to decline to answer on the ground that it will tend to degrade or criminate him, thus, it may be, injuring his case before the jury, cannot alter the rule as to the competency of the evidence. The question as to the scope allowed in the cross-examination of a defendant, under the section of the Code referred to, has been before this court in other cases. In the case of *People* v. *McGungill*, 41 Cal. 431, it was said: "The fact that defendant offered himself as a witness in his own behalf did not, as to him, change or modify the rules of practice with reference to the proper limits of a cross-examination of a witness." See, also, to the same effect, *People* v. *Dennis*, 39 Cal. 634; *People* v. *Russell*, 46 Cal. 121; *People* v. *Reinhart*, 39 Cal. 449; *People* v. *Johnson*, 57 Cal. 571; *People* v. *Beck*, 58 Cal. 212; *People* v. *O'Brien*, 66 Cal. 602, 6 Pac. Rep. 695. The objection to the question asked was properly overruled.

Defendant was also asked if he did not have a conversation with one Westerfield, in which he (defendant) said he would fix up something that was new, for Petrie, which would disfigure him so that he would not want to see another woman. The defendant having denied all knowledge of any intent to injure Petrie, or that he had participated in or advised or encouraged the act resulting in such injury, the evidence was material and competent, for the reasons above stated.

The judgment and order denying a new trial are affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.

MCFARLAND, J., (*concurring.*) I concur in the judgment; but I dissent from that part of the opinion of the court which holds that the defendant was properly asked, upon cross-examination, to prove the handwriting of a letter to which he had made no reference in his examination in chief. The letter was not a matter "about which he was examined in chief," within the meaning of section 1323 of the Penal Code. My views upon that question are fully stated in my dissenting opinion in *People* v. *Myer*, 17 Pac. Rep. 431, (filed March 28, 1888.) But in the case at bar I think that no material injury was done the defendant by the error.

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78 Cal. 49

MCDONALD *v.* SUPREME COUNCIL, ORDER OF CHOSEN FRIENDS.

(No. 12,727.)

(*Supreme Court of California.* December 31, 1888.)

1. MUTUAL BENEFIT SOCIETY—SUSPENSION OF MEMBER—REINSTATEMENT.

The by-laws of a mutual benefit society provided that a member failing to pay an assessment in 30 days should be suspended by the society at its next meeting. By the relief laws, any member so delinquent should forfeit all rights to benefits under the relief fund laws, and should be reported suspended from the "beneficiary membership," and should be declared suspended by the society, and should stand suspended until payment of arrearages and compliance with the other laws governing reinstatements. *Held*, that compliance with "the other laws governing reinstatements," which required a new certificate of the medical officer, and a re-election, was not necessary where no suspension had been declared by the society.

2. SAME—PAYMENT OF ARREARAGES—WAIVER OF FORFEITURE.

The laws of the society requiring all arrearages to be paid to the secretary, and providing that the secretary shall receive all moneys due the society, the receipt of a delinquent assessment by the secretary, and his entry of it on the minutes of the next meeting, are a waiver of a forfeiture by reason of such delinquency, when there are no conditions of reinstatement other than payment of arrearages.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by James F. McDonald against the Supreme Council of the Order of Chosen Friends, on a mutual benefit certificate. Judgment for plaintiff, and defendant appeals.

A. B. Hunt, for appellant. *J. E. Jarrett* and *W. W. Foote*, for respondent.

HAYNE, C. Action by the assignee of the heir of a member of a mutual benefit association to recover a sum of money claimed to be due upon the death of such member. The defense is that the deceased failed to pay assessment No. 99 within the time required by the rules of the association, and that by reason of such non-payment he stood "suspended" at the time of his death. The consequences of a suspension for over 30 days and less than three months are declared to be that the member "shall stand so suspended until all arrearages and fines shall have been paid to the secretary, and all other laws governing reinstatements have been fully complied with;" the requirements of the "other laws" referred to being that a new certificate from the medical officer shall be obtained, and a re-election had by a four-fifths vote. The facts are as follows: Assessment No. 99 was levied on September 30, 1886, upon all the members, including the deceased, who was then "in good standing." This assessment became delinquent at the expiration of 30 days, and, the deceased, having failed to pay it in time, was marked "delinquent" by the secretary; but no action as to a suspension was taken by the council. Another assessment (No. 100) was levied upon all the members, including the deceased, on October 21, 1886, and became delinquent on the 20th of the following month. These two assessments were paid by the deceased to the secretary on December 14, 1886, and were by him entered on the minutes of the next meeting of the council, which was on December 18, 1886. Another assessment (No. 101) was levied on November 15, 1886, and another (No. 102) on December 18th of the same year. The death occurred on December 31, 1886, and on the next day the father of the deceased paid the amounts due on the last two assessments to the treasurer, and the secretary receipted for the money, saying that he would refer the matter to his superior officers. Afterwards all the money which had been received on the above four assessments was tendered back by the association. The "dues" appear to have been paid up to January 1, 1887, no question being raised as to them. No new medical certificate was obtained by the deceased, and he was not re-elected as provided by the provision above referred to. The court below gave judgment for the plaintiff, and the association appeals.

We have no doubt that the secretary was authorized to accept the amount of the assessments paid on December 14th, notwithstanding the delinquency. The "subordinate constitution" provides that "the secretary shall * * * receive all money due this council;" and the provision of the relief laws first above quoted is that there shall be no reinstatement until all arrearages have been paid "to the secretary." And the secretary having received the amount for which the deceased was delinquent, and entered it on the minutes of the next meeting of the council, as above stated, we think it must be held that there was an acceptance by the association. Now, if the laws governing the association had not imposed other conditions of reinstatement besides the payment of the money due,—that is to say, if such laws had not required a new medical certificate and a re-election,—we think it clear that an acceptance by the association of the sum due would be a waiver of the forfeiture, for it is well settled that a forfeiture for delay in the payment of money may be waived, and, where there is no other condition imposed by convention of the parties, that acceptance of the money is such a waiver. The appellant contends that this doctrine does not apply to memberships in associations like the present, and places much reliance upon the case of *Borgraefe* v. *Knights of Honor*, 22 Mo. App. 142. But that decision is not at all in conflict with the rule as we have stated it, for the simple reason that in that case there was no payment of the sums for which the deceased was delinquent, and consequently no acceptance of such sums by the association. The court does, indeed, say that "the doctrine of waiver, which is often appealed to to prevent forfeitures in the case of policies of insurance, has no application to the forfeitures of membership in these orders." But this must be understood as applying to the acts of waiver appearing in the case before the court, which were the continuance of the name of the deceased upon the roll of members, his appointment upon committees, sending him notices of assessments, etc. See page 139.

The constitution expressly provided that non-payment should operate as a suspension, and that there should be no reinstatement without payment of the sums due; and, in view of this provision, it may very well be that the doctrine of waiver would not apply to such a state of facts. And that is all we think the court meant to assert. For the opinion goes on to say: "Nor do we think it would have entitled the plaintiff to recover if Ada Lodge had continued to treat the deceased as a member, unless Ada Lodge had in fact advanced the delinquent assessment to the supreme lodge, * * * and there is no evidence tending to show that this was done." Page 142. But if the opinion is to be construed as deciding that the doctrine of waiver does not apply in any case to societies like the present, we are not prepared to assent to it. If that were so, the society could accept the delinquent payment, and go on accepting payments, and, upon the death of the member years afterwards, avoid all responsibility by returning the assessments. It is hardly necessary to say that this would not be allowed. We say, then, that if the laws governing the association had not imposed other conditions of reinstatement besides the payment of the sums for which the deceased was delinquent, the acceptance of said sums by the association would be a waiver of the forfeiture.

The argument for the appellant, however, is that other conditions of reinstatement were imposed, and that a new medical certificate and a re-election were essential. It cannot be doubted that, if there was a complete suspension within the meaning of the laws governing the association, a compliance with said conditions was necessary, for such is the plain provision of the laws. The real question is whether he was so suspended. And this depends upon whether the delinquency of itself (or coupled with the report thereof by the secretary) constituted the suspension, or whether a declaration or adjudication thereof by the council was necessary.

This question is not to be disposed of by the mere assertion of the secretary, or by what was put upon the assessment notice, but must be determined by the provisions of the constitution and laws of the association. In this regard there are several matters relied upon by the learned counsel for the appellant which in our opinion do not touch the question. Thus the written application of the deceased for membership, and section 4 of the subordinate constitution, are irrelevant, because they relate merely to the consequences of the suspension, but do not say what shall constitute it. So the provision to be found at folios 145, 146, of the transcript, does not affect the question. That provision is that "it shall be the duty of members to ascertain the amount o their dues and assessments by personal application to the secretary, and thi council shall not excuse members, or pay, or cause to be paid, to them any benefits which they may have forfeited by non-payment, because of a failur on the part of the secretary to give them written or other notice." This provision relates to the effect of the want of notice. The phrase, "which they may have forfeited by non-payment," is merely the recital of matter descriptive of the benefits referred to. It certainly does not amount to a provision as to what shall constitute a "suspension."

The provisions which affect the question, so far as shown by the record before us, are section 6 of article 4 of the by-laws of the Vallejo council, and section 5 of article 3 of the relief laws of the supreme council. The former is that "any member failing to pay an assessment within thirty days from the date of the recorder's notice shall be suspended by the council at its first meeting thereafter." If this were the only provision, it would seem clear that some action by the council was necessary. But the other provision is as follows: "Each member shall pay the amount due to the secretary within thirty days from the date of such notice, and any member failing to pay such assessment within thirty days shall forfeit all rights and claims to benefits under the relief fund laws, and shall be reported suspended from the beneficiary membership by the secretary in his report to the supreme treasurer. At the first regular meeting of the council after an assessment has become delinquent, the secretary shall furnish to the councilor [council?] a list of all the members that have become delinquent, and shall enter their names in the minutes of the meeting, but a failure to do so shall not affect the suspension of the member. The councilor [council?] shall declare that all such members have been suspended, and they shall stand so suspended until all arrearages have been paid to the secretary, and all laws governing reinstatements have been fully complied with."

This provision is somewhat confused. There is first a clause that a member failing to pay for 30 days "shall forfeit" his rights. There is then a clause that the secretary shall report him to the treasurer as "suspended from the beneficiary membership;" then that the secretary shall furnish to the council a list of the names of the delinquents, and enter such names upon the minutes of the meeting, (a failure to do which, however, is not to affect the suspension,) and, finally, that the council shall declare the delinquent member suspended, and that he shall stand "so suspended" until certain conditions have been complied with. All this is sufficiently obscure. If the non-payment alone, or coupled with the report of the secretary, is to constitute the suspension, what is the use of a declaration or adjudication by the council? This may be pertinently asked. And it may be plausibly argued that "a condition involving a forfeiture must be strictly interpreted against the party for whose benefit it is created," (Civil Code, § 1442; *Society* v. *Weatherly*, 75 Ala. 248,) and consequently that doubts and ambiguities must be resolved in favor of the plaintiff; and that, reading the clauses together, the declaration by the council is essential to the completion of the process of suspension. On the other hand, it may be argued with equal plausibility that the payment of a sum of money to the nominee of a member at his death is not the only benefit to which he is entitled; that, in addition to this, the objects of the association are "to improve the condition of its membership morally, socially, and materially, by timely counsel and instructive lessons, by encouragement in business, and by assistance to obtain employment when in need;" and that, inasmuch as all parts of the provision are to be given effect, if it can reasonably be done, the clause as to forfeiture by non-payment, and report of suspension by the secretary, is to be confined to the right of pecuniary relief, (or, in the language of the provision, to the "beneficiary membership,") and that the clause, as to a declaration by the council, applies to a suspension from all the privileges of membership.

We do not find it necessary to express an opinion as to the relative merit of these somewhat nicely balanced arguments. The most favorable view for the appellant is the latter; and, for the purposes of this opinion, we shall assume that such is the proper construction of the provision. But in this view it is clear that the conditions of reinstatement prescribed by the provision, viz., a new medical certificate, and a re-election by a four-fifths vote, apply only to a suspension by the council from all the privileges of membership, and not to a suspension from the "beneficiary membership," arising from delinquency and a report by the secretary. Said conditions are placed after the clause as to a suspension by the council, and it is only when the member is "so suspended" that they apply. Leaving out these conditions, the only difficulty in the way of the plaintiff's recovery was the forfeiture for non-payment; and this, as we have seen, was waived by the acceptance of the sums due. We do not consider the cases cited by the learned counsel for the appellant as in conflict with the conclusion we have reached. It is unnecessary to examine the other positions taken by the respondent. We therefore advise that the order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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78 Cal. 95

WHEELER *et al. v.* WEST *et al.* (No. 12,215.)

(*Supreme Court of California.* December 31, 1888.)

1. PRACTICE IN CIVIL CASES—AMENDMENT—OBJECTIONS.
   Allegations, in an answer to an amended complaint, that the latter changes the form of the action, are properly stricken out as irrelevant and redundant. The objection should be taken to the filing of the amendment, or by motion to strike it from the files.
2. INJUNCTION—PLEADING—ALLEGATIONS OF DAMAGE.
   In a suit for an injunction, an allegation in the answer of damage by the preliminary injunction is immaterial, and should be stricken out.
3. SAME—ANSWER—SURPLUSAGE.
   In a suit to restrain mining, an allegation in the answer of one defendant that another defendant worked in the mine as his employe is surplusage, and should be stricken out.
4. SAME—LICENSE—REVOCATION—NOTICE.
   In a suit to enjoin defendant from mining in a certain claim, an answer alleging a verbal agreement by plaintiff, granting to defendant the right to the possession of the claim, and to work the same for a proportion of the yield, and that possession was delivered, no definite term being alleged, shows a license only, revocable at plaintiff's pleasure, and, plaintiff's allegation of notice to surrender not being denied, the answer is bad on demurrer.

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Action by Judson Wheeler and Abraham Breece against George, Elliott, and James West, to restrain defendants from entering upon, digging, etc., a mining claim.

The answer averred that plaintiffs entered into a verbal agreement with defendants, by virtue of which defendants acquired, and plaintiffs granted to them, the right to the possession of the mining claim, with the right to reopen and work all the old workings, and to explore, open, and work all of the ground; that defendants were to pay to plaintiffs for the possession, etc., the one-fourth of the gold yield; that plaintiffs were to furnish to defendants all necessary tools, etc.; that plaintiffs would crush at their mill, at a reasonable cost to defendants, the cemented gravel and rock or pay-dirt that defendants might mine, and deliver at the mill, when the mill was not required by plaintiffs; that defendants were to bear all other expenses; and agreed to take possession and work the ground upon the terms aforesaid; and that plaintiffs delivered possession, etc. Defendants appeal. For former appeal, see 11 Pac. Rep. 871.

Hale & Craig and *John M. Fulweiler*, for appellants. *C. A. & F. P. Tuttle*, for respondents.

WORKS, J. Action to enjoin the defendants from entering upon and digging up gold-bearing gravel and bed-rock on a mining claim of plaintiffs, and taking the gold therefrom. This is the second appeal. On the former appeal it was held that the answer of the defendants admitting the acts complained of, and attempting to justify under a verbal contract, was insufficient, for the reason that the contract relied upon was not pleaded either *in hæc verba*, or according to its legal effect, and the cause was reversed for error of the court below in permitting the defendants to make proof of a contract not properly pleaded. *Wheeler* v. *West*, 71 Cal. 126, 11 Pac. Rep. 871. Upon a return of the case to the court below, the defendants filed an amended answer to the plaintiffs' amended complaint, in which it was stated that the original complaint alleged for a cause of action that the defendants had taken possession of the mining claim under a contract by which they were to restore the same to plaintiffs at plaintiffs' option; that plaintiffs had notified defendants to surrender possession, which they had refused to do; that the prayer of said original complaint was for the possession of the property; that, without the consent of defendants, the amended complaint for injunction was filed,—thereby changing the form of action from ejectment to injunction; and that no summons was issued on the amended complaint. There was a motion to strike out the foregoing part of the answer, on the ground that the same was irrelevant and redundant. The motion was sustained, and this is assigned as error.

Counsel contend that the matter referred to was not irrelevant, for the reason that the amended complaint wholly changed the cause of action, and was such an amendment as the court should not have allowed; and cite *Ramirez* v. *Murray*, 5 Cal. 222; *Wilson* v. *Lassen*, Id. 114; *Hackett* v. *Bank*, 57 Cal. 335. The cases cited seem to support the appellants' position as to the right of the court to permit such an amendment as was made here, but we are of the opinion that the question is not properly presented for our consideration. A defendant certainly cannot answer a complaint by an allegation that it has been improperly filed. The question attempted to be raised by answer should have been presented by an objection to the filing of the amendment, if opportunity was offered, or by a motion to strike the amended pleading from the files. *Ramirez* v. *Murray*, *supra*. In the answer it was immaterial and surplusage, and was properly stricken out.

The answer also sets up a verbal contract authorizing defendants to enter upon and extract ore from the mining claim, and in connection therewith alleged that defendants, by the preliminary injunction, had been prevented from working the mine, and were damaged thereby in the sum of $10,000. The appellants complain that this latter allegation was also stricken out on motion. These matters might have been proper in an action on the injunction bond, but we cannot see their materiality in this action. The motion was properly sustained.

The court also struck out an allegation that the defendant James West worked in the mine as the employe of the other defendants. This action of the court was proper, for the reason that James West did not join in the answer, and the other defendants could not answer for him. An allegation in their answer, attempting to justify the act of some one else, was surplusage.

The only matter left in the answer after the above allegations were stricken out was the verbal agreement set up, and under which it was alleged the defendants lawfully took possession of the mining claim, or a part of it, and were entitled to continue in possession.

We have endeavored to separate the material allegations of the answer from a mass of irrelevant matter, and find that it sets up a verbal license from the plaintiffs which authorized the defendants to enter upon and work the mine, at the option of the plaintiffs,—a mere license, and not a lease of the real estate itself. The contract pleaded does not materially differ from the one found by the court on the first trial, and on the former appeal it was held that such contract did not create the relation of landlord and tenant between the parties, but was a mere license, which protected them from a charge of trespass while in force, and was liable to revocation at the will of the licensors. *Wheeler* v. *West*, *supra*. It is not alleged that the right to work the mine was given for any definite length of time, nor is the allegation in the complaint that the defendants were notified to desist from the work and surrender possession of the mine denied. The court sustained a demurrer to the answer, and judgment was rendered against the defendants. The answer was clearly insufficient for the reasons above stated, and the demurrer thereto was properly sustained.

It is true the answer contains some denials, but some of them are denials of mere conclusions, and the others do not, alone, or in connection with the affirmative matters pleaded, constitute a defense to the action.

Judgment affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.

77 Cal. 525

GRAY *et al.* *v.* WINDER *et al.* (No. 12,482.)

(*Supreme Court of California.* December 13, 1888.)

1. APPEAL—TIME OF TAKING.
   An appeal taken 13 years after entry of judgment will be dismissed; Code Civil Proc. Cal. § 939, requiring appeal to be taken within one year.
2. NEW TRIAL—MOTION—NOTICE OF DECISION.
   Under Code Civil Proc. Cal. § 659, providing that "the party intending to move for a new trial must, within ten days * * * after notice of the decision of the court or referee, if the action were tried without a jury," file and serve his notice, a notice of intention to move for a new trial, filed and served 14 years after entry of judgment, is not given in time, though the moving party had no formal notice of the judgment; the record showing that he had actual knowledge of it at or about the time it was rendered.
3. JUDGMENT—RES ADJUDICATA—MINORS.
   It is immaterial that some of the plaintiffs, the moving parties, were minors; as they, having commenced and prosecuted the action to judgment, are bound thereby.

In bank. Appeal from superior court, San Diego county; JAMES A. GIBSON, Judge.

Volney E. Howard & Sons, *Chalmers Scott*, *W. S. Van Dyke*, and *John R. Jones*, for appellants. *W. T. McNealy*, *E. Parker*, *Levi Chase*, *W. J. Hunsaker*, *W. J. Gatewood*, and *Oscar Trippett*, for respondent.

SHARPSTEIN, J. The judgment was entered August 25, 1874. The appeal was taken more than 13 years thereafter. An appeal from a final judgment must be taken within one year after the entry of the same. Code Civil Proc. § 939. The motion to dismiss must be granted.

There is also an appeal from an order denying plaintiffs' motion for a new trial. If there appears in the record any sufficient ground for the denial of the motion for a new trial the order must be affirmed. The notice of intention to move for a new trial was served and filed on the 6th of November, 1886,—a little more than 14 years after the entry of the judgment. Appellants insist that the notice was given in time, because no notice of the decision of the court had been served on them. The Code provides that "the party intending to move for a new trial must, within ten days after the verdict of the jury, if the action was tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention." Code Civil Proc. § 659.

Although it does not appear that plaintiffs were, at any time, served with a formal written notice of the decision of the court, it does appear that they had actual knowledge of it at or about the time it was made. This sufficiently appears by the transcript, from which we extract the following:

"August 24, 1874, at 8 o'clock A. M., court met pursuant to adjournment. Present, the Hon. Sepulveda, judge; T. F. Miller, deputy-sheriff, and A. S. Grant, clerk. [Title of court and cause.] Findings for defendants, and judgment to be entered in accordance, and by consent defendants allowed until Wednesday, August 26, 1874, to file judgment. On motion of plaintiffs, stay of proceedings is granted until October 19, 1874. Plaintiffs object to findings of fact and law this day filed, and ask for further findings. * * * Thereupon the court found and made additional findings, * * * as asked for by plaintiffs."

It has been held that formal notice of a decision may be waived by the party entitled to such formal notice. *Thorne* v. *Finn*, 69 Cal. 251;[1] *Cottle* v. *Leitch*, 43 Cal. 320. We understand that, when a party acts as if he had formal notice of a decision, such acts constitute a waiver of such formal notice. It is a cardinal principle of construction that "the object to be attained" must be kept constantly in view. We think the object to be attained by giving notice of a decision is as fully attained when the party entitled to notice has actual knowledge of the fact, and acts upon that knowledge, as when he has formal notice of it. When an action is tried by a jury, the party intending to move for a new trial must, within 10 days after the verdict, without any formal notice of it, give notice of his intention so to move. The only reason which we can now conceive of for not requiring the notice of intention to be given in such a case, the same as in other cases, is that where an action is tried by a jury it would barely be possible that both parties would not have actual knowledge of the result. Where an action is tried by the court or a referee, the liability of the party to be ignorant of the decision for a considerable time after it is rendered is much greater. The object of the law, we doubt not, is to give a party 10 days, after he has actual knowledge of the decision, within which to give notice of his intention to move for a new trial. Be that as it may, we think the plaintiffs in this case, by their acts, waived a formal written notice, and that their notice of intention to move for a new trial, given 14 years after such waiver, was too late.

The circumstance of some of the plaintiffs being minors is not entitled to any weight. They commenced and prosecuted the action to a final judgment, and must abide the consequences.

Appeal from judgment dismissed, and order denying plaintiffs' motion for a new trial affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.

THORNTON, J., (*concurring.*) In this case notice of intention to move for a new trial was given more than 12 years after the entry of judgment. The plaintiffs were in court when the findings and conclusions of law were presented, and objected to them, and asked for further findings, which were at once made, and the findings were filed. Judgment was ordered in accordance with the findings. This was on the 24th of August, 1874. By consent defendants were allowed until the 26th of August, 1874, to file judgment. At the same time plaintiffs asked for and obtained a stay of proceedings until October 19, 1874. The judgment was filed on the 25th of August, 1874. The plaintiffs contend that their notice of intention was in time, because they never had written notice of the decision. Though a party is entitled to such notice of the decision when the case was tried by the court, before giving notice of intention to move for a new trial, we are of opinion that the rule should not be applied, where the party in court consented to the filing of judgment when ordered within a certain time, and then waited for more than 12 years before giving notice of his intention to move the court for a new trial. He had knowledge sufficient to put him on inquiry as to the *status* of the cause during this long period; and whether or not the findings had been filed, the decision made, and judgment had been entered as ordered, his delay for more than 12 years amounted to such laches as is equivalent to a waiver of notice. It was, in effect, an abandonment of any intention to move for a new trial, and of all claim or right to do so. To permit such a notice to be prosecuted, under the circumstances shown by the record in this case, would be to allow an abuse of the process of the court. The case presented is novel in its features, and I concur in the judgment on the special circumstances of the case. I regard the conduct of the plaintiffs here as equivalent to a waiver of notice of the decision made in 1874.

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[1] 10 Pac. Rep. 414.

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77 Cal. 494

PEOPLE *v.* IRWIN. (No. 20,386.)

(*Supreme Court of California.* December 12, 1888.)

1. HOMICIDE—EVIDENCE—DECLARATIONS OF DECEASED—CONSPIRACY.
   Declarations of deceased that he was going to leave the country, as he was afraid P. would kill him; that P. and others were engaged in a conspiracy to take his life; and that he had nothing against defendant, but that the latter would be induced by P. to kill him,—are not admissible in evidence, even for the purpose of showing the existence of a conspiracy.
2. SAME—THREATS.
   The conspiracy to kill deceased not having been formed until after the burning of P.'s buildings, declarations by P., before the burning, that if his buildings were burned he should know whom to go after, coupled with threats to take the life of deceased, are not admissible against defendant.[1]
3. SAME—CONSPIRACY—DECLARATIONS AFTER THE KILLING.
   The conspiracy being to hang deceased, that his death might be a warning to others, declarations made after the murder, but before the body was hanged on a tree, are not admissible against a conspirator absent at the time.[1]
4. SAME.
   Declarations by deceased as to the disposition of his farm on leaving the country, and as to P.'s motive for commencing a lawsuit against him, being made before the conspiracy existed, are not admissible against defendant.
5. SAME.
   A remark made by defendant to P., while confined in jail, that "it would have been better to let the old s—— of a b—— leave," is not admissible; nothing further being heard, and it not appearing to whom the remark referred.
6. SAME—EVIDENCE OF CONSPIRACY.
   It is error to instruct the jury that they may consider, as tending to establish a criminal conspiracy, the falsehood, evasion, or silence of some of the alleged conspirators as to their knowledge of the death of deceased.
7. SAME—INSTRUCTIONS—REFUSAL OF CONSPIRATORS TO TESTIFY.
   It is error to refuse to instruct the jury that the refusal of alleged conspirators to testify, when called as witnesses, should not be considered in determining defendant's guilt or innocence.

In bank. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Indictment of Andrew Irwin for the murder of A. W. Powers.

N. C. Briggs, *P. B. Tully*, *John L. Hudner*, and *M. T. Dooling*, for appellant. *Geo. A. Johnson*, Atty. Gen., and *Montgomery & Scott*, for the People.

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[1] See, as to the admissibility in evidence in criminal cases of the admissions and declarations of co-conspirators, The Anarchists' Case, (Ill.) 12 N. E. Rep. 865, cited in opinion, and exhaustive notes; Menges v. State, (Tex.) 9 S. W. Rep. 49; Anderson v. State, (Fla.) 3 South. Rep. 884, and note; People v. Bentley, (Cal.) 18 Pac. Rep. 799, and note; People v. Parker, (Mich.) 34 N. W. Rep. 720; State v. Banks, (La.) 5 South. Rep. 18; People v. Pavlik, 3 N. Y. Supp. —.

PATERSON, J. The record herein bristles all over with errors. It is another case in which an overzealous prosecution has led the trial court into prejudicial errors, necessitating a reversal of the judgment.

It is contended that the court erred in appointing an elisor, in the absence of anything tending to show that the sheriff was disqualified to serve the *venire*. It is admitted that it was an irregularity, but counsel for respondent claim that no injury resulted. In view of other and more serious questions which we shall consider, it is unnecessary to determine whether the defendant was prejudiced by the appointment and services of the elisor. We repeat, however, the statement made by us in *People* v. *Yeaton*, 17 Pac. Rep. 544, that "in such matters courts should follow the statutes as closely as possible."

The declarations of the deceased, made to various persons and at different times prior to his death, to the effect that he was going to leave the country, because he was afraid Prewett would murder him; that Prewett was engaged with others in holding meetings, and conspiring to take his life; that he would have no chance to escape, as they would shoot him from the bush; that, although he had done nothing against Irwin, the latter would be induced by Prewett to kill him; that Irwin, Maynard, Hasbrouck, Chapman, Fowles, and Mylar were engaged in the conspiracy with Prewett; that Prewett persisted in making him trouble about his land, as he had for others before; that there was no truth in the statement that he, deceased, had set the fire on Prewett's place, etc.,—were not admissible under any known principle or rule of evidence. As was said by this court with respect to similar declarations: "It is impossible to conceive upon what theory the declarations were admissible. If the declaration had been made to the witness by any other person, it would not be contended that it was admissible in evidence, for evidently it would be obnoxious to the objection that it was hearsay testimony. The fact that the declaration was made by the deceased does not tend to remove the objection, for the declarations of the deceased are permitted to be proven in the single case when they are made *in extremis*, and have reference to the circumstances of the death, unless the declaration constitutes a part of the *res gestæ*, or can be classed with declarations against interest, etc. 1 Greenl. Ev. § 156. It was not admissible as a part of the *res gestæ*, for it did not constitute one of the circumstances surrounding the murder. The expectation of the deceased that the defendant would return, and that, too, unsupported by any evidence of the reasons for his expectation, did not even tend to prove any fact connected with the murder. The expectation may have been without any foundation; may have been merely a surmise, arising from the defendant's usual habits. His expectation or declaration that the defendant would return at the time stated would possess no more legal value as evidence to prove the fact that he did return than would the expectation of his neighbor Burns that the defendant would return at the given time." *People* v. *Carkhuff*, 24 Cal. 642.

In *People* v. *Carlton*, 57 Cal. 84, the fact that the deceased was killed by defendant was not disputed, but it was claimed by the defendant that in doing so he acted in self-defense. The widow of the deceased was called as a witness in that case, and, for the purpose of showing that the deceased was not the aggressor, was permitted to testify that on the morning of the homicide her husband, before leaving home, had said the trouble between defendant and himself would be settled in court, and that he wanted to leave his pistol at home, but was prevented by the witness, who said she did not want to stay in the house with a loaded pistol. The court there said: "This testimony was not a part of the *res gestæ*, and was not admissible under the authorities to which reference has been made, nor upon any theory or principle of the law with which we are acquainted. From it injury might readily have resulted to the defendant, for it might have been, and probably was, argued therefrom that deceased intended to resort to the courts rather than to force for redress, and therefore did not commence the rencounter in which he lost his life." So, in the case at bar, injury must have resulted to the defendant from these declarations, for it undoubtedly was argued that the deceased intended to leave the country to escape trouble with Prewett, the defendant, and others, "and therefore did not commence the rencounter in which he lost his life." The immediate circumstances of the killing are not in evidence, but the witness Alexander testified—and it is the only testimony as to what occurred between Prewett and deceased—that Prewett had told him he met the deceased in the canon, and killed him in self-defense. The declarations we have referred to must therefore have been given much weight by the jury.

Such declarations depend for their force upon the veracity of the deceased, or the party who has been assaulted, are highly prejudicial, (*State* v. *Pomeroy*, 25 Kan. 350,) and are regarded as being so grievously injurious that in one case it was held the judgment should be reversed, although no objection was made to the evidence when offered, (*People* v. *Williams*, 3 Abb. Dec. 600.) There is no analogy between such statements and dying declarations; for the latter, being made in view of immediate death, have all the sanction and solemnity of testimony given under oath before the court and jury. *Kennedy* v. *People*, 39 N. Y. 253; *State* v. *Clements*, 14 Pac. Rep. 411; *State* v. *Draper*, 65 Mo. 335; *Binns* v. *State*, 57 Ind. 46.

But it is claimed by counsel for respondent that these declarations were admissible in evidence to prove conspiracy, and the court seems to have allowed them for that and no other purpose; that is to say, the main fact which they are supposed to explain is the alleged conspiracy, and not the killing. In other words, it is admitted by counsel for respondent—as we understand the matter—that, if there was no question of conspiracy in the case, a declaration by deceased that Irwin was making preparations to kill him, and would kill him unless he left the country, would be inadmissible. This must be admitted. Such a declaration is on a par with the one referred to in *People* v. *Carlton*, *supra*, and, as said there, "not admissible upon any theory or principle of the law with which we are acquainted." The existence of a conspiracy was a fact to be proven in the case. Without such proof the defendant could not be convicted, as it is not claimed that he was present at the killing, or knew of it until some hours after it occurred.

Now, the declaration of Prewett, Fowles, or of any other alleged conspirator, could not be admitted to prove the fact of conspiracy. Such declaration would be rejected, "lest," as Greenleaf says, "the jury should be misled to infer the fact itself of a conspiracy from the declaration of strangers." 1 Greenl. Ev. § 111. "After proof of conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy," is the restriction which is placed upon the evidence of co-conspirators by our Code of Civil Procedure, (section 1870,) lest the jury take the declaration of one, not proven by other evidence to be a conspirator, as proof of the conspiracy itself, and then, "after proof of conspiracy" by such declarations, use the same evidence to establish the guilt of the defendant. We are unable to discern any greater sanctity in the declarations of a deceased in this regard than that pertaining to the declarations of alleged conspirators. Declarations favorable to defendant, made by the deceased so long prior to the killing, have been held to be not admissible as a part of the *res gestæ*. *State* v. *Vincent*, 24 Iowa, 576. Nor is the defendant permitted to prove that a third party made threats to kill the deceased, and then left just before the killing. *Crookham* v. *State*, 5 W. Va. 510. To admit such declarations—such hearsay testimony—in proof of the conspiracy itself would in civil matters "put every man at the mercy of rogues," (*Solomon* v. *Kirkwood*, 55 Mich. 261, 21 N. W. Rep. 336;) and, in charges of criminal conspiracy, render the innocent the helpless victims of villainous schemes, supported and proved by the prearranged and manufactured evidence of the promoters thereof.

If any further authority be needed in support of the proposition that, where two are jointly indicted, the declarations of the deceased cannot, under such circumstances, be used against either of the defendants for any purpose, it may be found in *Cheek* v. *State,* 35 Ind. 492. There Cheek and one Bailey were jointly indicted for the murder of one Harrison. A witness was asked what the deceased said to him on the road before he met the defendants, or came in sight or hearing of either of them, as to the purpose of Harrison in turning back with the witness. He replied: "Mr. Harrison spoke thus: 'Doc, I am glad you have come; there are two ruffians going up the road, and they have threatened to take my life. They have gone to my house, and I want you to go back with me.'" The court there held that the evidence was not *res gestæ,* and said: "We think the books may be searched without success to find a case where the statements of a murdered man, made before he came in sight or hearing of his slayer, can be given in evidence against the accused on his trial. Was this evidence detrimental to the accused? We think so. It was well calculated to make or induce the jury to believe that the killing was from premeditated malice, and not from sudden, hasty transport, or momentary passion; and might, and probably did, induce the jury to find a verdict of murder in the first degree, (the penalty of which is death,) instead of a lower degree of the offense. The case must be reversed for this error." *Weyrich* v. *People,* 89 Ill. 98, is a case illustrative, and in support of the same proposition.

The cases cited by counsel for respondent are not in point. The main act to be proved in cases of this kind is the unlawful killing of the deceased. Anything so connected with that act in point of time and character as to explain how and why it was committed is a part of the *res gestæ.* If Prewett had not succeeded in killing Powers, it could hardly be contended that the latter, on a trial of the defendant for an assault to murder, could testify to declarations of his own, made several hours before the affray, concerning the relations existing between Prewett and the defendant.

There were other declarations of the deceased admitted in evidence still more prejudicial than those to which we have referred. Against the objections of defendant, the witness Holt was permitted to say that Prewett had told him—long before the fire on Prewett's place, which occurred before any meetings were held, and before any conspiracy existed—"deceased had blown up houses, and, if any of his property was burned or blown up, he would know the man to go after; that it was a serious thing to take human life, but he would know the man to go for if his property were destroyed." The witness Alexander was permitted to testify to declarations made by Prewett after the death of Powers. No declarations, except those made "during the pendency of the conspiracy, and in furtherance of its objects," can be used against a co-conspirator. Declarations showing past acts, or expressing merely the opinion or desire of the conspirator making them, are not binding upon any one except himself, or those in whose presence they are made. *Anarchists' Case,* (Ill.) 12 N. E. Rep. 873; *Samples* v. *People,* 13 N. E. Rep. 537; 1 Greenl. Ev. §§ 111, 233; *People* v. *Moore,* 45 Cal. 21; *Same* v. *English,* 52 Cal. 212; *People* v. *Aleck,* 61 Cal. 138.

The evidence shows that the conspiracy, if any existed, began subsequent to the time of the fire on Prewett's land, and ended with the death of Powers. It is claimed by counsel for respondent that the conspiracy was not ended until the dead body of Powers had been hung upon the tree. It would be sufficient to say that defendant is tried here for the murder of Powers, not for mutilating his dead body; but the evidence shows beyond controversy that the only conspiracy, if any existed, to which defendant was a party, was to hang Powers for the purpose of killing him, that his death might be a warning to others, not to kill him for the purpose of hanging his dead body up as a warning. Witnesses for the prosecution testified that the agreement to hang the body up as a warning was made after the killing, and that defendant was not present when the conclusion to do so was arrived at.

Among the declarations of deceased admitted in evidence were statements that he was going to leave the country, and wanted to leave his farm in charge of a neighbor; that Prewett wanted to get an outlet to the San Benito river to head off Melindy, and had commenced a suit against him (Powers) through spite; that Prewett had accused him of putting Bradley on his (Prewett's) land, but it was not true. These declarations as to the opinion and intention of Powers (some of which were made two years prior to the time of the conspiracy) were admitted in evidence apparently upon the ground that anything admissible against Prewett was admissible against defendant, without regard to time or character. Conceding that they might have been competent evidence in a case against Prewett, it is impossible to perceive upon what principle of evidence they could be used against the defendant.

One of the witnesses, Clay, testified that, while listening at a grating in the outside wall of the jail, he overheard a portion of a conversation between Prewett and the defendant while they were confined in jail; that he overheard "Irwin tell Prewett it would have been better to let the old s—— of a b—— leave." There is nothing to show to whom he referred. The witness was unable to state or to understand anything that was said by either party to the conversation before or after the remark quoted. It was error to admit this scrap of the conversation. *People* v. *Keith*, 50 Cal. 139; *People* v. *Ah Wee*, 48 Cal. 238.

The court instructed the jury: "Testimony has been introduced tending to show that some of the alleged conspirators, including the defendant, sought to conceal the fact that they had any knowledge of the death of Dr. Powers prior to the discovery of the body on the morning following his death; that the body was placarded, and hung in the tree for the purpose, as the prosecution claims, of giving the impression that the death was caused by 150 vigilantes; that some of the alleged conspirators were guilty of falsehood, evasion, and silence when questioned concerning the death of Dr. Powers. If you believe these to be established facts by the evidence, you may consider them, or any other criminating circumstances found in the testimony, as tending in some measure to establish the fact of a criminal conspiracy as charged." This was error. No falsehood, evasion, or silence of a conspirator, occurring after the death of Powers, was admissible in evidence against the defendant, under any circumstances, (*People* v. *Stanley*, 47 Cal. 118;) and, whether occurring before or after the death, such evidence, being the act or declaration of a co-conspirator, was inadmissible, as we have seen, to establish the fact of a criminal conspiracy.

The court also erred in refusing to instruct the jury that the refusal of the alleged conspirators, who had been placed on the witness stand and declined to testify, should not be considered by the jury in determining the question of guilt or innocence, and that the jury should not presume from such refusal to testify that the testimony, if given, would be against the defendant.

As the case is going back to the court below for a new trial, and the same questions may arise, it is proper to say that we see no error in its rulings upon challenges made to jurors, or upon objections made to the introduction in evidence of the card claimed to have been found on the body of deceased, or to the deposition of defendant taken by the coroner at the inquest, or to the testimony of Nash given after the case had been once closed, or to McGrury's testimony.

Judgment and order reversed, and cause remanded for a new trial.

We concur: McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

77 Cal. 507

McBlane v. McBlane. (No. 11,251.)

(*Supreme Court of California.* December 12, 1888.)

1. Judgment—By Default—Setting Aside—Affidavits.

A motion by defendant in divorce, supported by affidavit, to set aside a decree by default, on the ground that she was not a resident of the state, and was not served personally or by publication, should be granted, where the order for publication was not made until July 16th, and the person by whom personal service is alleged to have been made in his affidavit stated that he made such service July 17th, in Philadelphia, while the affidavit, as to the mailing of the summons, showed that it was mailed only on July 16th, and the affidavits in opposition to the motion contain many improbable statements.

2. Same—Affidavit of Merits.

Such motion need not be supported by an affidavit of merits.

In bank. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

D. W. Douthitt, for appellant. *Tyler & Tyler*, for respondent.

Paterson, J. Action for divorce. The complaint was filed July 10, 1884. Summons issued the same day. Affidavit for publication of summons was made July 15th. Order for publication of summons was made July 16th, but not filed until October 27, 1884. The default of the defendant for failure to answer was entered October 17, 1884, on an affidavit of John M. Wheeler, made that day, alleging that he delivered to the defendant personally, in the city of Philadelphia, on the 17th day of July, 1884, a copy of the complaint and summons. On October 27, 1884, one J. F. McLaughlin made affidavit that the affidavit for publication and order of publication were lost, and could not be found, and that on the 16th day of July he had deposited a copy of the summons and a copy of the complaint in the post-office at San Francisco, inclosed in an envelope directed to the defendant at her place of residence, Philadelphia, Pa., with postage prepaid thereon. Thereupon what purported to be copies of said affidavit and order for publication were filed "October 27, 1884, *nunc pro tunc*, July 16, 1884." The authority of the clerk for filing said copies *nunc pro tunc* does not appear, but probably an order was had therefor, because judgment in favor of plaintiff, dissolving the bonds of matrimony, was made and entered on the same day. On the 20th day of April, 1885, the defendant, Sarah McBlane, filed a motion in said cause to set aside the decree rendered against her, and for permission to answer the complaint, on the grounds that the defendant was not a resident of this state within six months preceding the commencement of the action, and that the defendant had never been served personally or by publication, and that the proceedings were fraudulent and irregular. The court, having heard the matter upon affidavits, denied the application of the defendant, on the ground that no affidavit of merits had been filed.

The order of the court must be reversed. The affidavit made by the defendant contains sufficient denials of the material matters set forth by the plaintiff in his complaint, and shows a good defense on the merits if its contents are true. But there is no necessity for an affidavit of merits in an action for divorce; and the court should be very liberal in granting applications to set aside defaults in divorce actions, where it appears at all probable that there was no service, either personal or by publication. Not only can no divorce be granted upon the default of the defendant, or a finding of fact made by a referee, but the law inhibits the granting of divorces upon the uncorroborated testimony or admission of the parties. The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce; the policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters.

The affidavit of the defendant shows that the first information she had of these proceedings came to her in a copy of the decree "in the familiar handwriting of said John F. McBlane, mailed in San Francisco, and received by her in Philadelphia during the month of November last;" that no complaint or summons was ever served on her by said Wheeler, or any one else; and that she never received any copy, through the mail or otherwise. The counter-affidavits are a mosaic of statements, as a ground of opposition to the application of the defendant. It will be observed that Wheeler says he served the summons personally on the defendant in Philadelphia on the 17th day of July, just seven days after it was issued. The papers were not mailed to him until July 16th from San Francisco. Personal service out of the state can be made, if at all, (*Freeman* v. *Alderson*, 119 U. S. 185, 7 Sup. Ct. Rep. 165,) only when a publication of the summons has been ordered. Publication in this case was not ordered until July 16th, just one day before it is alleged the summons was served in Philadelphia. The affidavit for publication was not made until July 15th. McLaughlin claimed that "at the same time he sent the copy of the summons and complaint to defendant by mail—July 16th—he also sent a copy of the complaint and summons to a friend of the plaintiff in Philadelphia for service upon the defendant personally"; but, when asked the name of the person to whom he had sent the papers, he replied that he did not remember. In one of the counter-affidavits it is claimed that the date named in the affidavit of Wheeler as to the time of service, to-wit, July 17th, ought to have been July 27th, but was printed "17" through a mistake in making a copy on the type-writer.

The improbability of many of the statements contained in these affidavits is so glaring that the conclusion is irresistible that no service was ever had upon the defendant. The whole showing is a bungling piece of patchwork, and the court below should not have hesitated for a moment to grant the application of the defendant.

Order reversed and cause remanded, with directions to allow the defendant to answer within a reasonable time.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

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77 Cal. 534

TAYLOR *v.* WESTON *et al.* (No. 11,415.)

(*Supreme Court of California.* December 15, 1888.)

1. PUBLIC LANDS—APPLICATION FOR PURCHASE—AFFIDAVIT—ACTUAL SETTLEMENT.
Pol. Code Cal. § 3500, providing that the affidavit of an applicant for the purchase of lieu lands from the state shall state that the applicant is an actual settler, applies to all lands, no distinction being made between lands suitable for cultivation and lands not suitable; and the statement must be true, and where the affidavit as to applicant's being an actual settler is false, his proceedings are invalid.

2. SAME—ASSIGNMENT OF CERTIFICATE—BONA FIDE PURCHASER.
The assignee of a certificate of purchase issued to such applicant, who purchased for value without notice of the falseness of the affidavit, is in no better position than the applicant, as he is a purchaser of an equitable interest in the land, the legal title being in the state, and is not protected by the rule as to *bona fide* purchasers.

3. SAME—EFFECT OF CERTIFICATE—EXAMINATION.
In a proceeding to determine who is entitled to purchase the land, such certificate of purchase is not of itself a bar to inquiry into the rights of the person to whom it was issued.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

Action by Taylor against Weston and Payne on a reference from the land-office to determine who is entitled to purchase certain lieu lands from the state. Judgment for defendants. Plaintiff appeals.

J. M. Mannon and *J. W. Harding*, for appellant. *J. A. Cooper*, for respondents.

HAYNE, C. Action upon a reference from the land-office to determine who is entitled to purchase certain lieu lands from the state. The plaintiff, who was an actual settler upon the land, filed his application to purchase on December 24, 1884. This application "was in due form, and stated all the facts required by law, and was duly verified." The defendant Weston's application, which was regular in form, was filed on March 1, 1884, nearly nine months previously. This application stated that Weston was an actual settler on the land; but the court found that he "never was a settler on said land, nor in the possession thereof." On March 12, 1884, a certificate of purchase was issued to Weston; and on the 15th of the same month he assigned this certificate to the defendant Payne, who paid value for the same, and who had no knowledge of the falseness of Weston's affidavit. The court below gave judgment in favor of Payne, and the plaintiff appeals. We think the judgment was wrong.

1. The fact that Weston was not a settler on the land rendered his proceedings invalid, whether the land was suitable for cultivation or not. It is true, the constitution provides that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers." Article 17, § 3. But this did not prevent the legislature from annexing a similar condition to lands not suitable for cultivation. It did not "prevent or in any way affect the sale of lands which were not suitable for cultivation." *Dillon* v. *Saloude*, 68 Cal. 270, 9 Pac. Rep. 162. The state, being the owner of the land, could dispose of it upon any terms she pleased, provided they were not inconsistent with her organic law, or with the grant under which she held. And at the time Weston's application was filed the condition imposed was that the applicant should be an actual settler. This condition resulted from section 3500 of the Political Code as amended in 1880, (it was again amended in 1885,) which provided that the affidavit should state that the applicant was an actual settler on the land. No distinction was made between lands which were suitable for cultivation and lands which were not so. The requirement applied to all lands within the scope of the section; and it meant that the statement must be true. *McKenzie* v. *Brandon*, 71 Cal. 211, 12 Pac. Rep. 428; *Plummer* v. *Woodruff*, 72 Cal. 31, 11 Pac. Rep. 871, and 13 Pac. Rep. 51; *Harbin* v. *Burghart*, 18 Pac. Rep. 128. Weston's affidavit as to his being an actual settler having been false, his proceedings were invalid.

2. Payne, being the assignee of Weston, was in no better position. The court below held that Payne was protected by the rule as to innocent purchasers for value; in other words, that a certificate of purchase is negotiable, like a promissory note. And there is a statement to that effect in the opinion of DEADY, J., in *Smith* v. *Ewing*, 23 Fed. Rep. 741. But the point was not necessary to the decision, which was that the officers of the land department had no power to cancel a certificate of purchase, but that resort must be had to the courts. With deference to the views of that learned judge, we do not think that the rule as to *bona fide* purchasers applies.

This conclusion might perhaps be rested upon grounds of public policy. The case is not like that of a private owner who sells his land for considerations of gain alone. The state does not throw the land upon the market for sale to the highest bidder. A price is fixed for all purchasers; and this is put much below the actual value, because other considerations enter into the transaction. Among these was the requirement that the purchaser should be an actual settler upon the land. It was not thought best that the lands should be disposed of to persons who might simply desire to hold them for an increase in value. The plan was to dispose of them to persons who would reside upon them and improve them, and so increase the wealth of the community, and add to the number of good citizens. That was the policy of the state. Now, it is manifest that this policy would be defeated if persons who falsely pretend to be of the class entitled to purchase could, after deceiving the land department into giving them their preliminary papers, shut off investigation by immediately assigning such preliminary papers to some third party. The proceedings before the land-officer being *ex parte* in the first instance, and he being unable, from the nature of the case, to personally investigate the truth of the statements made to him, the opportunities for fraud are great; and, the temptation being strong, the result would probably be that the legislative will would be almost entirely frustrated. Hence we say that our conclusion, that the rule as to *bona fide* purchasers does not apply, might perhaps be rested upon grounds of public policy.

But it is not necessary to put it upon that ground. Upon the most favorable view for the respondent, his position can be no better than if he had acquired a contract of purchase made by a private party; and in such case the rule as to *bona fide* purchasers would not apply, because his purchase would not be of the legal title, but of an equitable interest. The general rule, subject to some exceptions and qualifications, is that the purchaser of an equitable interest is not protected as a *bona fide* purchaser. The authorities cited below are conclusive to this effect. In *Vattier* v. *Hinde,* 7 Pet. *271, the deed under which the party claimed was from one who had no title at all. The decision, therefore, is not in point. But in delivering the opinion, MARSHALL, C. J., said: "The rules respecting a purchaser without notice are framed for the protection of him who purchases a legal estate, and pays the purchase money without knowledge of an outstanding equity. They do not protect a person who acquires no semblance of title. They apply fully only to the purchaser of the legal estate. Even the purchaser of an equity is bound to take notice of any prior equity." This language was adopted by Story in his treatise on Equity Jurisprudence. See volume 2, (13th Ed.) § 1502, pp. 825, 826. And in another place that learned and cautious writer, speaking of the rule as to *bona fide* purchasers, says: "The purchaser, however, in all cases must hold a legal title, or be entitled to call for it, in order to give him the full protection for this defense; for if his title be merely equitable, then he must yield to a legal and equitable title in the adverse party." Id. vol. 1, § 64*c*, p. 64.

The recording laws doubtless somewhat enlarge the rule as stated above. Under their operation the purchase of an apparent legal title may in some cases be protected by the rule as to *bona fide* purchasers, although his grantor had no title at all; and the purchaser of a mortgage (which, under our system, is merely a lien) is within its operation. See *Frey* v. *Clifford*, 44 Cal. 335; Civil Code, § 1214. But the general rule as to the purchaser of a mere equity still obtains; and the assignee of an executory contract of purchase is the purchaser of a mere equity within the meaning of the rule. So far as the property is concerned, his right is merely to have specific performance of the contract, for which he must resort to a court of equity, which may refuse to lend it aid if not satisfied of the fairness of the transaction. In *Boone* v. *Chiles*, 10 Pet. *209, the rule as to *bona fide* purchasers was invoked on behalf of the holder of a contract of purchase. But the court, per BALDWIN, J., said: "There is no one subject of equity cognizance in which there is a wider difference between a deed and a contract of purchase than the one under consideration. A purchaser with notice may protect himself under a purchaser by deed without notice, but cannot do it by purchase from one who holds or claims by contract only. The cases are wholly distinct." In the subsequent case of *Villa* v. *Rodriguez*, 12 Wall. 338, which went up from California, the rule as to *bona fide* purchasers was invoked in relation to a contract of purchase contained in a lease. But the court, per SWAYNE, J., said: "The doctrine invoked has no application where the rights of the vendee lie in an executory contract." So, in *Polk* v. *Gallant*, 2 Dev. & B. Eq. 397, where a son took a contract of purchase from his father, and paid the price without notice of any defect in the father's title, it was held that the rule as to *bona fide* purchasers did not protect him. And RUFFIN, C. J., delivering the opinion, said: "Precisely on the same footing stands the purchase of the son from the father himself, which was of an equity only. It is only the honest purchaser of a legal title whom equity will not disturb. If the purchase be of the legal title, but with notice of an equity in another; or if it be only an assignment of an equity, with or without notice of a prior equity in another person,—in either case the estate must in the hands of the purchaser answer all the claims to which it would have been subject in the hands of the vendor." So in *Chew* v. *Barnet*, 11 Serg. & R. 389, it was held that a purchaser claiming through a contract of purchase was not a *bona fide* purchaser within the meaning of the rule. And GIBSON, J., delivering the opinion, said: "When we hear, therefore, of a purchaser for a valuable consideration taking the title free from every trust or equity of which he had not notice, it is intended that he is the purchaser of a title perfect on its face; for every purchaser of an imperfect title takes it with all its imperfections on its head. It is his own fault that he confides in a title which appears defective to his own eyes; and he does so at his peril. Now, every equitable title is incomplete on its face. It is, in truth, nothing more than a title to go into chancery to have the legal estate conveyed; and therefore every purchaser of a mere equity takes it subject to every clog that may lie on it, whether he had notice of it or not." So in *Dupont* v. *Wertheman*, 10 Cal. 369, it was held that the rule as to *bona fide* purchasers did not protect a party who took a contract which did not amount to a conveyance, but at most gave a mere equitable right. And FIELD, J., delivering the opinion, said: "The purchaser of an equitable title takes the property subject to all existing equities. He is not within the rule which protects a *bona fide* purchaser for value and without notice of the real or apparent legal title. He must take the imperfect title with all its imperfections." And this case was approved in *Reynolds* v. *Harris*, 14 Cal. 680, in which it was said that the rule as to *bona fide* purchasers did not protect the assignee of a sheriff's certificate of purchase. See, also, *Winborn* v. *Gorrell*, 3 Ired. Eq. 122. *Williams* v. *Love*, 2 Head, 86; *Haskell* v. *State*, 31 Ark. 98; *Young* v. *Atkins*, 4 Heisk. 531; *White* v. *Railroad Co.*, 7 Heisk. 550.

In the case before us the person through whom the respondent claims had only a contract of purchase. It is undisputed that the legal title is in the state; the very object of the proceeding being to determine who is entitled to a conveyance from the state. What is called a "certificate of purchase" (although treated as evidence of title as between third parties) is, as against the state, merely evidence of a contract to convey; and the respondent must establish his right against the state, each party in this kind of proceeding being an actor. *Dillon* v. *Saloude*, 68 Cal. 269, 9 Pac. Rep. 162. Hence the rule as to the purchase of equitable interests applies; and it has been applied by courts of authority to cases in relation to the acquisition of public lands. In *Root* v. *Shields*, 1 Woolw. 364, it was applied by Mr. Justice MILLER to the assignee of a pre-emption claim. In *Craig* v. *Leiper*, 2 Yerg. 193, it was applied, in an able opinion by CATRON, J., to the grantee of the rights acquired by an entry and land-warrant under the early land laws. In *Stout* v. *Hyatt*, 13 Kan. 243, 244, it was applied to the assignee of a pre-emption claim for school lands under the territorial laws of Kansas. And in *Maghee* v. *Robinson*, 98 Ill. 466, it was applied to the assignee of a swamp-land certificate of purchase. See, also, *Chrisinger's Case*, 4 Dec. Dep. Int. 347. We think, therefore, that the court below erred in holding the defendant Payne to be protected by the rule as to *bona fide* purchasers.

It is hardly necessary to add that, in what we have said, we have no reference to cases where the legal title has passed to the person through whom the *bona fide* purchaser claims.

3. In a proceeding like the present the certificate of purchase is not of itself a bar to inquiry into the rights of the person to whom it was issued. *Gilson* v. *Robinson*, 68 Cal. 542, 10 Pac. Rep. 193; *Gould* v. *Lanterman*, 70 Cal. 247, 11 Pac. Rep. 709; *Jacobs* v. *Walker*, 18 Pac. Rep. 129. The defendant Payne, therefore, acquired no right to the land; and we think that the facts found show that plaintiff has the right to purchase it. We therefore advise that the judgment be reversed and the cause remanded, with directions to enter judgment in favor of the plaintiff.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and cause remanded, with direction to enter judgment in favor of plaintiff.

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77 Cal. 485

WILSON *v.* ATKINSON. (No. 11, 899.)

(*Supreme Court of California.* December 12, 1888.)

1. LIMITATION OF ACTIONS—ADVERSE POSSESSION—EVIDENCE—VOID TAX DEED.
   Under Code Civil Proc. Cal. § 322, providing that where one enters upon property "under claim of title, * * * founding such claim upon a written instrument as being a conveyance of the property, * * * continuous occupation of the property included in such instrument, * * * or some part of the property under such claim for five years, the property so included is deemed to have been held adversely," entry on property under a void tax deed, and possession thereunder, is possession under color of title, and the statute of limitations is set in motion by such tax deed, and it is admissible in evidence for the purpose of defining the character and limiting the extent of the occupant's possession.
2. SAME—COLOR OF TITLE—NOTICE OF CLAIM.
   Although the tax deed under which the occupant claimed contained a recital showing that the assessment under which the tax sale was made was invalid, it contained all the other requisites of a good deed, including a sufficient description of the land claimed under it, and it was as effective as notice of the extent of defendant's possession and claim, as if the objectionable recital had been omitted.
3. SAME—GOOD FAITH OF OCCUPANT.
   The claim of title should be made in good faith, believing the deed to be a conveyance of the property, but the knowledge of the true character of the instrument by the occupant must be actual, and not such as would arise from a legal construction of the instrument.
4. SAME—COLOR OF TITLE.
   Instructions based upon the theory that such tax deed was not sufficient to give color of title, were properly refused.[1]

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Ejectment by C. L. Wilson against E. J. Atkinson. Verdict and judgment for defendant. Plaintiff appeals.

C. A. & F. P. Tuttle, for appellant. *Hale & Craig*, for respondent.

WORKS, J. Action of ejectment. Trial by jury. Verdict and judgment for defendant. The plaintiff proved title from the United States government, and that at the time the action was commenced the defendant was in possession of the property. The defendant, to sustain the issues on her behalf, introduced a tax deed to one Singer, bearing date September 3, 1875, and a bargain and sale deed from Singer to her. There was evidence tending to show that Singer had claimed title under the tax deed from the time of its execution, and that he had notified the plaintiff of the fact that he held the tax deed, and claimed title under it, soon after its execution. There is also evidence that Singer leased the land to other parties, to be used as pasture for stock for the years 1876 to 1882, inclusive, except the year 1879, and that all taxes were paid by him from the time of receiving the deed. The deed from Singer to the defendant bears date May 11, 1883. The land is shown to have been fenced early in 1880. The only evidence of possession before that is that the land was used for the purpose of pasturing sheep and other stock, but it tends to show that such posesssion was exclusive, the stock being herded on the land, and the stock of others kept off.

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[1] That a void tax deed constitutes color of title on which to base adverse possession, see Whittlesey v. Hoppenyan, (Wis.) 39 N. W. Rep. 355. See, also, note, Id.; Doe v. Clayton, (Ala.) 2 South Rep. 24, and note; Hunt v. Gray, (Iowa) 41 N. W. Rep. 14.

The tax deed above referred to was held to be void when this case was here before. 68 Cal. 590, 10 Pac. Rep. 203. The plaintiff objected to the admission of this deed in evidence, on the ground that it was void, and passed no title, and was irrelevant, did not give color of title, and was not sufficient to set the statute of limitations in motion, or to show possession under it. The objection was overruled, the defendant admitting that the deed was not sufficient to prove title, but contending that it was competent as tending, in connection with the parol testimony, to show the character and extent of the possession.

There is much diversity of opinion, in the decided cases, upon the question whether a deed, void on its face, is such a written instrument as will uphold and render effective the possession of real estate that would otherwise fail to give title. It has been held by this court in a number of cases that a tax deed like this, containing the recital that the land was assessed to "unknown owners, and to all owners and claimants known and unknown," is void, and appears to be so on its face. *Grimm* v. *O'Connell*, 54 Cal. 522; *Hearst* v. *Egglestone*, 55 Cal. 365; *Wilson* v. *Atkinson*, 68 Cal. 590, 10 Pac. Rep. 203. The Code provides: "When it appears that the occupant, or those under whom he claims, entered into the possession of the property under claim of title, exclusive of other right, founding such claim upon a written instrument, as being a conveyance of the property in question, * * * and that there has been a continued occupation and possession of the property included in such instrument, * * * or of some part of the property, under such claim, for five years, the property so included is deemed to have been held adversely." Code Civil Proc. § 322.

The deed in question was a written instrument, purporting to convey the real estate in controversy by a proper description. It is properly executed, and there is evidence tending to show that the defendant and her grantor claimed title under it as being a conveyance of the property. In some of the cases it is said that the conveyance must be good in form, contain a description of and profess to convey the property, and that, containing these requirements, it will give color of title, although in fact invalid and insufficient to pass the title, or actually void or voidable. *Packard* v. *Moss*, 68 Cal. 123–127; 8 Pac. Rep. 818, and cases cited.

To sustain their contention that the deed, being void on its face, could not put the statute of limitations in motion, counsel for appellants cite the following authorities: *Packard* v. *Moss*, *supra*; *Moore* v. *Brown*, 11 How. 414, 425; *Skyles* v. *King*, 2 A. K. Marsh. 385; *Walker* v. *Turner*, 9 Wheat. 542; *Shoat* v. *Walker*, 6 Kan. 65; *Cain* v. *Hunt*, 41 Ind. 466; 26 Amer. Law Reg. 409, 416. We have given these authorities our careful attention. They are in the main based upon statutory provisions differing materially from our own, but in principle support the appellant's position. Many other cases to the same effect might have been cited. The decided cases are so conflicting as to aid us very little in attempting to arrive at a proper conclusion, but the reasoning by which the courts of the several states have supported the doctrines laid down are worthy of careful consideration.

The case of *Moore* v. *Brown, supra,* was founded upon a statute of limitations of the state of Illinois, which applied to persons "having a connected title in law or equity * * * from any public officer or other person authorized by the laws of the state to sell such land for the non-payment of taxes, and who had held possession thereunder for seven years." The deed showed upon its face that the auditor sold the land short of the time provided by law. It was held that the deed disclosed the fact that the officer was not "authorized by the laws of the state to sell the land," that the purchaser must take notice of the fact appearing on the face of his deed, and his holding could not be regarded as adverse. Chief Justice TANEY and Justices CATRON and GRIER dissented, and gave their reasons. This case reviews the case of *Skyles* v. *King*, cited by counsel. It was based upon a statute almost identical with the Illinois statute above referred to. The case of *Shoat* v. *Walker* rested upon similar grounds. The deed showed upon its face that the property was sold for taxes to the county of Lyon, and that the certificate of sale was assigned by the county treasurer to one Howard, and the tax deed executed to him. It was held that there was no law authorizing the treasurer to make such assignment, but that it must be done by the county clerk. The case did not involve the question of adverse possession, as it was conceded that there had been no actual possession, and that the land was wild and uncultivated. The decision was based upon *Moore* v. *Brown, supra,* and *Lain* v. *Shepardson*, 18 Wis. 59, in which it was held that the statute of limitations did not run under a tax deed, void on its face, where there had been no actual possession. The other cases cited by counsel do not materially aid them, and need not be specially noticed.

In the article in 26 Amer. Law Reg. 409, by Mr. Black, entitled "Color of Title," the authorities are carefully reviewed, and the conclusion reached that their weight is against the position of appellant in this case. Color of title is that which in appearance is title, but which in reality is no title. *Wright* v. *Mattison*, 18 How. 54. In the case of *Veal* v. *Robinson*, 70 Ga. 816, it was held that "color of title is anything in writing purporting to convey title to land, which defines the extent of the claim, it being immaterial how defective or imperfect the writing may be, so that it is a sign, semblance, or color of title."

In *Brooks* v. *Bruyn*, 35 Ill. 394, it is said: "Any instrument having a grantor and a grantee, and containing a description of the lands intended to be conveyed, and apt words for their conveyance, gives color of title to the lands described. Such an instrument purports to be a conveyance of the title; and, because it does not, for some reason, have that effect, it passes only color, or the semblance of a title. It makes no difference whether the instrument fails to pass an absolute title, because the grantor had none to convey, or had no authority, in law or in fact, to convey one, or whether such want of authority appears on the face of the instrument, or *aliunde*. The instrument fails to pass an absolute title, for the reason that the grantor was not possessed of some one or more of these requisites, and therefore it gives the semblance or color only of what its effect would be if they were not wanting."

The supreme court of Wisconsin says in *Oconto Co.* v. *Jerrard*, 46 Wis. 317: "When municipalities or their taxing officers assume to levy a tax or to institute a tax proceeding not authorized by statute, they are outside of their functions, and are not acting *virtute officii*. They are not in the exercise of the sovereign power of taxation, and are as powerless to tax as private persons. Their whole proceeding is a mere usurpation, and absolutely void throughout for all purposes. In such a case there is nothing for the statute of limitations to act upon. But when there is statutory authority within the scope of the constitution to raise money by taxation from property subject to taxation, to come into the public treasury for public use, and there is an actual attempt under color of law to exercise the authority, it is, while *in fieri*, *prima facie* a valid tax proceeding; and when the statute of limitations has run upon it, it is conclusively established as a valid exercise of the taxing power."

The statute of Wisconsin is in almost, if not quite, the exact language of our own, and the supreme court of that state has held in a number of cases that a tax deed, void upon its face, is a written instrument within its meaning. *McMillan* v. *Wehle*, 55 Wis. 685, 693, 13 N. W. Rep. 694, and cases cited. As further supporting this doctrine we cite *Leffingwell* v. *Warren*, 2 Black, 599; *Pugh* v. *Youngblood*, 69 Ala. 296; *Gatling* v. *Lane*, 22 N. W. Rep. 227; *Dalton* v. *Lucas*, 63 Ill. 337; *Stovall* v. *Fowler*, 72 Ala. 77; *Pillow* v. *Roberts*, 13 How. 472, 476; Wood, Lim. Act. 522–536.

In *Pillow* v. *Roberts*, *supra*, the court uses this language: "Statutes of limitation are founded on sound policy. They are statutes of repose, and should not be evaded by a forced construction. The possession which is protected by them must be adverse and hostile to that of the true owner. It is not necessary that he who claims their protection should have a good title, or any title but possession. A wrongful possession, obtained by a forcible ouster of the lawful owner, will amount to a disseisin, and the statute will protect the disseisor. One who enters upon a vacant possession, claiming for himself upon any pretense or color of title, is equally protected with the forcible disseisor. Statutes of limitation would be of little use if they protected those only who could otherwise show an indefeasible title to the land. Hence, color of title, even under a void and worthless deed, has always been received as evidence that the person in possession claims for himself, and of course adversely to all the world. A person in possession of land, clearing, improving and building on it, and receiving the profits to his own use, under a claim of title, is not bound to show a forcible ouster of the true owner in order to evade the presumption that his possession is not hostile or adverse to him. Color of title is received in evidence for the purpose of showing the possession to be adverse; and it is difficult to apprehend why evidence offered and competent to prove that fact should be rejected till the fact is otherwise proven."

In the case of *Packard* v. *Moss*, 68 Cal. 123, 8 Pac. Rep. 818, cited by counsel for appellant, the authorities were cited and reviewed to some extent. The deed before the court in that case was not void upon its face, but was founded upon a void judgment. The court said: "At least it is not urged that the sheriff's deed is in other than the usual form. As a foundation of title, it is worthless by reason of the void judgment in which it had its inception. We are not, however, considering it as a medium for the conveyance of title. An adverse claimant of land is a wrong-doer, and as such is treated and known to the law, until, by lapse of years, his acts, before tortious, are consecrated by time, and dignified as lawful. A deed which gives color of title simply measures and fixes the limit—the extent—of a wrongful possession, and, while it continues wrongful, may be used against the wrong-doer as evidence of the extent of his wrongful possession; and when, by five years' acquiescence, the wrongful acts of possession come to be recognized as lawful, the deed which before fixed the extent of the wrong stands as a land-mark to bound the right acquired. Before it defined the limits to which an unlawful possession extended. After five years of adverse possession, the occupancy having become valid, the boundaries which before marked the wrongful possession remain as indices of the extent of the right."

The deed we are now considering, although it contained a recital showing that the assessment under which the tax sale was made was invalid, contains all the other requisites of a good and valid deed, including a sufficient description of the land claimed under it. It was just as effective, as notice of the extent of the defendant's possession and claim, as if the objectionable recital had been omitted. There are cases holding that in order to avail himself of the benefits of the statute of limitations the adverse occupant must enter and hold the land in good faith, believing his conveyance to be valid. *Nieto* v. *Carpenter*, 21 Cal. 455, 490; *Waterhouse* v. *Martin*, Peck, (Tenn.) 392; *Saxton* v. *Hunt*, 20 N. J. Law, 487; *Davidson* v. *Coombs*, (Ky.) 18 Reporter, 15; 26 Amer. Law Reg. 418. But see Wood, Lim. Act. 530, 531. This is no doubt the meaning of the provision of the Code, that he must enter into possession under claim of title, founding such claim upon a written instrument as being a conveyance of the property. *McCracken* v. *City of San Francisco*, 16 Cal. 591, 636; *Walsh* v. *Hill*, 38 Cal. 481, 488; *Wolfskill* v. *Malajowich*, 39 Cal. 276, 280. It could not be justly said that a party was founding his claim upon a written instrument, as being a conveyance, when he knew the instrument to be absolutely void. The Code should be construed as requiring the claim of title to be made in good faith, believing the deed to be a conveyance of the property. But the knowledge of the true character of the instrument by the occupant must be actual, and not such as would arise from the legal construction of the instrument. To give the statute any other construction would deprive it of much of its force.

There are decisions of this court holding that a deed made in violation of law, and so appearing on its face, cannot give color of title. *Sunol* v. *Hepburn*, 1 Cal. 254, 280; *Woodworth* v. *Fulton*, Id. 295; *Bernal* v. *Gleim*, 33 Cal. 668. So it has been held in the earlier cases that a deed, to give color of title, must *prima facie* give a good title. *Bernal* v. *Gleim*, *supra*, 668, 676. But the earlier cases, holding that a deed void upon its face could not aid the adverse possession of the occupant, were based upon the peculiar language of the Spanish law, and are of but little weight in determining what should be the rule under the present Code provision. Besides, in one, at least, of the cases, the deed was one expressly prohibited by law. So far as the cases hold that a void deed, which does not appear on its face to be such, cannot give color of title, they are overruled by later cases. *Packard* v. *Moss*, 68 Cal. 123, 8 Pac. Rep. 818.

The deed we are considering was not prohibited by law, and the officer who executed the deed was authorized to do so by the laws of this state. The only objection to it is that it shows that the legal steps necessary to authorize a sale of the property were not taken. The defect was not one which would be readily detected. Whether such a deed was in fact void has been a matter of grave question, but is now settled by the decided cases.

The parol evidence in the case sufficiently shows that the holder of the deed entered and held possession of the land under it, claiming to be the owner of the property by reason of the conveyance, and that the plaintiff had actual notice of the adverse claim and its foundation. We are clear that under the circumstances of this case the deed was properly admitted in evidence for the purpose of defining the character and limiting the extent of the defendant's possession. See dissenting opinion of Mr. Justice McKee, in *Wilson* v. *Atkinson*, 68 Cal. 592, 10 Pac. Rep. 203.

Certain instructions were asked by appellant, and refused. They proceeded upon the theory, either expressed or assumed, that the tax deed above referred to was not sufficient to give color of title, and for that reason, if for no other, were properly refused.

There are other questions presented by the appellant's brief, but they do not call for special notice.

The judgment and order denying a new trial are affirmed.

We concur: Sharpstein, J.; Thornton, J.; McFarland, J.

77 Cal. 544

BROWN *v.* BANK OF NAPA *et al.* (No. 11,688.)

(*Supreme Court of California.* December 15, 1888.)

1. FRAUDULENT CONVEYANCES—SUIT BY ASSIGNEE IN INSOLVENCY.
The value of personalty sold by a debtor before, but of which he retains possession until after, insolvency proceedings are begun by him, can be recovered by the debtor's assignee in insolvency, against a mere volunteer, who, claiming under the vendee, has converted the property, under Civil Code Cal. § 3440, which declares a sale void as against creditors of a vendor who remains in possession, and the successors of such creditors, and against any one on whom the estate devolves in trust.

2. TRIAL—VERDICT—INCONSISTENT FINDINGS.
In such case, a finding that the debtor was the owner of the property on and for a long time previous to the date of the insolvency proceedings is not inconsistent with a finding that he sold and transferred it to said vendee on a prior date; it being intended thereby to find that, as to plaintiff, the debtor was the owner at the later date, the sale being void as to him.

In bank. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action by Smith Brown, assignee in insolvency of William Reed, against the Bank of Napa, C. Anduran, Charles Carpy, and Andrew Sampson, for the conversion of a quantity of wine. Judgment for plaintiff, and defendant the Bank of Napa appeals.

Wallace & Johnston, for appellant. *G. W. Towle* and *Coghlan & Coombs*, for respondent.

THORNTON, J. The principal question here presented is whether an assignee in insolvency can maintain an action for the conversion of personal property against a vendee who has purchased such property of a vendor who had it in possession when the sale was made, which sale was not accompanied by an immediate delivery of the property sold to the vendee, and not followed by an immediate and continued change of possession. The property in controversy was a quantity of wine. This was sold by William Reed on the 15th of September, 1884, to S. M. Chapman. There was no delivery to Chapman, and the wine remained, as before the sale, in Reed's possession. This continued to be the case until May 4, 1885, when the wine was attached as the property of Reed, in an action brought against him. The interest which Chapman had acquired from Reed passed to the defendant the Bank of Napa prior to the 4th of May, 1885. How long prior does not appear, nor does it appear that the bank paid anything to Chapman on acquiring his interest. On the evening of the 4th of May, 1885, the officer (one Brown) who had seized the wine under the writ of attachment before mentioned was ordered to release it from levy, and at the same time received a written request from the defendant the Bank of Napa to act as its agent and take and hold the wine for it. The officer (Brown) kept the wine as the agent of the bank, placed a keeper in charge of it, and retained it in his possession until the bank removed it, between the 10th and 15th of May, 1885, from Reed's wine-cellar to the wine-cellar of Anduran & Carpy. On the 5th of May, 1885, Reed commenced proceedings under the statute to be declared an insolvent, and subsequently procured a discharge. Smith Brown, the plaintiff, was in June, 1885, appointed assignee of Reed, and afterwards qualified and acted as such. The action is brought by the plaintiff, assignee, as above stated.

It is argued for the Bank of Napa, appellant here, that the sale to Chapman was not void as to the plaintiff, assignee in insolvency of the vendor, Reed; that the plaintiff stood merely in the shoes of Reed; and that, as the sale was valid as to Reed, it was valid as to the assignee. We do not think that the contention is sound. The statute declares the sale is void as against his creditors, while the vendor remains in possession, and the successors in interest of such creditors, and against any persons on whom his estate devolves in trust for the benefit of others, and against purchasers and incumbrancers in good faith subsequent to the transfer. We think that the assignee in insolvency is a person on whom the estate of an insolvent devolves in trust for the benefit of others. Such estate devolves upon the assignee by operation of law, under the statutes in relation to insolvents in this state, (see article 4 of the insolvent act, § 17,) for the benefit of others, viz., the creditors of the insolvent. Of the correctness of this position we do not entertain a doubt.

It was so held in *Merrill* v. *Hurlburt*, 63 Cal. 496, by department 1 of this court, and we concur in and approve the ruling. It was also held in the case just cited that the assignee was the successor in interest of the creditors. There certainly is much reason for so holding. The creditors cannot sue to recover their debts. The assignee has the right to sue for and recover everything due to the estate for the benefit of the creditors. Insolvent Act, §§ 18, 21.

We adhere to this ruling, also, in the case cited. There can be no doubt, we think, that the transfer or sale by Reed to Chapman, as to the persons mentioned in the statute, (section 3440, Civil Code,) was void. There was never the pretense of a delivery or any change of possession whatever on this sale. On the contrary, the bill of sale to Chapman shows that it was agreed between Reed and Chapman that the latter was to have the right to keep the wine in the tanks of Reed in his wine-cellar (where it was when sold) as long as he chose, provided he returned the tanks empty by July 1, 1885, where it remained until removed by the bank at the time above stated. We cannot perceive that the right of the defendant bank is any greater than that of Chapman.

The bank is not a purchaser or incumbrancer in good faith. It does not appear in any way that it ever paid Chapman a cent or anything of value for the wine, or made him any loan of money on it. In this state of the case, the bank is a mere volunteer; stands in Chapman's place, clothed with his right to the wine,—none other or greater. The statute protects purchasers and incumbrancers in good faith subsequent to the transfer. But such purchaser or incumbrancer must show his good faith by parting with his money, or money's worth, on acquiring the property without notice of any infirmity in the vendor's title. We are of opinion that the evidence shows that the bank had notice of the infirmity of Chapman's title, and it is, in effect, so found.

It is further argued that the assignee cannot, conceding that he can maintain replevin, maintain an action for the conversion of the wine. We see no ground on which any such position can rest. If the sale or transfer of the property is void against the assignee, and it is withheld from him, he can maintain any appropriate action to redress the wrong. The bank clearly converted the property. The right to the property by force of the law vested in the assignee. The law clothed him with the rights of an owner for the purpose of recovering it, and, like any other owner, he had a right to proceed to recover the specific property, or, where converted by another, to proceed for damages for its conversion.

We think the findings are in accordance with the requirements of the law. The contradiction urged between the findings is only apparent. They can be easily reconciled. In finding that Reed was the owner of the wine on the 5th of May, 1885, when it is also found that he sold and transferred it to Chapman on the 15th of September, 1884, the court thereby intended to find that, as to the plaintiff, Reed was the owner on the day mentioned, the sale to Chapman being void. It must be observed that the court finds that Reed was also the owner for a long time prior to May 5, 1885. The finding that Reed was the owner on the day named might be stricken out, and the findings would support the judgment. Striking out this part of the findings, they would then stand that for a long time prior to May 5, 1885, Reed was the owner of the wine, and on the 15th of September, 1884, sold and transferred it to Chapman. The case standing thus, as all parties claimed under Reed, we would not reverse, because it is not expressly found that Reed was the owner on the day when he made the transfer by bill of sale to Chapman.

We have examined all the points made and argued by counsel for the bank, and, finding nothing in them to justify a reversal, judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

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77 Cal. 541

MONTEREY COUNTY v. ABBOTT. (No. 11,001.)

(*Supreme Court of California.* December 15, 1888.)

In bank. On rehearing. For former opinion, see 18 Pac. Rep. 113.

R. M. F. Soto, *A. N. Dorn*, *W. M. Parker*, and *Hermann & Soto*, for appellant. *S. F. Geil* and *H. V. Morehouse*, for respondent.

PER CURIAM. This cause was heard before department 1, and a decision given on the 3d of May, 1888, (18 Pac. Rep. 113.) Upon rehearing nothing has been called to our attention which should induce us to change the result then reached.

Judgment affirmed.

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77 Cal. 529

PEOPLE v. MAHONEY. (No. 20,453.)

(*Supreme Court of California.* December 14, 1888.)

1. CRIMINAL LAW—CONDUCT OF TRIAL.
   In a trial for murder, where certain clothing had been identified as that worn by deceased at the time of the killing, and referred to by witnesses on the stand, but had not been formally offered in evidence, it was not error, after the jury had retired, to allow it to be sent to them at their request; the defendant's counsel, in defendant's presence, consenting thereto.
2. SAME—APPEAL—RECORD.
   Where a transcript in appeal was filed in June, and another document was filed in September, containing what purported to be affidavits on a motion for new trial, certified by the clerk to be correct copies of affidavits used on such a motion, but with no certificate nor indorsement by the judge, and not appearing in the bill of exceptions, the affidavits constitute no part of the record on appeal.
3. SAME—TRIAL—OBJECTION TO EVIDENCE.
   Where a physician is asked, in a murder trial, whether, from the appearance of a wound, the deceased could have shot himself, and an objection is made that the testimony is incompetent, no foundation having been laid, and, after evidence by the physician as to his experience, the question is again asked, and the same objection is made, the question before the court is whether the witness is competent as an expert, and not whether the opinion, when given, is competent evidence.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Taylor & Craig, for appellant. *Atty. Gen. George A. Johnson*, for the People.

PATERSON, J. The defendant was charged with the murder of one John H. Lannon on or about the 19th day of February, 1888, and the jury found him guilty of manslaughter.

After the jury had retired to deliberate upon their verdict, they requested, through the deputy-sheriff, that a certain coat, alleged to have been worn by the deceased at the time of the alleged killing, should be sent into the jury-room for their inspection. The transcript certified by the judge states that the coat "was the one which had been produced and examined in open court during the examination of the witnesses Carpenter and Lannon, and at said time exhibited to the jury. After the retirement of the jury, the officer in charge of the jury informed the trial judge that the jurors had expressed a desire to see said coat, said to have been worn by the deceased at the time of the homicide. The court informed the counsel in the case, in the presence of the defendant, that the jurors had requested that said coat be sent into the jury-room for their inspection. Thereupon said defendant's counsel stated that the coat had not been formally offered in evidence. In response to that suggestion the court said that if the coat was not in evidence the jurors would have to get along without the coat. Counsel for defendant thereupon, after a moment's reflection, and in presence of the defendant, in open court, consented that the coat might be submitted to the jury. Thereupon the package containing the coat, and other clothes said to have been worn by the deceased at the time of the homicide, was produced in open court, in view of counsel and defendant, and the contents examined, and the officer, without any objection whatever, was allowed to take said coat into the jury-room. At the same time defendant's counsel objected to the officer's taking the blood-stained collar, said to have been worn by the deceased, and the court directed said officer not to take such collar, and it was not taken to the jury-room." The articles sent to the jury had been examined before the jury and identified as the clothing worn by deceased at the time of his death. As stated by counsel for the defendant, when the proposition was made to send them to the jury, while they were deliberating upon their verdict, the articles "had not been formally offered in evidence." But the clothing had been exhibited to the jury, and referred to by the witnesses on the stand. The consent of counsel for defendant, in the presence of the defendant, that the articles might be sent to the jury, was a waiver of all objection, and we see no error in the action of the court or jury.

The defendant moved for a new trial on the ground, among others, of newly-discovered evidence, but the affidavits in support thereof are not in the transcript. The transcript was filed on June 25, 1888. A document was filed September 5, 1888, containing what purports to be affidavits in support of the motion for a new trial, with a certificate of the clerk thereto attached, that they are "correct copies of the affidavits of Daniel Mahoney, J. B. Goldstone, E. Benjamin, Leon Deshayes, and Thomas Price, used and read upon defendant's motion for a new trial herein," etc. There is no certificate nor indorsement by the judge to show what affidavits were used or considered, and they do not appear in the bill of exceptions. The certificate of the clerk cannot be taken as a sufficient identification. The copies filed herein are "mere loose papers, not embodied or referred to in any statement or bill of exceptions, and thus want the authentication essential to constitute any portion of the record." *People* v. *Price*, 17 Cal. 314; *People* v. *Padilla*, 42 Cal. 535.

The most serious question in the case is that which relates to the testimony of Dr. B. F. Carpenter. During his examination the following proceedings were had: "*Question.* From an examination of the wound and the course of the bullet, in your opinion would it have been possible for defendant to have shot himself? (Objected to by defendant's counsel as incompetent, no foundation having been laid for it. *District Attorney.* Then I will lay the foundation.) *Q.* How long have you been practicing medicine? *A.* Five years. I make an autopsy about every other day,—not gunshot wounds every other day, but autopsy. We have gunshot wounds quite frequently. Every time a man is shot in the city we study the course of the bullets, and the direction. I did not see clothing on his person. *Q.* The position this bullet went in the clothing, tell us whether or not, in your opinion, the deceased could have shot himself. (Objected to by defendant's counsel as incompetent and irrevelant, no foundation being laid for the testimony. The court overruled the objection, to which ruling the defendant by his counsel excepted.) *A.* No, sir; he did not."

When the question was first asked, counsel for defendant objected to it on the ground that it was incompetent, no foundation having been laid for it. The district attorney said, "Then I will lay the foundation;" and proceeded to examine the physician as to his experience in the examination of gunshot wounds. The question was then again put to him whether in his opinion the deceased could have shot himself, and was objected to by defendant's counsel on the ground that it was incompetent and irrevelant, no foundation being laid for the testimony. It appears quite clear, therefore, that the only question upon which the court was asked to pass was whether the witness had had sufficient experience in such matters to entitle him to speak as an expert,—to give his opinion,—not whether the opinion, if given, was competent evidence. The objection made was not specific if the point now urged was the one which counsel desired the court to pass upon at the trial. Furthermore, the answer of the witness to the question was: "No, sir; he did not." This was not responsive to the question, and might have been stricken out on motion. No motion to strike it out was made. We therefore conclude that the judgment ought not to be reversed on the ruling of the court. The evidence, we think, was sufficient to justify the verdict.

Judgment and order affirmed.

We concur: SEARLS, C. J.; McFARLAND, J.; THORNTON, J.

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77 Cal. 592

SANTA CLARA COUNTY *v.* BRANHAM. (No. 12,613.)

(*Supreme Court of California.* December 26, 1888.)

SHERIFFS AND CONSTABLES—SALARY—CONSTRUCTION OF STATUTE.

Act Cal. 1883, (St. 1883, p. 299,) "to establish a uniform system of county and township governments," provided that the sheriff, in counties of the third class, should receive a certain salary, and "mileage collected by him in criminal cases, where the same is not a charge against his own county." Section 164 of the act declared the salaries and fees provided for therein should be in full compensation for all services, except that sheriffs should be allowed "all expenses necessarily incurred in conveying prisoners to and from the state-prison, and insane persons to and from the insane asylum, which shall be * * * collected from the state." Section 165 provided that "all salaried officers of the several counties of this state shall charge and collect, * * * and pay into the county treasury, * * * the fees now or hereafter allowed by law in all cases." Act March 14, 1885, (St. 1885, p. 125,) entitled "An act to allow compensation to sheriffs for conveying prisoners to the state-prisons, and insane persons to the insane asylums," allowed sheriffs actual expenses, and a certain amount *per diem* for those services, to be collected from the state. *Held*, that compensation collected for such services from the state, by a sheriff of a county of the third class, was not for his own use, but should be paid into the county treasury.

Commissioners' decision. In bank. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

Action by Santa Clara county against B. F. Branham, sheriff, and others. On motion, the action was dismissed as to all defendants except Branham, and judgment was rendered for plaintiff. Branham appeals.

S. F. Leib and *T. H. Laine*, for appellant. *H. C. Moore* and *D. W. Burchard*, for respondent.

BELCHER, C. C. The defendant, B. F. Branham, was sheriff of Santa Clara county from January 5, 1885, to December 1, 1886, and during that time received from the state the sum of $704 for transporting prisoners to the state-prisons, and insane persons to the insane asylums. The money was allowed by the state board of examiners for the time necessarily consumed by defendant in delivering the prisoners and insane persons, at the rate of five dollars per day. It was claimed for the plaintiff that it was the duty of defendant to pay the money into the county treasury, but he declined to so pay it, claiming that he was entitled to retain it for his own use. This action was then brought to recover the sum named. In the court below judgment was entered for plaintiff, and defendant appealed.

Public officers are entitled to receive and retain for their services only such compensation as is allowed them by statute. Whether, therefore, the plaintiff or defendant was entitled to the money in controversy must be determined by an examination of the statutes bearing on the question.

In 1883 an act was passed by the legislature "to establish a uniform system of county and township governments." St. 1883, p. 299. Under that act the sheriff in a county of the third class—and Santa Clara was of that class—was entitled to receive a salary of $9,520 per annum, and "as additional compensation, the mileage collected by him in criminal cases, where the same is not a charge against his own county." By section 164 of the act it was declared that "the salaries and fees provided for in this act shall be in full compensation for all services of every kind and description rendered by the officers therein named, their deputies and assistants:" provided, however, that sheriffs should be allowed certain expenses, and, among them, "all expenses necessarily incurred in conveying prisoners to and from the state-prison, and insane persons to and from the insane asylum, which shall be allowed by the board of examiners, and collected from the state." By section 165 it was declared that "all salaried officers of the several counties of this state shall charge and collect, for the use of their respective counties, and pay into the county treasury on the first Monday in each month, the fees now or hereafter allowed by law in all cases, except the percentage hereinbefore allowed such officers, and excepting also such fees as are a charge against the county." Section 166 required each of the officers authorized to receive fees under the provisions of the act to keep a fee-book, "in which must be entered at once and in detail all fees or compensation of whatever nature, kind, or description, collected or chargeable," and on the first Monday of each month to add up each column in the book, and set down the totals. And by section 167 it was provided that the payment into the county treasury must be accompanied by a statement of the aggregate shown by the fee-book, and an affidavit of the officer that the fee-book "contains a true statement in detail of all fees and compensation of every kind and nature for official services rendered by me, my deputies and assistants," etc.

On the 14th day of March, 1885, section 164 of the act of 1883 was amended by re-enacting the same, and adding thereto a provision allowing county officers of counties of certain enumerated classes additional deputies in certain cases. St. 1885, p. 125. And on the same day another act was passed entitled "An act to allow compensation to sheriffs for conveying prisoners to the state-prisons, and insane persons to the insane asylums," which reads as follows:

"Section 1. There shall be allowed by the state board of examiners to the sheriff, for delivering a prisoner to either of the state-prisons, actual expenses and $5 *per diem* for the time necessarily consumed in delivering such prisoner.

"Sec. 2. There shall be allowed by the state board of examiners to the sheriff, for delivering an insane person to either of the insane asylums, his actual expenses, and the same *per diem* as is allowed in section 1 of this act.

"Sec. 3. This act shall take effect and be in force from and after its passage." St. 1885, p. 126.

The question is, was it the duty of defendant, under the provisions of the county government act, to pay the money in controversy into the county treasury, or had he a right to retain it for his own use, under the provisions of the last-named act?

In *Adams* v. *San Francisco*, 50 Cal. 117, a similar question was presented. Adams was the sheriff of the city and county of San Francisco at the time of and after the adoption of the Codes, and under their provisions (sections 1586, Pen. Code, and 2221, Pol. Code) was allowed and received compensation for transporting prisoners to the state-prisons and insane persons to the asylums. But an act was passed by the legislature in 1861, and was still in force, which provided that salaries should be allowed and paid to certain officers of the city and county, (among whom was the sheriff,) and should be "in full compensation for all official services required of them by law." It further provided that the officers receiving salaries should pay into the county treasury "any fees, commissions, percentages, or other compensation, of whatever nature or kind, allowed by law, for services rendered by them or their deputies, in their several official capacities." Adams claimed that the Codes allowed the compensation to him for his own use, but this court held that it was compensation allowed by law for official services, and under the act of 1861 was required to be paid over to the county treasurer.

The case is in point here. There is no material difference in the language used in the statutes which controlled that decision and in those which must control the decision here. The circumstances, too, are alike. The plaintiff in that case asserted rights under the Codes which were passed after the act of 1861, and the defendant here asserts the same rights under the act of 1885, which was passed after the county government act.

Upon the authority of the case above cited, we advise that the judgment be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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77 Cal. 548

COLEMAN *v.* COMMINS *et al.* (No. 11,515.)

(*Supreme Court of California.* December 15, 1888.)

1. CONTRACT—CONSTRUCTION.
   Plaintiff purchased a ranch of defendant, for which he paid part cash, received a deed, and executed a mortgage for the residue of the price, due on confirmation of the survey; defendant remaining in possession until that time, in lieu of interest. If the survey should be rejected, it was agreed that plaintiff might rescind the contract, and receive back what he had paid, with 1 per cent. interest. Before the confirmation, plaintiff advanced money on the debt, to secure which defendant assigned him the mortgage; the assignment stipulating that the advances should bear interest until the confirmation or rescission, at "1½ per cent. per month, payable monthly," and referring to the mortgage itself for particulars as to its terms, and that the advances, with said interest, should be credited on the mortgage debt when the transaction was consummated, or refunded upon rescission. *Held*, that the words "payable monthly" were controlled by the other terms of the instruments, which evidenced an intention that neither the principal nor interest of the advances should become due and payable until the consummation or rescission of the sale, and that until confirmation, the statute of limitations did not begin to run against the interest.
2. SAME—COUNTER-CLAIM.
   The survey having been confirmed, and the contract thus consummated, the plaintiff cannot recover the excess of his advances, and their interest, over the amount of the mortgage debt.
3. INTEREST—RATE—AGREEMENT BY WRITING.
   Under St. Cal. 1868, p. 553, § 2, (Civil Code, § 1918,) providing that parties may agree in writing for any rate of interest which shall be allowed until the entry of judgment, such a contract is valid, and a court cannot relieve against it.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

Action by William T. Coleman against James Commins, Edward Commins, Edward Ryan, John Doe, and Richard Roe, for the recovery of a tract of land. Defendant James Commins had sold the land to plaintiff, and conveyed it to him; taking a mortgage for the unpaid purchase money. Claiming the mortgage to be paid, plaintiff sued for the possession of the land, joining the other defendants as being in possession under the mortgage; the names of the latter two defendants being fictitious, their true names being unknown to the plaintiff. Judgment of foreclosure was rendered, plaintiff's indebtedness being found to be $5,324.09. Plaintiff appeals. The defendants James and Edward Commins also appeal separately. The opinion on their appeal may be found *post*, 80. The statute quoted in the opinion is St. 1868, p. 553, § 2, (Civil Code, § 1918.)

Hepburn Wilkins, for appellant. *Nygh, Fairweather & Durst*, for respondents.

PATERSON, J. Ejectment. The land in controversy was conveyed by the defendant to the plaintiff on February 17, 1872. It is a portion of the Mexican grant, commonly known as the "Corte Madera." A survey of the ranch had been made, but was not confirmed until the 1st day of March, 1885. The purchase price to be paid by plaintiff to defendant was $16,000, $7,500 of which was paid at the time the deed passed, and plaintiff gave to defendant a mortgage for the balance, $8,500. The mortgage, which was executed by both parties, provided that the money should be payable "upon final confirmation of the survey, but that in no event should the money be due before November 1, 1872." It further provided that Commins should remain in possession until confirmation, in lieu of interest upon the $8,500 secured. On December 18, 1872, Commins received from Coleman the sum of $700, and, to secure its repayment, if the survey should not be confirmed, executed to the latter an assignment of the mortgage, "by way of mortgage." On May 12, 1873, Coleman made another advance of $250, and received from Commins an agreement that the money was taken on the same terms and conditions as those named in the assignment of the mortgage, "except that the interest on this sum shall be reckoned only from the present date." On January 5, 1874, Coleman advanced the further sum of $500, and executed an instrument similar to the one last referred to. It provided, however, that the rate of interest should "be 2 per cent. per month from and after the 5th day of January, 1874, payable monthly in gold coin, and if not paid at the end of each month shall be added to and become part of the principal, and draw the same rate of interest as the principal sum." No part of the principal sums thus advanced, or interest thereon, was ever paid by defendant. At the time of final confirmation of the survey, March 1, 1885, the principal and interest of the sums advanced by Coleman amounted to more than $8,500,—the amount named in the mortgage of plaintiff to defendant.

This action was commenced on September 11, 1885. The complaint contains the usual allegations in ejectment. The defendant filed a cross-complaint, claiming that the original mortgage had not been paid, and asking for a foreclosure and sale, and for a decree that he might be permitted to retain possession of the property until the mortgage was satisfied. The plaintiff filed an answer thereto, claiming that the principal and interest of his loans to Commins amounted to more than the money due upon his mortgage to Commins, and that this fact entitled him, under the terms of the assignment, to the possession of the land; and, as a counter-claim, that he was entitled to $1,781, the excess of the amount of principal and interest advanced to defendant over the $8,500, amount of the mortgage debt. The court held that all interest on the advances made,—$700, $500, and $250,—which had accrued more than four years prior to the commencement of the action, was barred; the amount of the principal sums named, and interest thereon, not barred, being $3,175.91. Judgment was rendered in favor of defendant for the difference between that sum and $8,500,—$5,324.09,—and for a foreclosure sale, as prayed for.

We are of opinion that the court erred in its construction of the contract of assignment. It is true the phrase "payable monthly" is used in one place in the contract with reference to the payment of the interest on the $700 "advanced and paid" by Coleman; but the provisions of the contract, when all read and construed together, make it clear, we think, that the parties intended the advances made by Coleman, with the interest due thereon at the time when he could be called upon by Commins to pay the mortgage, to be taken as an offset to, or payment of, the $8,500, to the extent of the amount of said advances, and interest thereon then due. It was impossible to tell at the time of the execution of the deed and the mortgage when the survey would be confirmed, or whether it would be confirmed at all. It was provided in the mortgage that, if confirmed, the $8,500 mortgage debt would be due and payable; if rejected, that the contract might be rescinded by Coleman; and in that case Commins agreed "to refund and repay to said party of the first part, in United States gold coin, all sums of money paid to him on account of the purchase of said mortgaged lands and premises, with interest thereon in like gold coin, at the rate of one per cent. from date of payment until repayment of same." At that time, therefore, it is clear the parties intended to wait until final action of the land department before adjusting their accounts as to either principal sums or interest thereon. This intention seems to have been carried through the subsequent agreements. In the contract of assignment executed by both parties, December 18, 1872, it is provided that "whereas, the said James Commins is desirous that said William T. Coleman shall advance to him, said Commins, the sum of $700 in gold coin, part of the money secured to be paid in and by said indenture of mortgage, to which mortgage reference is hereby made for a more particular description of said lands, and the terms and conditions of the payment, and refunding of the purchase price of said land, as the case may be. Now, this indenture * * * witnesseth that, in consideration of the sum of $700 in gold coin, advanced and paid by said party of the second part to said party of the first part, * * * said party of the first part * * * does hereby assign, transfer, and set over unto said party of the second part * * * said indenture of mortgage * * * by way of mortgage to secure the repayment of said sum of $700 in U. S. gold coin, with interest thereon from the date hereof until final consummation of said purchase, or until said party of the first part hereto repay and fully refund to said party of the second part hereto, in case he rescind said purchase, as provided in said mortgage, at the rate of one and one-half per cent per month, * * * payable monthly. It is distinctly understood * * * that should the sale and purchase * * * be consummated at the time and in the manner in said indenture of mortgage expressed, that then, and in that case, the sum of $700, with interest thereon as aforesaid secured hereby, shall be applied and taken to be in part payment of the amount of money due or to grow due upon said indenture of mortgage first mentioned; but, if the party of the second part should * * * rescind the purchase of the lands, * * * said sum of $700, together with the interest thereon as aforesaid, shall be refunded and repaid by said party of the first part."

In this instrument the provision that the interest is "payable monthly" seems to be controlled by other provisions, which show that the object of the assignment was to secure to Coleman the repayment of the $700 advanced, with interest thereon from the date of the assignment until the maturity of the mortgage, in case the sale should be rescinded; and, in case it was not rescinded, to use the $700 and interest then due as an offset to the $8,500 mortgage debt. Upon a reasonable construction of the contract, we do not think it can be said that the parties contemplated that there should be a monthly demand of $10.50 interest, and, in case it should not be paid, a foreclosure or personal action to collect it. The intent of the parties must be found in a fair interpretation of all the terms of the contract, and, if any particular phrase or clause be repugnant to, or inconsistent with, what appears to be the object and intention of the parties, as gathered from a consideration of all the provisions of the contract, it should be rejected.

It is claimed by respondent that the rates of interest on the several sums advanced are exorbitant and oppressive. They certainly seem very high, but the statute in force at the time the contract was made read as follows: "Sec. 2. Parties may agree in writing for the payment of any rate of interest whatever on money due or to become due, and it shall be allowed according to the terms thereof until the entry of judgment thereon." The illegality of usury is wholly the creature of legislation, and in this state nothing has been prescribed by the legislature to relieve parties from contracts providing for exorbitant rates of interest.

The plaintiff is not entitled to anything under his counter-claim. The amounts advanced by him, together with the interest thereon, were to be applied in payment of his $8,500 mortgage debt, if the survey should be confirmed. It was only in case the survey was rejected, and the contract rescinded by him, that the several amounts advanced by him were to be returned, with interest thereon. The survey was confirmed, there was no rescission, and there is nothing in the contract, or in law or equity, which entitles the plaintiff to recoup. When the sums advanced, with interest thereon, amounted to $8,500, the debt was paid, and interest ceased.

Judgment and order reversed, and cause remanded, with direction to the court below to enter judgment in favor of the plaintiff for the possession of the land, and costs of the action.

We concur: SEARLS, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

COLEMAN *v.* COMMINS *et al.* (No. 11,971.)

(*Supreme Court of California.* December 15, 1888.)

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

For statement of facts, see *Coleman* v. *Commins, ante,* 77.

Nygh, Fairweather & Durst, for appellants. *Hepburn Wilkins,* for respondent.

PATERSON, J. There are two appeals in this record. One is an appeal by the defendant, J. Commins, from the judgment in his favor against the plaintiff, entered in the superior court on the 19th of December, 1885; and the other is an appeal by Edward Commins from the judgment entered on the same day in favor of the plaintiff, and against Edward Commins, Edward Ryan, and Alexander Manning. We are unable to understand clearly the object of the defendant in appealing from the judgment entered in his favor, but, as it is the same judgment which was reversed in *Coleman* v. *Commins, ante,* 77, (No. 11,515, filed this day,) it is unnecessary to make any further order affecting that judgment.

The appeal herein is heard upon the judgment roll. The court finds "that the defendants, Edward Commins, Edward Ryan, and Alexander Manning, were on the 30th day of May, 1885, and ever since have been, wrongfully and unlawfully in possession of said land, and still wrongfully and unlawfully withhold the same from plaintiff; that the value of the use and occupation of said land from May 30th hitherto is $246.75." This finding is within the issues, and there is nothing in the record to impeach it.

The judgment in favor of Coleman, and against the defendants, Edward Commins, Edward Ryan, and Alexander Manning, is affirmed.

We concur: SEARLS, C. J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.

In re FOWLER'S ESTATE. (No. 12,255.)

(*Supreme Court of California.* January 8, 1889.)

DESCENT AND DISTRIBUTION—RIGHTS OF SURVIVING WIFE—HOMESTEAD.

Under Code Civil Proc. Cal. § 1474, which provides that a homestead selected from community property shall, on the death of the husband or wife, vest absolutely in the survivor; and Id. § 1476, which provides that if the value of such homestead, at the time of its selection, exceeds $5,000, it may be divided or sold, and the excess over $5,000 distributed,—a homestead of less value than $5,000, when selected, will, as against the heirs of the husband, vest in the wife absolutely upon his death, although at that time worth much more than that amount. Following *In re Burdick's Estate*, 18 Pac. Rep. 805. THORNTON, J., dissents.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

C. P. Sprague, for appellant. *Eugene Aram*, for respondents.

PER CURIAM. The precise question involved in this case was presented and decided in *Estate of Burdick*, 18 Pac. Rep. 805, and on the authority of that case the order of the court below denying the widow the homestead as prayed for in her petition is reversed, with instructions to the court to grant said petition, and proceed accordingly.

THORNTON, J., dissenting.

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81 Cal. 11

WISE *v.* WALKER *et al.* (No. 11,693.)

(*Supreme Court of California.* December 26, 1888.)

JUDGMENT—RES ADJUDICATA—ACCOUNTING.

Defendants, first mortgagees, brought an action to foreclose, and made plaintiff, a second mortgagee, a party defendant. Pending suit, plaintiff bought the mortgagor's interest. After judgment, but before sale, a receiver was appointed, who collected the rents and profits until the sheriff's deed was given, defendants having purchased at the sale, when an account was had, and by order of court the amount of rents collected was applied in payment of a deficiency from proceeds of the sale. Defendants took possession and collected the rents pending an appeal from the judgment of foreclosure, which resulted in reversal. A new trial was had, a similar judgment rendered, and defendants again bought at sheriff's sale. On accounting before the court on the second trial, defendants had their mortgage debt credited by the amount received from the receiver, and by the amount of all the rents they had collected up to that time. *Held*, that plaintiff could not maintain an action against them to recover the rents so collected on the ground that he was the owner during the time defendants collected them. Having been a party to the foreclosure proceedings, and having acquiesced in the accounting, he is bound by the judgment therein. PATERSON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; OLIVER P. EVANS, Judge.

Action by John H. Wise against James D. Walker and Thomas Menzies to recover for rents and profits collected. Judgment for defendants, and plaintiff appeals.

Edward P. Cole, for appellant. *Sidney V. Smith*, for respondents.

FOOTE, C. Walker and Menzies, the defendants in this action, held a first mortgage executed by one Buffandeau upon a certain parcel of land in the city of San Francisco. John H. Wise, the plaintiff here, and one Denigan held a second mortgage upon the same property. Walker and Menzies brought a foreclosure suit, and made Wise and Denigan parties defendant. While that suit was pending, and after service upon him of summons, Wise, under a bankrupt sale, bought whatever title Buffandeau had. Walker and Menzies recovered judgment, had a foreclosure of the mortgage, the property was sold under the decree therein rendered, and a sheriff's deed was executed and delivered to them. After judgment, but before the sale under the decree, a receiver was appointed, who collected the accruing rents from the property until the sheriff's deed was given, when an account of the receiver was filed, and upon the order of the court the amount shown to be due thereby was paid to Walker and Menzies on account of a deficiency of the money realized from the sale of the property to satisfy their judgment. After that time Walker and Menzies collected the rents, and continued to do so until the trial of the present action. An appeal was taken from the judgment of foreclosure, which was reversed by the appellate court. A new trial was had, which resulted in a second judgment in favor of Walker and Menzies. Under that, a sale of the property was had at which these parties again became the purchasers. On the second trial, upon an accounting before the court, Walker and Menzies had their mortgage debt credited by the amounts which they received from the receiver, and for all rents which they had collected up to the time of the trial. Wise contends that he is entitled to maintain this action against them for the amount of the rents which they have thus collected, claiming that inasmuch as he bought the mortgagor, Buffandeau's, title to the property, he, Wise, was the owner thereof during the time the defendants collected the rents.

Conceding that Wise, as the owner before foreclosure and sale, was entitled to the rents, and that the mortgaged property was merely a security out of which Walker and Menzies might make their debt; conceding, also, that the sale of the property in the first instance, and the purchase by Walker and Menzies, and the sheriff's deed to them, discharged the receiver,—nevertheless the judgment of the court below in favor of the defendants was correct. Wise was a party to the action of foreclosure so far as his rights as a second mortgagee are concerned. In order to determine for what amount the judgment should be given, it was certainly the duty of the court, sitting as a court of equity, to settle all matters of account which would affect the parties in interest to the action. *Raun* v. *Reynolds*, 15 Cal. 472. "A court of equity will not make an incomplete settlement of accounts, but will go on and adjust the whole matter, even if it involves items accruing after the commencement of the suit." *Roberts* v. *Eldred*, 73 Cal. 397, 15 Pac. Rep. 16.

Wise, as a second mortgagee, was interested in that accounting, at least to the extent that if the judgment was lessened in amount by the reducing of their mortgage debt by the rents which Walker and Menzies had received, the security which Wise held under his second mortgage would be increased in value. He did not object to receive this benefit, but sat by and took it in silence. He is bound by the accounting, to which he was a party and made no objection, and we advise that the judgment be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

PATERSON, J., dissenting.

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3 Cal. Unrep. 47

TROPE *v.* KERNS. (No. 11,186.)

(*Supreme Court of California.* December 24, 1888.)

1. EJECTMENT—WHEN ACTION LIES—CUMULATIVE REMEDY.
   Plaintiff who has obtained a valid title to land by foreclosure, and is in possession of a portion of it, can bring ejectment for the balance, and is not compelled to rely on a writ of assistance.

2. JUDGMENT—COLLATERAL ATTACK.
A decree in foreclosure cannot be attacked in ejectment brought to recover the land sold under the decree.

3. ESTOPPEL—BY MORTGAGE DEED—WARRANTY.
A mortgagor is estopped by the terms of his deed to deny that his estate was other than an estate in fee, and the terms of a mortgage, importing a conveyance of the fee, are equivalent to a general warranty running with the land.

4. TRIAL—VERDICT—SPECIAL FINDINGS.
Where one special finding is conclusive of the whole case, findings on other issues are unnecessary.

In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

R. M. F. Soto and *Hermann & Soto*, for appellant. *S. F. Geil* and *H. V. Morehouse*, for respondent.

PER CURIAM. This action is in ejectment for a parcel of land lying in the city of Salinas, Monterey county. The defendant filed a plea in abatement, and an answer traversing all the allegations of the complaint. The plaintiff filed a special demurrer to that plea, which was sustained. The defendant filed a cross-complaint, to which an answer was filed. The cause was tried upon its merits, and the court gave judgment for the plaintiff, from which this appeal is prosecuted. There are no questions arising in the case to be reviewed, except those relating to the pleadings, and whether the findings are sufficient and support the judgment.

The defendant seems to contend that because his plea in abatement shows that the plaintiff was in possession of nearly all the lot sued for by a valid title under a foreclosure suit and sale and sheriff's deed, that nevertheless he ought not to recover, because he was not in possession of a part of the lot, and did not claim it, for the reason that he did not get out a writ of assistance, and gain possession under the foreclosure sale, but sought in this action to get possession by an action of ejectment. We perceive no merit in this view of the law. The remedy by writ of assistance is merely cumulative, and does not, if a failure to use it occurs, preclude the plaintiff from bringing an action of ejectment. The demurrer was properly sustained.

The defendant contends that the judgment should be reversed, because it is shown by the findings, as he alleges, that in the action of foreclosure, before the judgment was made and entered, a stipulation was entered into by his attorney, himself, and the plaintiff's attorney, by which the decree of foreclosure was not to include a portion of the land in controversy, which stipulation, by inadvertence, was not carried out, but the judgment rendered as to the whole of the land. But this is in the nature of a collateral attack upon the judgment of the district court having jurisdiction of the subject-matter and of the parties, in rendering the judgment, to include more land than the parties intended by stipulation should be included. This, we think, cannot be done.

It is further urged that the plaintiff should not have recovered his judgment, because the findings show that the defendant had, before the execution of the mortgage to the plaintiff, deeded a part of the land under certain covenants and agreements to one Iverson, and that when Iverson, under those covenants, removed his tank, the defendant's former title reverted to him, and was good as against his mortgage to the plaintiff, the judgment of foreclosure, the sheriff's sale, and deed thereunder. But this appellant is estopped from claiming, as we think. "The rule that a sheriff's deed delivered upon execution sale imports no warranty of title, but transfers to the purchaser only such estate as was held at the time by the defendant in execution, has no practical application to a sheriff's deed delivered upon foreclosure of a mortgage in fee; for, as we have seen already, the defendant in the latter case must continue to be estopped, by the terms of the mortgage deed itself, to deny that the estate was other or less than an estate in fee in the premises. These terms, importing a conveyance of the fee, are equivalent to a covenant of general warranty of title running with the land." *Association* v. *Viera*, 48 Cal. 580.

There is nothing, therefore, in the other findings which contradicts the ultimate facts set out in the tenth finding, "that the plaintiff at the time of the commencement of this suit was, ever since has been, and still is, the owner in fee-simple of the premises described in the complaint on file herein." That finding is conclusive against the defendant's right of possession to the land, and in favor of that of the plaintiff. Findings upon the other issues, which it is claimed by the defendant ought to have been made, were therefore unnecessary. *Dyer* v. *Brogan*, 70 Cal. 136, 11 Pac. Rep. 589.

No prejudicial error appearing, the judgment is affirmed.

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7 Cal. 560

PEOPLE *v.* DOANE. (No. 20,450.)

(*Supreme Court of California.* December 24, 1888.)

RIMINAL LAW—APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where in a trial for embezzlement the defense is properly submitted by the court to the jury, their verdict will not be set aside on appeal, though the proof of defendant's guilt is weak. THORNTON, J., dissents.

In bank. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

J. C. Black, for appellant. *Atty. Gen. G. A. Johnson*, for the People.

MCFARLAND, J. The defendant was convicted of the embezzlement of "one sewing-machine," of the value of $70, the property of one George W. Welch, and appeals from the judgment, and from an order denying his motion for a new trial.

In this case we have examined the entire record (which is in rather a confused condition) several times, and very minutely. At first we were inclined to doubt that there was sufficient evidence to warrant the jury in finding either that defendant embezzled any particular sewing-machine, or that there was an embezzlement of any interest or property of Welch of the value of as much as $50 in any particular sewing-machine, so as to make the crime punishable as a felony. Welch, who was a merchant, had a lot of sewing-machines, and the defendant had been engaged for some time before the alleged embezzlement in selling them under a verbal contract or arrangement between him and Welch, which was somewhat complicated. It was admitted that defendant was to have one-half of all the machines which were sold for in cash over their original cost price. He had also authority to receive old machines in part payment of the new ones sold by him; and there was a conflict of evidence as to whether or not defendant was to own one-half of each old machine thus received,—there being nine of such old machines delivered to Welch by defendant, for which the latter had received no credit. And it was contended by defendant that he had such a joint interest in all the machines that there could be no legal embezzlement by him thereof. That question, however, was fairly put by the court to the jury.

After a thorough examination and consideration of the case, we think that there was sufficient evidence to warrant the jury in finding that there was an embezzlement by defendant of the sewing-machine No. 593,599; that it was of the value of $70; that it was sold by defendant to a Mrs. Kimball, without the sale being reported to Welch, and with fraudulent intent to secretly convert the proceeds thereof to defendant's own use. At least we are not satisfied that the proof on these points is so weak that we should overturn the verdict. In such cases much must be left to the discretion of the jury, who see the witnesses, and deal with the living case, while we can look only at the cold paper record. And as the trial court has the power to grant a new trial for insufficiency of evidence, the responsibility on that point must ordinarily rest with that court and the jury. We perceive no error of law which would warrant a reversal. Those parts of the instructions asked by defendant and refused, which were correct, were given elsewhere by the court. Instruction No. 1, asked by defendant, was, perhaps, intended to embody the principle set forth in that clause of section 511 of the Penal Code which provides that "it is sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable." Defendant was entitled to an instruction giving that clause, or its substance, if such instruction had been asked; but the said instruction No. 1 was incorrect, and properly refused. We think there was no error in overruling the objection which defendant made to evidence of contracts about certain machines other than the one claimed to have been embezzled. This evidence was proper to explain the character of the transaction with Mrs. Kimball.

Judgment and order affirmed.

We concur: SEARLS, C. J.; PATERSON, J.; SHARPSTEIN, J.

THORNTON, J. I dissent. The statute defines embezzlement "to be the fraudulent appropriation of property by a person to whom it has been intrusted." Pen. Code, § 503. The statute in regard to embezzlement also contains the following: "Every person intrusted with any property as bailee, tenant, or lodger, or with any power of attorney for the sale or transfer thereof, who fraudulently converts the same or the proceeds thereof to his own use, or secretes it or them with a fraudulent intent to convert to his own use, is guilty of embezzlement." Id. § 507. "Every clerk, agent, or servant of any person who fraudulently appropriates to his own use, or secretes with a fraudulent intent to appropriate to his own use, any property of another which has come into his control or care by virtue of his employment as such clerk, agent, or servant, is guilty of embezzlement." Id. § 508.

There must be, under the foregoing sections, to constitute embezzlement, either a fraudulent conversion of the property or of the proceeds of the same, or a secreting of the property or the funds with a fraudulent intent to convert it or them to his own use. If property is intrusted to another with any power of attorney to sell it or transfer it, and he converts the same or the proceeds of such property to his own use, or secretes it or them with a fraudulent intent to convert it to his own use, he is guilty of embezzlement. The same is the rule in regard to any agent in regard to any property which has come into his hands by virtue of his employment as agent.

The property in the case under consideration came into the hands of defendant by virtue of his employment as agent. The defendant, Doane, was accused by information of embezzling and converting to his own use, on the 30th of April, 1887, a sewing-machine of the value of $70, the property of George W. Welch, which before that time had been intrusted to him by Welch as his agent for the purpose of sale. On the trial defendant was convicted as charged, a new trial was moved for and denied, judgment was pronounced, and Doane prosecutes this appeal from the judgment and order.

It is argued that the verdict is contrary to the evidence. On an examination of the testimony appearing in the record, made with great care, I am of opinion that this contention must be sustained. In considering this point I take the strongest case made by the testimony, or which it tends to make, against the defendant. Viewing the case in this aspect, the record shows that Welch, who was a merchant in San Jose, in connection with his business had sewing-machines for sale, and employed defendant as agent to sell these machines for him. They were of the kind known as the "White Sewing-Machine." The contract between Welch and Doane, under which the latter acted as agent for the sale of these machines, was as follows: Doane was to sell the machines, and report all sales to Welch or his book-keeper. The machines were to continue to be the property of Welch until sold and paid for. Doane had the right, on making a sale, to take old machines in part payment, which old machines were to continue to be the property of Welch until sold. Doane's payment for his services on making sales was to be one-half of the sum received for each machine over and above the cost price; when old machines were taken in payment Doane was to receive one-half of the amount realized on such sale, provided he (Doane) made sale of such old machines. If he did not sell such old machine, and it was sold by another agent, the latter received the one-half referred to; the other half in all cases going to Welch.

Doane reported a sale to Welch of a machine to one A. Sanches, and that he had received of Sanches $15 in part payment, and an old machine of the Remington pattern, taken in part payment at the price or value of $17. The money and machine so received were paid over and delivered by Doane to Welch. When Doane reported this sale he produced a contract purporting to be signed, "A. SANCHES." The contract set forth a sale of the machine of the White pattern, numbered 593,599, to Sanches, by Doane, for $65, a payment of $15 in cash, and a Remington machine valued at $17; and that the remainder of the $65 was to be paid in monthly installments of $5 each. When the payment became due under this contract, Welch notified Sanches, according to the address of the latter—Mountain View—as given by Doane. He addressed him also at Saratoga, and got no return from either notice. He afterwards found this machine at the house of a Mrs. Kimball in Santa Clara county. This machine, so found, had the same number—593,599—which Doane reported as having been sold to Sanches. There is evidence in the record, which must be held to be true, in the manner in which I am considering this case, that Doane, on the 30th of April, 1887, sold this machine to Mrs. Kimball for $70, of which sum she paid him $30 in cash, delivered to him in part payment an old Remington machine and an old Wilson machine, and was to pay him $5 in sewing. This sale to Mrs. Kimball he never reported to Welch, but it appears clearly that the Remington machine so received was delivered by Doane to Welch, as above stated, and that $15 was paid Welch by Doane at the time of the delivery of the Remington machine. I say it appears clearly that this latter machine was delivered, for the reason that it was identified by Mrs. Kimball as the machine delivered by her to Doane, and there is no evidence to the contrary. I think it must also be held that the $15 paid to Welch, as above stated, was a part of the $30 received from Mrs. Kimball. I consider it an established fact, also, that Sanches was a myth, and that no sale was ever made to him.

It further appears that Doane reported to Welch a sale of a machine as made to Mrs. Jennie Smith, on which he had received in part payment the old Wilson machine, above mentioned, which, in fact, he received from Mrs. Kimball. This last machine was delivered to Welch as coming from Mrs. Smith. In fact, there was no sale ever made by Doan to Mrs. Smith. There is testimony that Doane was paid, by Welch, compensation for his services on the reported sale to Sanches, $8.75, and on the sale to Mrs. Jennie Smith, $12.50. The payment of the sum of $21.25, in compensation for services, to Doane, is established by the evidence. There were four contracts of sale of machines reported by Doane to Welch as having been made by the former, but which I hold were never made. One of these was reported as a sale to a man named Davis, which Davis never got. After a dispute about this business of sales by Doane had arisen between him and Welch, Doane informed Welch that the machine reported as sold to Davis was at a house on the Monterey road, and Welch got it. It is clearly shown that Welch got all the old machines which Doane had taken in payment. It is not pretended that Doane had embezzled any other machine than the one the number of which is given above, and which was found at Mrs. Kimball's house, and was sold to her.

Doane admits the sale to Mrs. Kimball of a machine for $65, of which he received $30 in coin, and an old Remington and an old Wilson machine, of which he testified he paid over $15 to Welch, and delivered to him the Remington machine. The old Wilson machine he says he broke up as worthless, and sold for old iron, at a cent and a half per pound. He testifies that he sold a machine to a man who told him his name was Sanches; that the man signed the contract, which he reported and delivered to Welch, but that he had never been able to find him, though he had made strenuous efforts to do so. He insinuates that the number of the machine found in Mrs. Kimball's possession had been changed. But I regard it as proved that no sale was ever made to Sanches, and that the machine reported as sold to Sanches was sold to Mrs. Kimball. All the machines can be accounted for without a sale to Sanches. In fact, it is immaterial, in the view I take of the case, to whom the sale was made. The evidence incontrovertibly establishes, in my opinion, that, after the sale of the machine as above stated, Doane paid over to Welch a part of the proceeds of the machine, and, though he may have embezzled a part of the proceeds of the sale of the machine, he did not embezzle this machine or any other.

Welch testifies that he paid him $15, and delivered to him the Remington machine, and that he also delivered the Wilson machine. These machines were received on the sale of the machine numbered as above to Mrs. Kimball,—the only machine that there is any charge that Doane embezzled. This machine was sold on the 30th of April, and the $15 paid over to Welch by Doane on the same day. There is no evidence that he received any money on any other machine at or about this time. Therefore it must be held that this sum was paid on the sale of the machine to Mrs. Kimball. Welch, speaking of the sale of this machine, testified that he was out $35 on the transaction. The sale was made for $70, of which Welch got the Remington machine, taken from Mrs. Kimball, for $25, and the Wilson machine, taken from the same person, at $5. Welch then received of Doane on this sale $15 in money and $30 in machines, and, deducting these amounts, (they aggregate $45,) Welch received all but $25. Or, take the evidence of Welch's book-keeper. He says Doane paid in $15 and the Remington machine at $17; that Doane was allowed in compensation for the reported sales to Sanches and Mrs. Kimball $21.25. Now, putting the White machine sold at $70, and deducting therefrom the amount paid in in money and machine, $32, will leave $38 not paid in; charging Doane with $21.25 received as compensation above mentioned, will reduce the amount paid in from $32 to $10.75, which leaves (deducting $10.75 from $70) $59.25 not paid in. But really the Remington machine was taken at $25, and not $17. This is established by Mrs. Kimball's testimony, and admitted by Doane in his testimony. Then, putting the Remington at $25 will make the amount paid in $18.25; leaving only ($70, less $18.25) $51.75 of the proceeds of the machine not paid in. Take the testimony of Doane, and that shows that a part of the proceeds of this White machine was paid in, leaving a balance unaccounted for.

It must be conceded that Doane deceived his employer, that he rendered false accounts to him of the sale of this machine and of others; but the above acts do not constitute embezzlement of the machine, which was actually sold, and part of the proceeds paid over. Doane had authority to sell, and did sell, the White machine. If anything was embezzled by Doane, it was part of the proceeds of the machine sold. I do not intend by this to say that he embezzled anything, but, if he did embezzle, it was not the machine.

I see no evidence that Doane converted this White machine with intent to embezzle it. Such intent is disproved by his paying over a part of the proceeds. As Doane did not embezzle this machine, I cannot see how, under the information, he could be convicted. Conceding that he embezzled a portion of the proceeds of its sale, he cannot for this offense be convicted under the information, which was for embezzling the machine. The case is one presenting a material variance between the offense charged and the offense found,—between the information and the evidence,—on which a conviction should not have been allowed. In this view, the direction of the court below to the jury, given in the following language: "If you find from the evidence that the machine in question was so received by defendant, and that he sold it to one Mrs. Kimball for the sum of $30, and two old machines, and $5 worth of sewing for Doane, and that he reported to Welch that he had sold said machine to one A. Sanches for the sum of $15 in cash, an old machine, and a contract for the payment of a sum in installments of $5 per month, and only paid over to Welch $15 of the $30 received from Mrs. Kimball, and the machines received by her as coming from another, with the intent to defraud Welch, and did not report said sale to Kimball, the defendant is guilty of the offense of embezzlement," —was misleading, and therefore erroneous. The court tells the jury that, on the facts stated in the direction, Doane was guilty of embezzlement. This was so on the facts stated in the direction, but he was guilty only of embezzlement of part of the proceeds of the sale of the machine, but not of the machine itself. The court, by the language used in the direction, left the jury under the impression that, if the facts stated in it were true, the defendant, in its opinion, was guilty of the offense charged, viz., of the embezzlement of the machine, whereas, on such facts, he was not.

My conclusion is that the judgment and order should be reversed, and the cause remanded for a new trial.

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77 Cal. 609

WATSON *v.* SUTRO *et al.* (No. 12,596.)

(*Supreme Court of California.* December 27, 1888.)

1. APPEAL—FROM INTERLOCUTORY DECREE.
   In an action to obtain a decree declaring plaintiff to be the equitable owner of an undivided interest in real property, and for a partition, an interlocutory decree was entered adjudging title in plaintiff, as claimed by him, and appointing commissioners to make partition. An appeal was taken after the statutory time had elapsed for appeals from interlocutory judgments in partition suits. *Held* that, if the decree adjudging the equitable interest of the plaintiff was not to be regarded as a part of the partition suit, it was not appealable at all.
2. SAME—PRACTICE—DISMISSAL—PARTIES.
   On a motion to dismiss an appeal from an order refusing a new trial, the question whether others should have been made parties in the court below is not involved. If the proceedings were properly taken on the appeal, it should not be dismissed.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Lloyd & Wood, for appellant. *Stanly, Stony & Hayes,* for respondent.

HAYNE, C. Motion to dismiss appeal from a judgment, and from an order denying a new trial. The suit was to obtain a decree declaring that the plaintiff was the equitable owner of an undivided interest in certain real property, and for a partition of the property among the several co-tenants. Findings were filed, and an interlocutory decree entered thereon, adjudging, among other things, that the plaintiff was the equitable owner of five one hundred and sixtieths of the property, and that the defendant Sutro hold the legal title thereto in trust for plaintiff, and directing a conveyance accordingly; and that certain other parties held the legal title to four undivided one hundred and sixtieths in trust for Sutro; and directing a conveyance to him, and establishing the rights of the other parties of the suit; and appointing commissioners to make partition of the property in accordance with the rights of the respective parties as established by the decree. The defendant Sutro is the only party who appears to be dissatisfied with the result. He gave notice of intention to move "to set aside and vacate the decision and findings heretofore made herein, and to grant a new trial in this case;" addressing the notice to the plaintiff's attorneys, and serving it on them only. The motion made in pursuance of this notice was denied; and within 60 days thereafter, and about 7 months after the recording of the interlocutory decree, the defendant gave notice of appeal from the order denying his motion for new trial, and from so much of the decree "as determines and decides the title to and ownership of the 5-160 shares" of the plaintiff.

1. We think the motion to dismiss the appeal from the decree should be granted. If the suit is to be regarded as a partition suit, it is obvious that the appeal was not taken within the 60 days allowed by law. Code Civil Proc. § 939, subd. 3. If, however, as contended for the appellant, so much of the decree as established the equitable rights of the plaintiff was not properly a part of the partition suit, and for that reason is to be considered as a decree in an ordinary action, it would follow that the decree was not appealable at all. It is well settled that interlocutory matters are not appealable except in the cases provided by statute. See cases collected in Hayne, New Trials & App. § 188. There is nothing inconsistent with this in the case of *Thompson* v. *White*, 63 Cal. 505, second appeal, 18 Pac. Rep. 399. On the contrary, on the first appeal the court, after stating that the decision was reviewable on motion for new trial, said: "That decision is also reviewable on appeal from final judgment, when one shall be entered." And this was the view on the second appeal. It is to be regretted that this is the law. There are many actions, notably actions for an accounting, in which almost the whole controversy may be as to whether an interlocutory decree should be made; and the parties should not be compelled to wait until a final decree is rendered, and then to drag the whole case up to the appellate court, in order to present a question which could with much less expense be presented at once. The due administration of justice requires that where an interlocutory decree is proper it should be placed upon the same footing as interlocutory decrees in partition. But it is for the legislature to make the change.

2. The motion to dismiss the appeal from the order refusing a new trial should be denied. The question whether other parties should have been made parties to the motion in the court below is not involved upon a motion to dismiss the appeal. That question is simply as to whether the order was or was not properly made. And whether it was or not is a question to be considered upon the hearing of the appeal. If the proceedings on the appeal were properly taken, it should not be dismissed. And we think they were properly taken. The notice of appeal was served upon, and the transcript was certified by, the parties to the motion in the court below; and that is all that was necessary, at least in cases where the motion in the court below is denied.

We therefore advise that the appeal from the judgment be dismissed, and that the motion to dismiss the appeal from the order refusing a new trial be denied.

I concur: FOOTE, C.

BELCHER, C. C., took no part herein.

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the judgment is dismissed, and the motion to dismiss the appeal from the order refusing a new trial is denied.

77 Cal. 575

ALLEN *v.* HALEY. (No. 12,699.)

(*Supreme Court of California.* December 26, 1888.)

1. APPEAL—REVIEW—OBJECTIONS TO PLEADINGS.
In an action by an attorney for professional services, an objection that the complaint does not state facts sufficient to constitute a cause of action will not be sustained, where there was no demurrer and no plea of statute of limitations.

2. TRIAL—VERDICT—CONTRADICTORY FINDINGS.
Findings are not contradictory when made according to the allegations of the complaint, which states that the services were rendered at the request of defendant, and in one count that he promised to pay a certain sum therefor, and in another that he promised to pay what they were reasonably worth, and that they were reasonably worth a certain sum, the same amount claimed in the first count.

3. SAME.
A finding that an allegation in the answer that in January, 1883, defendant allowed plaintiff to stay in his office in consideration of plaintiff's promise that he would make himself as useful as he could in defendant's business, and that he remained in the office until about January, 1886, but was of but little use, is not contradictory to findings in favor of plaintiff, where the time the services sued for were rendered does not appear, and the promise to pay therefor is alleged to have been made in one count on July 30, 1886, and in another before July 30, 1886.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action by Horace Allen against Salisbury Haley, to recover for professional services. Defendant appeals.

Richard Dunnigan and *S. Haley*, for appellant. *J. G. Howard*, for respondent.

HAYNE, C. Action by an attorney to recover for professional services. Judgment for plaintiff, and appeal by defendant upon the findings.

1. It is said that the complaint does not state facts sufficient to constitute a cause of action. The only objection on this score is that the time the services were rendered does not appear. There was no demurrer, and the answer does not set up any plea of the statute of limitations. We think that the point is frivolous.

2. It is said that the findings are contradictory. The findings are by reference to the pleadings, and the complaint contains several counts. In one of these it is alleged that the services were rendered at the request of the defendant, and that he promised to pay a certain sum therefor. In another it is alleged that the services were rendered at the request of the defendant; that he promised to pay what they were reasonably worth; and that they were reasonably worth a certain sum, which is the same amount claimed in the first count. The effect of the findings is that defendant both promised to pay what the services were reasonably worth, and promised to pay a certain sum for them. There is nothing impossible in his having done this, and we see no inconsistency in the finding that he did so.

Another finding is that the allegations in paragraph 5 of the answer (with a specified exception) are true. The substance of this paragraph of the answer is that in the month of January, 1883, the defendant allowed the plaintiff to stay in his office in consideration of plaintiff's promise that "he would make himself as useful as he was able in and about the defendant's business;" that the plaintiff remained in the office from January, 1883, until about January 1, 1886, but was of very little use. Assuming that this portion of the answer stated a defense, (which we doubt,) we nevertheless do not see any inconsistency in the findings. The time when the plaintiff rendered the services does not appear. One of the defendant's promises to pay for them was "on the 30th day of July, 1886," and this was after the sojourn of the plaintiff in the defendant's office. The other promise was "before the 30th day of

July, 1886," and this may have been before said period. In neither case is there any contradiction.

The other matters do not require special notice. We think that the appeal was taken for delay, and we therefore advise that the judgment be affirmed, with 10 per cent. damages.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed, with 10 per cent. damages.

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77 Cal. 577

RIDDELL v. MULLAN *et al.* (No. 12,850.)

(*Supreme Court of California.* December 26, 1888.)

1. PLEADING—COMPLAINT—PURCHASE OF PUBLIC LANDS.
   An allegation, in an action to determine the right to purchase land from the state, that the surveyor general "referred the contest arising under the various applications to purchase said land to the superior court," with "profert of said order of reference," sufficiently avers that an order of reference was made, under Pol. Code Cal. § 3498, providing for dismissal of unapproved applications "wherein the contest has not been referred to court, or a demand made for an order of reference."
2. SAME—AMENDMENT.
   Even if a demand for an order of reference is necessary under the above act, it is error to refuse leave to amend an amended complaint by alleging such demand.

Commissioners' decision. In bank.

Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Action by George Riddell against John Mullan, J. H. Higgins, and D. B. Milliken, to determine the right to purchase from the state certain lands. Plaintiff, after describing the land, setting forth his application, etc., alleged "that, subsequent to the filing of his application to purchase said lands of the state of California, the plaintiff ascertained that the defendants hereinbefore named claimed some right or title in or to the said lands by virtue of applications heretofore made to the state for the purchase of said lands by said defendants, whereupon the said plaintiff filed with the surveyor general of the state of California his protest against the applications of the said defendants, or either of them, to purchase said land of the state, on the ground that said land is and was agricultural land, and suitable for cultivation, and that said defendants do not and never did reside on said land, nor are they, or any of them, settlers on said land, nor do any of them reside thereon; that on the 14th day of June, 1886, the surveyor general of the state of California referred to the contest arising under the various applications to purchase said land to the superior court in and for the county of San Bernardino, state of California, for adjudication and determination; that the order of the surveyor general referring said contest to said last-named court was on the 14th day of June, 1886, filed with the clerk of said superior court last-named; and the said plaintiff makes profert of said order of reference of said surveyor general." There was a general demurrer to the complaint, the objection being that it was not averred that an order of reference to the court had been made. The demurrer was sustained, and leave to amend was denied. Pol. Code Cal. § 3498, provides that all unapproved applications which have been on file over six months, wherein the approval has not been demanded, and wherein the contest has not been referred to court, or a demand made for an order of reference, as provided in section 3414, shall be null and void. Plaintiff appeals.

H. T. Hazard and *Chapman & Hendrick*, for appellant. *Curtis & Otis*, for respondents.

FOOTE, C. This was an action to determine which of the parties thereto had the better right to purchase from the state the lands described in the plaintiff's application; being the S. ½ of section 15, township 1 S., range 7 W., San Bernardino meridian. A general demurrer that the amended complaint did not state facts sufficient to constitute a cause of action was filed and sustained. The plaintiff asked leave to amend, but it was refused. A trial was had, and judgment rendered in favor of Mullan, one of the defendants, upon proof made under the answer which he had filed. This appeal is taken from that judgment by the plaintiff.

We think that, as against a general demurrer, the complaint sufficiently averred that an order of reference had been made. Conceding, without deciding, that the complaint should have averred that a demand for an order of reference had been made by the plaintiff, and the time when such demand was made, so as to show that he had complied with the provisions of section 3498 of the Political Code, as amended March 14, 1885, nevertheless the offer to amend in that particular, made by the plaintiff, should have been allowed. It is seldom the case that the appellate court will interfere with the action of the court below in such a matter, but in this case a wise discretion would have been exercised in granting the plaintiff's request, and no detriment would have accrued to any of the parties.

We advise that the judgment be reversed, and the cause remanded for further proceedings.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for further proceedings.

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77 Cal. 570

PEOPLE *v.* MCGREW. (No. 20,422.)

(*Supreme Court of California.* December 26, 1888.)

FALSE IMPRISONMENT—EVIDENCE—BURDEN OF PROOF.

Under Pen. Code Cal. § 236, defining "false imprisonment" to be "the unlawful violation of the personal liberty of another," the imprisonment being proven, the law presumes it unlawful, and it is for the defendant to show that it was lawful.

Commissioners' decision. In bank. Appeal from superior court, Shasta county; AARON BELL, Judge.

Jackson Hatch, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was prosecuted upon an information for false imprisonment. He was convicted as charged, and from the judgment rendered against him, and an order refusing him a new trial, he has appealed.

Two points are made in his behalf for a reversal of the judgment and order:

1. It is claimed that the jury were not warranted in bringing in a verdict of guilty, under the evidence before them. To this contention, after a careful review of the whole record, we cannot agree.

2. It is argued that the sixth instruction given by the court at the request of counsel for the people is erroneous. This instruction is as follows: "While it is true that the prosecution must prove the imprisonment, it is also true that, the imprisonment being proven, the law presumes it unlawful until the contrary is shown. It is for the defendant to justify it by proving that it was lawful." It is contended that under section 236[1] of the Penal Code the existence of two elements are necessary in order to constitute false imprisonment:

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[1] Pen. Code Cal. § 236: "False imprisonment is the unlawful violation of the personal liberty of another."

(1) That another's personal liberty is violated. (2) That such violation is unlawful in its character. And that it is incumbent upon the people, when a prosecution is being conducted in a case of the kind in hand, to show affirmatively both the violation of another's personal liberty and its unlawful character.

We have been cited to no case decided in this state where the point has been determined. In Arkansas, under a statute, (Dig. Ark. 1858, c. 51, art. 7, § 1,) the first clause of which is in the exact language of section 236 of the Penal Code of this state, it has been decided that, in order to establish the offense of false imprisonment, it is only necessary on behalf of the people to show the imprisonment. When that is done it devolves upon the defendant to prove that he was justified in what he did, and that the imprisonment was lawful. *Floyd* v. *State*, 12 Ark. 47; *Mitchell* v. *State*, Id. 55.

Mr. Archibold, in the second volume of his work on Criminal Pleading and Practice, 293, says: "All the prosecution has to prove is the imprisonment, for that is presumed to be unlawful until the contrary is shown. It is for the defendant to justify it by proving that it was lawful."

To the same effect has the matter been determined in Texas. *Kirbie* v. *State*, 5 Tex. App. 63. See, also, 2 Bish. Crim. Proc. § 368.

No prejudicial error being disclosed by the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

77 Cal. 618

PEOPLE *v.* NORTHEY. (No. 20,441.)

(*Supreme Court of California.* January 25, 1889.)

CRIMINAL LAW—APPEAL—APPLICATION FOR REHEARING.

Where, in a criminal case, the counsel for the accused, on appeal, ably present all the rulings of the trial court, and after decision thereon other counsel, on an application for rehearing, present new points, purely technical, they will not be considered.

Application for rehearing. For statement and former opinion, see 19 Pac. Rep. 865.

BEATTY, C. J. In his petition for a rehearing appellant relies altogether upon points that were neither urged nor suggested in the argument upon which the case was submitted for decision; and the question is presented whether we are to be governed in criminal cases by the same rule that has uniformly obtained in civil cases, viz., that the court will not consider upon petition for rehearing any point waived, either expressly or tacitly, at the argument. Comparatively few of the cases in which this rule has been applied are to be found reported, but we cite the following: *Grogan* v. *Ruckle*, 1 Cal. 197; *Atherton* v. *Supervisors*, 48 Cal. 160; *Dougherty* v. *Henarie*, 49 Cal. 686. It is even more emphatically true now than it was at the date of these decisions that the proper dispatch of the business of the court requires that cases should be fully argued before submission without reservation of other points to be used on petition for rehearing; and certainly the policy and necessity of the rule are as cogent in criminal as in civil cases. It is true that in cases involving life or liberty the court should apply with less strictness a rule merely designed to expedite the dispatch of business, and doubtless the court would, in a case of peculiar or real hardship, entirely dispense with it. But when, as in this case, counsel originally charged with the defense of the petitioner has ably presented all the rulings of the trial court affecting the verdict, and after the decision of these points other counsel petitions for a rehearing upon points purely technical, and relating merely to the form of the judgment, we see no reason from departing from a rule so essential to the disposition of the business of the court.

Rehearing denied.

We concur: PATERSON, J.; MCFARLAND, J.; WORKS, J.; SHARPSTEIN, J.; THORNTON, J.

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77 Cal. 572

BEDELL *v.* HERING. (No. 12,719.)

(*Supreme Court of California.* December 26, 1888.)

NEGOTIABLE INSTRUMENTS—TRANSFER—INNOCENT PURCHASER.

That a negotiable note was signed by the maker, who could not read or write English, believing the payee's representations that it was not a note, but a mere memorandum of agency, cannot avail against an innocent purchaser for value before maturity.

In bank. Appeal from superior court, Suter county; PHILIP W. KEYSER, Judge.

Action on a promissory note, brought by J. C. Bedell against A. Hering. Trial to the court, and judgment for plaintiff. Defendant appeals.

M. E. Sanborn, for appellant. *J. T. Harrington*, for respondent.

MCFARLAND, J. 1. This is an action upon a promissory note for $500, made by defendant, payable to the order of E. Jones, due in six months, and by the latter indorsed and delivered to plaintiff before maturity. Judgment went for plaintiff, and defendant appeals. The appeal is from the judgment and upon the judgment roll alone. The defense relied on was that said payee, Jones, procured defendant to sign the note by falsely and fraudulently representing that it was not a note, but a mere memorandum about a certain agency.

It appears from the findings that at the time defendant signed the note the said Jones and one Moss falsely represented to him that it was not a promissory note, or any contract for the payment of money, but was merely a writing by which he signified his willingness to act as agent for the sale of a certain patent hay-fork. Defendant could not read or write the English language, except that he could sign his name. He signed the note without knowing its contents, and believed the said representations of said Jones and Moss. Plaintiff purchased the note for $400, before its maturity, and had no notice or knowledge that it was procured as aforesaid, or of anything that affected its validity as between the original parties. It is also found that "plaintiff is the indorsee of said note in due course," and that "defendant signed said note voluntarily, and without exercising the ordinary care in regard to the character of the paper signed which a prudent business man would and should exercise."

The defense set up cannot be maintained, and the judgment of the superior court was right. It is found by the court (fully enough, we think) that the defendant, in signing the note, did not exercise ordinary care. Indeed, the act of signing the paper, as shown in the findings, (and there is no evidence here,) was itself intrinsically careless. Therefore, leaving other aspects of the case out of view, it is clear that the judgment was right upon the principle that when one, by his carelessness and undue confidence, has enabled another to obtain the money of an innocent third person, he must answer for the loss which he has thus caused.

2. It is not necessary here to pass definitely upon the broader question discussed in the briefs, whether or not payment of a negotiable note in the hands of an innocent indorsee, who received it before maturity, can be avoided, under any circumstances, on the ground that it was procured by fraud. It is apparent that to apply to such an instrument the principles which establish the essentials of an ordinary contract as between the original parties—as, for instance, that there must be consent of the parties and a sufficient consideration; that where there was no intention to sign, there was, in law, no signature; that fraud vitiates a contract *ab initio*, etc.—would be to undermine the whole structure of commercial law, and "shake paper credit to its foundation." The former decisions of this court seem to be in the direction of holding that in such a case payment cannot be avoided for fraud in the original procurement of the note. *Mitchell* v. *Hackett*, 14 Cal. 666; *Hellman* v. *Potter*, 6 Cal. 14; *Rich* v. *Davis*, 4 Cal. 22; *Haight* v. *Joyce*, 2 Cal. 65; *Rich* v. *Davis*, 6 Cal. 141; *Meyer* v. *Brown*, 65 Cal. 590, 4 Pac. Rep. 25, 625; *Fuller* v. *Hutchings*, 10 Cal. 523; *Poorman* v. *Mills*, 39 Cal. 345; *Smith* v. *Silsby*, 55 Cal. 470.

In *Shepherd* v. *Jones*, 71 Cal. 225, 16 Pac. Rep. 711, it does not appear that the note there involved was negotiable or transferred before maturity; and there is no discussion, in the opinion, of the general question here under consideration. In Indiana a great many cases arose similar in their facts to those of the case at bar, and it was uniformly held there that the defense set up could not be maintained. The current of American authorities seems to be in the same direction.

Judgment affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; PATERSON, J.

THORNTON, J., (*concurring*.) I concur in the judgment on the ground that the defense here urged cannot be made against plaintiff, who is an innocent purchaser, before maturity, of the negotiable note in suit.

78 Cal. 116

REESE *v.* THORBURN. (No. 12,831.)

(*Supreme Court of California.* January 15, 1889.)

PUBLIC LANDS—PURCHASE OF SWAMP LANDS—CONTEST—ALLEGATIONS.

Under Pol. Code Cal. § 3443 providing that a person desiring to purchase swamp and overflowed lands must make an affidavit, setting forth certain facts, and file it in the office of the surveyor general, the complaint in a contest as to the right to purchase such lands must allege that an affidavit containing the matters specified in section 3443 was made and filed, and must set out the substance of such affidavit; and it is not sufficient to allege merely that an application was made in due form of law, and filed.

In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Rogers & Chilstrom, for appellant. *J. C. Bowmer*, for respondent.

THORNTON, J. Appeal by defendant from a judgment by default.

This is a contest as to the right to purchase of the state swamp and overflowed lands. It is contended that the complaint does not state facts sufficient to constitute a cause of action. The statute provides that a party desiring to purchase swamp and overflowed lands must make an affidavit setting forth certain matters, and file the same in the office of the surveyor general of the state. Pol. Code, § 3443. These matters are specified in the section of the Code above cited.

The complaint does not set forth that any affidavit at all was made or filed. The pleader merely states that an application was made in due form of law, and that this application was filed. This is the sum of the allegations of the complaint, taking the view most favorable to the plaintiff. The facts must be set out in the complaint so that the court can discern that the application is in due form of law, or rather that it complies with the requirements of the law. "Each of the contestants must state in his pleading all the facts upon which he relies as showing his right to become the purchaser, and the steps he has taken to avail himself of and secure his right to make the purchase." The above is the rule laid down in *Cadierque* v. *Duran*, 49 Cal. 356, and we have no doubt of its correctness. See also *Millidge* v. *Hyde*, 67 Cal. 5, 6 Pac. Rep. 852.

The plaintiff has not complied with the above rule, and his complaint, therefore, does not state facts sufficient to constitute a cause of action. Judgment reversed and cause remanded for a new trial, and the court below is directed to grant leave to plaintiff to amend his complaint.

Ordered accordingly.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; WORKS, J.

DEREVAN *v.* MACCLEAN. (No. 12,832.)

(*Supreme Court of California.* January 15, 1889.)

PER CURIAM. This case is like *Reese* v. *Thorburn*, *supra*, (No. 12,831,) in which the opinion was this day filed; and in accordance with the judgment in that case the judgment is reversed, and the cause remanded for a new trial, and the court below is directed to grant leave to plaintiff to amend his complaint.

Ordered accordingly.

O'BRIEN *v.* NEWMAN. (No. 12,833.)

(*Supreme Court of California.* January 15, 1889.)

PER CURIAM. This case is like *Reese* v. *Thorburn, ante,* 131, (No. 12,831,) in which the opinion was this day filed; and in accordance with the conclusion reached in that case the judgment is reversed, and the cause remanded for a new trial, with a direction to the court below to grant leave to plaintiff to amend his complaint.

Ordered accordingly.

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77 Cal. 588

HUNT *v.* ELLIOTT. (No. 12,723.)

(*Supreme Court of California.* December 26, 1888.)

1. TRIAL—VERDICT—SPECIAL FINDINGS.
   Under Code Civil Proc. Cal. § 625, providing that, in an action for the recovery of money only, the jury, in their discretion, may render a general or special verdict, a verdict in an action for the agreed price of erecting windmills, pumps, etc., is not erroneous for lack of special findings on the issues raised by a cross-complaint claiming damages for plaintiff's failure to perform.
2. SAME—VERDICT BY DETERMINATION OF CHANCE.
   A verdict obtained by averaging the amounts marked down by all the jurors is not assented to "by a resort to the determination of chance," within the meaning of Code Civil Proc. Cal. § 657, subd. 2.[1]
3. SAME—MISCONDUCT OF JURY.
   A juror's affidavit of misconduct of the jury in arriving at a verdict is overcome by the affidavits of two other jurors, of whom one is the foreman.
4. CONTRACTS—ACTIONS—LIABILITIES.
   In an action for the contract price of labor and materials, instructions that, if defendant received any benefit from the work, he is liable to the extent of what was due, and any injury he may have sustained by omissions or defects in the work may be deducted from the price; that if he was injured more than he was benefited, or was not benefited at all, by reason of such defects or omissions, the jury should find for him,—are not in conflict with an instruction that if plaintiff and defendant executed the contract plaintiff must show a substantial compliance with its terms on his part, in order to recover, and together they state the law of the case correctly.

Commissioners' decision. In bank. Appeal from superior court Los Angeles county; H. K. S. O'MELVENY, Judge.

Action by John Hunt against J. S. Elliott for the contract price of certain labor and materials supplied. Verdict and judgment for plaintiff. Defendant appeals. Code Civil Proc. § 657, subd. 2, gives as one of the grounds for a new trial the fact that any juror assented to the verdict "by a resort to the determination of chance."

The instructions complained of were as follows: "If the jury find that the defendant received or accepted the benefit, or any benefit, of the work of the plaintiff under the contract, then the defendant is liable to the extent of what was due, and, if any injury has been sustained by the defendant by omissions or defects in the performance of the contract, it may be deducted from the contract price." "In this case, if the defendant was, by the evidence, injured, by reason of any defects or omissions in the work of the plaintiff, more than he was benefited therefrom, you should find a verdict in favor of the defendant." "Or if you find from the evidence that the work done under this contract was not done as provided therein, and that if it was done in such manner that by defects in it, or omissions on the part of the plaintiff, the work was of no use or benefit to the defendant, you should find a verdict in favor of the defendant." "If you believe from the evidence that the plaintiff and defendant executed the agreement dated September 30, 1885, introduced in evidence in this case, then you are instructed that the plaintiff must show a substantial compliance on his part with the terms of said agreement to entitle him to recover in this action."

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[1] It is entirely proper for the jury, in actions for unliquidated damages, to add the amounts named by each, and divide the sum by 12, to obtain an average to be submitted as a proposition for a verdict; but such plan must not be adopted pursuant to an agreement to be bound by its result. Village of Ponca v. Crawford, (Neb.) 37 N. W. Rep. 609. See, also, Parshall v. Railway Co., 35 Fed. Rep. 649, and note; State v. Harper, (N. C.) 7 S. E. Rep. 730.

Bicknell & White, for appellant. *Wells, Van Dyke & Lee*, for respondent.

BELCHER, C. C. This action was brought to recover the sum of $400, the agreed price for erecting two windmills, pumps, tanks, etc. The defendant, by his answer, denied that plaintiff had performed the conditions of his contract, and by way of cross-complaint alleged that by reason of the plaintiff's failure to construct the works as agreed he had been damaged in the sum of $400, for which he asked judgment. The defendant answered to the cross-complaint, denying all of its material allegations. The case was tried by a jury, and a verdict returned for the plaintiff for the sum of $356. The defendant thereupon moved for a new trial upon the following grounds: *First*, misconduct of the jury in this: that one or more of the jury were induced to assent to the verdict by a resort to the determination of chance; *second*, insufficiency of the evidence to justify the verdict, and that it is against law; *third*, errors in law occurring at the trial, and excepted to by the defendant. The motion was denied, and the defendant appealed.

1. The objection that the verdict should be set aside because there were no special findings on the issues raised by the cross-complaint and the answer thereto cannot be sustained. The Code provides that, "in an action for the recovery of money only, or specific real property, the jury, in their discretion, may render a general or special verdict." Code Civil Proc. § 625. This action was for the recovery of money only, and the verdict covered all the issues presented by the pleadings. There was no necessity, therefore, for special findings.

2. The point that the verdict of the jury was reached "by a resort to the determination of chance" is not well taken, for two reasons: (1) The affidavit of the juror Baer did not state facts which made the verdict a chance verdict, within the meaning of subdivision 2 of section 657 of the Code of Civil Procedure, and it was therefore inadmissible to impeach the verdict. (2) Baer's affidavit was met and overcome by counter-affidavits of two other jurors, one of them being the foreman. *Turner* v. *Water Co.*, 25 Cal. 397; *Hoare* v. *Hindley*, 49 Cal. 274.

In the case first cited, the court, by SANDERSON, C. J., speaking of a similar alleged misconduct, and after reviewing the authorities, said: "But, independent of authority, it is manifest that there is no element of chance in such a verdict. Each juror marks a sum which, in his judgment, represents the true amount of damages. Neither of these sums is the result of chance. On the contrary, each is the result of the judgment or will of the juror by whom it was marked. Neither is the aggregate of these sums, nor the quotient, resulting from a division of the aggregate by 12, the result of chance, but, on the contrary, the result of the most accurate of the sciences. Thus, from the commencement to the end of the process, no quantity which enters into the final result is determined by a resort to chance." And in another part of the opinion it is said: "To ascertain this average the jury may properly adopt the method which was used in the present case, but they ought not to agree to be bound by the result, whatever it may be. If they do so agree, and such result is made the verdict without further consultation or assent, such verdict is vicious and irregular, and must be set aside whenever the fact is made to appear by proper and competent evidence. If, on the contrary, they do not agree to be bound by the result, but reserve to themselves the right to dissent, such a proceeding is not irregular; and if afterwards, upon consultation and discussion, they finally agree to adopt such result as their verdict, the verdict so found is good."

The counter-affidavits in this case show that all the jurors were in favor of returning a verdict for plaintiff, and that, after considering the matter, each juror marked down the amount he was willing to allow; that no one of these amounts was less than $350; that they then agreed to divide the aggregate of these amounts by 12, it being understood, however, that they were not to be bound by the result; and that after the amount was so ascertained the jurors unanimously agreed to adopt it as the sum to be returned.

3. The evidence introduced for the plaintiff was sufficient to sustain the verdict, while that introduced for the defendant was sharply in conflict with it. In such a case the rule is well settled that the judgment will not be disturbed by the appellate court, on the ground of insufficiency of the evidence to justify the verdict or other decision.

4. The instructions given to the jury stated the law of the case correctly, and we see nothing in them to mislead or confuse the jurors. The alleged conflict is seeming rather than real. The court properly gave instructions to meet each party's theory of the case. We find no material error in the record, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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77 Cal. 596

WILSON *v.* MORIARTY. (No. 12,828.)

(*Supreme Court of California.* December 26, 1888.)

1. EQUITY—RESCISSION OF LEASE—FRAUD.

   A complaint alleging that plaintiff was ignorant, of weak understanding, unable to fix her attention upon or understand legal documents, and unable to read or write; that defendant, an extraordinarily shrewd business man, of plausible manners, having great influence over plaintiff and her husband, who was ignorant and of no business capacity, intending to defraud plaintiff, induced her husband to procure from her a lease for 5 years, for $150 per month, of premises worth at least $350, persuading the husband that the sum of $150 was a fair rent; and that defendant, knowing her incapacity, procured her to execute a lease for 10 years under the belief that it was for 5 years only,—states a cause of action for rescission.[1]

2. SAME—OFFER TO REFUND RENTS.

   An offer to refund the rents received is not necessary to entitle plaintiff to a rescission, as the value of the use of the premises exceeds the amount of such rents.

3. PLEADING—COMPLAINT—AMBIGUITY.

   Such a complaint is not liable to the objection that it is ambiguous, unintelligible, and uncertain.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action by Bridget Wilson against John Moriarty for the rescission of a lease. A demurrer to the complaint was sustained, and plaintiff appeals.

Anderson, Fitzgerald & Anderson and *Smith, Patton & Howard,* for appellant. *Stephen M. White* and *R. H. F. Variel,* for respondent.

FOOTE, C. This action was instituted for the purpose of having a certain contract of lease rescinded. The defendant demurred to the complaint filed, upon the grounds—*First,* that it did not state facts sufficient to constitute a cause of action; *second,* that it was ambiguous, unintelligible, and uncertain in various particulars.

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[1] As to when equity will allow rescission of contracts on the ground of mental incapacity and undue influence, see June v. Willis, 30 Fed. Rep. 11, and note; Goodrich v. Shaw, (Mich.) 40 N. W. Rep. 187, and cases cited; Weller v. Weller, (N. Y.) 19 N. E. Rep. 433.

The demurrer was sustained, and, the plaintiff declining to amend her complaint, judgment passed for the defendant, from which an appeal was taken.

The facts stated in the complaint are, as it appears to us, different from those set up in the case of *Hawkins* v. *Hawkins*, 50 Cal. 558, the decision in which is relied on by the respondent here. In that case there was no allegation that the plaintiff was a person of weak mind, or that the consideration for the making of the contract was inadequate. It seems to have been a case where the party deceived as to the terms of the contract he apparently assented to was simply an unlettered and illiterate person, of ordinarily sound intellect, we must suppose, who, by his own carelessness, had allowed himself to be entrapped, and where the defendant occupied no trust relation.

In the present case, "an illiterate and ignorant woman, of weak understanding, unable to read or write, and ignorant of business, and unable to fix her attention upon or to understand the effect of legal documents when read to her," declares that the defendant was a man of more than ordinary capacity, a "shrewd merchant and business man of very plausible manners and address," and during all the period of time referred to in the complaint on "terms of intimate friendship with the plaintiff and her husband, who was a person ignorant of business, illiterate, and of no business capacity;" that during all that time the defendant had and exercised a great influence over her and her husband; that, before the lease sought to be canceled was executed, the defendant had endeavored, without success, to induce the plaintiff to sell him the property mentioned in the complaint; that "thereupon the defendant conceived the intent to defraud and cheat the plaintiff out of said property under the disguise of a long lease, for a rental far below the rental value of said property, and, in pursuance of said fraudulent intent, did importune" the said husband of plaintiff "to procure for the defendant a five-years lease of said property, and finally, by such importunity," induced her husband to consent thereto,—the said husband then agreeing that he would "procure the plaintiff to give the defendant such a lease for a term of five years only, on the following terms: For a monthly rental of $150 per month; the plaintiff to put an iron front to the lower story of the building on said premises, which building was of two stories." She further alleges that the monthly rental of the premises in question, with the iron front improvement, (which was made,) was at least $350, as the defendant knew; and that he cunningly, taking advantage of the want of knowledge and the want of business capacity of her husband, and of his friendship to the defendant, and of the influence which defendant exercised over him, and knowing the ignorance of the plaintiff, and that she relied on her husband in the premises, fraudulently persuaded her husband that the sum of $150 was a fair monthly rental for the premises, and that her husband, thus deceived, consented to the execution of the five-years lease, and persuaded his wife to make it, she being under his influence, and ignorant of the true value of the premises; that the defendant then had the instrument drawn up which it is sought here to have rescinded, which, instead of being for five years, as the defendant had induced her to believe, was for 10 years, with the privilege to him of leasing the property for 10 years more, at the rate of $150 per month; that defendant fraudulently procured her to go before a notary, and execute the lease thus altered from its originally supposed terms, knowing the plaintiff's incapacity to understand it when read to her; and that she relied upon his fraudulent statement as to its contents. She further alleges that, when the instrument was read to her, she, "thinking, and having been induced to believe by the defendant, that she knew what the contents of the said instrument were, and that it was read to her as a mere form, plaintiff was unable to keep her attention fixed upon said reading, and her attention wandered from the reading of the long legal document, and the real terms thereof were unheeded by her." That no further explanation thereof having been made to her save the reading of the instrument, and the statement that it was a lease of her property, she executed and acknowledged it. After she had ascertained, upon consultation with friends, how she had been deceived with reference to the rental value of the premises, and had vainly endeavored to get the defendant to reform the lease so as to make it conform to what her husband had persuaded her to agree to, she rescinded the contract and notified the defendant thereof at once. The prayer of the complaint is that the contract, as executed, be rescinded, and for such other and further relief as equity may require.

Upon demurrer, all the facts stated in the complaint, which are offered to be proved, must be taken as if proved. It is evident, therefore, that the defendant was to have the use and occupation of the plaintiff's premises for a rent far less than its value, that the lease was executed for an inadequate consideration, and that the plaintiff, while not entirely incapacitated, was of great mental weakness, under the influence of the defendant, acting throughout with a fraudulent intent through her husband, who was his ignorant tool, and that she executed the lease sought to be canceled under such conditions. This is sufficient to bring the case in hand within the rule laid down by the appellate court in the case of *Richards* v. *Donner*, 72 Cal. 211, 13 Pac. Rep. 584. There the court declares that an imposition was practiced upon one Peck, a man of great weakness of mind, though not absolutely disqualified, through which he was induced to execute a deed, in that he was permitted to so execute it under the belief that he was reserving and securing to himself during his life the control and revenues of his property.

It was unnecessary, notwithstanding the defendant's argument to the contrary, to have offered to refund the rents received at the rate of $150 per month, even if it be conceded that the complaint shows that they were paid, for, if they were paid, the defendant must have occupied the premises for a rent greatly less than they were worth, so that he is already fully reimbursed for the payments he may have made to the plaintiff.

The complaint is couched in ordinary and plain language, such as can be readily understood, and is not obnoxious to the second ground of demurrer.

We advise that the judgment be reversed, and the cause remanded for further proceedings.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for further proceedings.

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77 Cal. 579

SILVARER *v.* HANSEN *et al.* (No. 11,673.)

(*Supreme Court of California.* December 26, 1888.)

1. APPEAL—REVIEW—HARMLESS ERROR.
   Where, aside from certain improper evidence admitted, the evidence of defendant's adverse possession is so strong that the finding could not well have been otherwise, the error in admitting such improper evidence is harmless.
2. EJECTMENT—ADVERSE POSSESSION—EVIDENCE.
   On the issue of adverse possession, the testimony of witnesses who have lived on the premises, and are familiar with the character of the fences, and who testify that the fences were sufficient to keep out stock, is admissible.
3. BOUNDARIES—ADJOINING OWNER—AGREEMENT.
   Possession and assertion of ownership under a contract to purchase are sufficient to constitute the occupant an adjoining owner for the purposes of agreed boundary lines, and to enable him to make a valid agreement for such lines.
4. SAME—RECOGNITION—DISPUTED LINES.
   Where the true boundary lines are uncertain, and can be determined only by judicial inquiry, it is not necessary that there should be any actual dispute between the parties as a basis for an agreed line.

5. APPEAL—REVIEW—PRESUMPTIONS.

Where the record of another's suit, the judgment in which was admitted in evidence, is not before the court on appeal, it will be presumed that the trial court's finding on that point was correct.

6. PRACTICE IN CIVIL CASES—MOTION TO STRIKE OUT.

A motion to strike out parts of a pleading, not made until the case has been tried, reversed on appeal, and ready for the second trial, comes too late.

In bank. Appeal from superior court, Santa Cruz county; F. J. MCCANN, Judge.

Ejectment by William Silvarer against Lawrence Hansen and Nelson Struve. Trial to the court, and judgment for defendants. Plaintiff appeals.

Charles B. Younger, for appellant. *H. S. Kittredge*, for respondents.

PER CURIAM. Ejectment. The defendant Struve claims to have become the owner of a portion of the land described in the complaint, by adverse possession. The defendant Hansen claims another portion of the land by virtue of a boundary line alleged to have been agreed upon by the plaintiff and himself in 1873.

1. The facts found by the court show that the defendant Struve made out a valid defense under the statute of limitations. The deeds under which he and his predecessors claimed were sufficient color of title, and these deeds, taken in connection with the evidence as to the character of the natural and artificial fences, and the actual possession of the defendant, show the extent of the possession claimed by defendant, and that he was holding in good faith under claim of right in himself, and adverse to all others. *Wilson* v. *Atkinson*, *ante*, 66, (filed December 12, 1888;) *Smith* v. *Shattuck*, 7 Pac. Rep. 335; *Oglesby* v. *Hollister*, 18 Pac. Rep. 146; *Grimm* v. *Curley*, 43 Cal. 253; *Tryon* v. *Huntoon*, 67 Cal. 328, 7 Pac. Rep. 741.

The court found that in 1864 Dunlap was in possession of the land claimed by defendant Struve herein, together with a tract of land adjoining the same on the west; that in 1867 W. H. Patterson, who was the owner of said adjoining tract, entered into a contract in writing to sell and convey said tract to Dunlap, and in March 1873, delivered to Dunlap a deed conveying said adjoining tract; that there has never been a fence between or dividing said tract and the parcel claimed by defendant, but that said parcel, with said adjoining tract, has always constituted a single body of land as a farm; that from the fall of 1864 to the end of October, 1873, Dunlap was in the actual possession and occupation of said body of land, including said parcel, and during all that time said land was inclosed and protected by a substantial inclosure throughout and around its whole circumference, and was resided on by said Dunlap and his family; that said land was cultivated and improved by him, and used by him, for the ordinary purposes of husbandry and pasturage; that this possession and use by Dunlap was at all times open, notorious, uninterrupted, exclusive, under a claim of title in himself, and exclusive of any other right, (except in said Patterson between the dates of the contract and the deed;) that on October 27, 1873, Dunlap conveyed to Struve the tract purchased from Patterson, and on October 31, 1873, conveyed the land to Struve which is herein claimed by him; "that thereupon said Struve took actual occupation and possession of said premises, including said parcel herein claimed under said deeds, and from October, 1873, to the time of the commencement of this suit, and ever since, he, in like manner as said Dunlap, had taken, possessed, occupied, cultivated, improved, and used the same, constituting, as before, a single body of land or farm, and inclosed and protected as before by a substantial inclosure, openly, notoriously, continuously, uninterruptedly, exclusively, under claim of title in himself, exclusive of any other right; that from 1864 to the time of the commencement of this suit the plaintiff, William Silvarer, and his grantor, Charles Silvarer, had actual notice and knowledge of the said possession, use, and occupation of said Dunlap and Struve, and of said inclosure, and of the acts of ownership exercised by them over said body of land, and at no time did either of them make any objection to the same until this suit was brought."

These findings, we think, are supported by the evidence. The court erred in admitting in evidence the deposition of Dunlap, but the error, we think, was harmless. The testimony of Dunlap, so far as it refers to Struve's claim, shows the possession of the latter. Upon the question of possession there is practically no conflict. The evidence offered by the defendant to show his possession is so strong and direct, and that of the plaintiff, which tends to contradict it, is so qualified and weak, that the decision could not well have been otherwise than in favor of Struve, if the deposition of Dunlap had been excluded. The fact that Struve did not suppose he was interfering with anybody's rights does not defeat his right to claim by adverse possession. *Grimm* v. *Curley, supra.* It is, however, a circumstance tending to establish more strongly the good faith and exclusiveness of his own claim.

We see no error in the rulings of the court admitting in evidence the testimony of the Dunlaps and of Struve as to the character of the fence. The witnesses referred to had been living on the ground, and were familiar with the fence and its operation from personal observation. They testify, not so much as a matter of opinion, but as a matter of knowledge, that the barriers constituting the fence did operate to keep the stock out.

2. The court found that in the spring of 1873, and prior thereto, defendant Hansen and Charles Silvarer were the owners, and in the actual and exclusive possession, each claiming ownership in his own right, of adjoining tracts of land; that during said period the true boundary line between the tracts was uncertain and indefinite; that while they were the owners and in the possession of said tracts (spring of 1873) Hansen proposed to Silvarer that they should establish and mark a line as a boundary between their said tracts, and construct a division fence on it; that Silvarer agreed to this, went on the ground with Hansen and others, placed stakes as upon the line, and then agreed with Hansen that the line thus designated should be the division line and boundary between said tracts; that Hansen also agreed to this, and the fence was then so erected on the line so agreed upon, and was accepted, recognized and agreed by said parties to be the partition fence, and has remained there as such to the present time; that after the erection of said fence both parties occupied and used their lands exclusively on each side, respectively, up to the line of the fence so built, and that Hansen from that time continuously to the present time has been in the actual and exclusive possession and use under said agreement of the said tract on his side up to the line of said fence; that after the erection of the fence, and prior to the year 1876, Hansen dug a ditch along the fence on his side; that the land affected by the agreement is the parcel described in the defendant Hansen's answer; that Charles conveyed to William Silvarer, May 17, 1877, the premises described in the complaint, which included the parcel of land claimed by the defendant; that plaintiff then had notice of the said agreement between Charles Silvarer and the defendant Hansen, and of the establishment and location of said agreed line, and the fence thereon, as the boundary or division line between them along the easterly side of said parcel.

We think the evidence supports these findings. The boundaries of the Corralitos and Pajaro ranches conflicted. The easterly boundary of the Corralitos, as designated in the patent, was the "center of the slough," and the westerly boundary of the Pajaro rather close to the upland. Between these two boundaries, therefore, was left a strip of slough land which is the subject of controversy between the adjoining claimants. Hansen purchased from Patterson on the Corralitos side, and went into possession of a portion of the slough land. Silvarer held adjoining lands on the Pajaro side. The Corralitos lands held by Hansen were contiguous to the lands of Silvarer. The contract from Patterson was properly admitted in evidence to show the extent and nature of his claim in June, 1868, and this contract, and his possession and acts thereunder, we think, were sufficient to constitute him, so far as Silvarer was concerned, an adjoining owner within the meaning of the authorities on questions of agreed boundary lines, and to enable him to make a valid agreement with Silvarer for a division line. Patterson's claim evidently had some substance, and it was judicially determined in his favor by the decree of partition, in 1871. Hansen received a deed from Patterson in 1876, before the commencement of this suit. Silvarer seems to have recognized Hansen as an adjoining owner. He testified that defendant asked him for a quitclaim deed of the land in suit in 1874, and he told him that his (Hansen's) land was on one ranch, and his (Silvarer's) was on another. He said: "I told him that I had no quitclaim to give. My land was on the Bolsa del Pajaro, and his land was on the Corralitos." The evidence is quite clear that the defendant Hansen fenced and ditched the land upon the strength of the agreement made with Silvarer. The boundaries of Silvarer's land were uncertain, indefinite. It is in testimony that to make a survey to include the disputed premises the surveyor would have to go by the "lay of the ground, and by fences, and possession of adjoining occupants, and by rejecting and changing and adding calls of deed." The lines of the two ranches overlapped. Neither of the parties could tell where Silvarer's lines were. The conflict was one which could be determined only by judicial investigation. It seems that they preferred to adjust it between themselves. It is not necessary in such cases that there shall be an actual dispute as a basis for an agreed boundary line. *Helm* v. *Wilson*, 18 Pac. Rep. 608.

The interest or title held by Patterson does not clearly appear, but, as stated before, the presumption is that Patterson had some valid claim. The decree entered in the suit for the partition of the Corralitos ranch gave him a title conclusive upon all other parties to the suit, and those in privity with them, and constituted a color of title as against all the world. There can be no doubt, we think, that the conveyances from Patterson to Hansen, and the judgment roll in the partition suit of *Patterson* v. *Roach and others*, were properly admitted in evidence. The suit referred to was brought by Patterson against Roach and others. We have not the record of that suit before us here. It does not appear who the other defendants were. The presumption we indulge here is always in favor of the correctness of the finding of the court below. It is for the appellant to show error.

What we have said above respecting the deposition of Dunlap is applicable to the case made by the defendant Hansen. It was improperly admitted in evidence. The testimony of Hansen tended to establish an agreement between defendant and Silvarer for a division line, but, as in Struve's case, we think the error was not prejudicial. Hansen's occupancy of the land, his building of the fence, and excavation of the ditch seem to be admitted. The evidence is overwhelmingly in support of the finding of the court, regardless of the testimony of Dunlap. The denial made by Silvarer in his testimony was rather qualified.

3. There was no error in the refusal of the court to strike out certain denials in the answers. Said answers were filed in August, 1877. The case was tried without any motion having been made to strike out any portions of the answers. Judgment was rendered in 1878, an appeal was taken, and the judgment was reversed. The *remittitur* was filed in the lower court on March 12, 1879, but no motion to strike out was made until just before the commencement of the second trial, on May 4, 1885. Under these circumstances the motion came too late. The delay operated as a waiver by the plaintiff of the objection.

Several assignments of error are made as to rulings of the court on evidence offered and admitted. Cross-examination is largely in the discretion of the trial court. We see no abuse of discretion here.

Judgment and order affirmed.

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77 Cal. 601

PACIFIC SEVENTH-DAY ADVENTIST PUB. ASS'N *v.* MCKENNEY *et al.*

(No. 11,485.)

(*Supreme Court of California.* December 27, 1888.)

CONTRACTS—CONSTRUCTION.

Plaintiff contracted to print a book compiled by defendant M., and defendants H. & J., who were to bind and superintend the sale of it, guarantied to pay plaintiff for the printing out of the first money realized from such sales. They realized therefrom more than the amount due for printing, but failed to pay a balance of $1,510. Afterwards plaintiff contracted to print another book for M., the latter's portion of the profits, after paying all proper expenses, to be applied in payment of the $1,510. An employe of M., without the knowledge of any of the parties, pirated certain copyrighted articles which were included in this book, and the owners of the copyright recovered judgment against plaintiff and M. for the infringement. *Held*, that neither M. nor H. & J. were entitled to have the amount of this judgment, when paid by M., credited on the $1,510.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action on contract, brought by the Pacific Seventh-Day Adventist Publishing Association against L. M. McKenney and the firm of Hicks & Judd. Trial to the court, and judgment for plaintiff, from which it appeals.

F. M. Husted and *H. A. Powell*, for appellant. *Tyler & Tyler*, for respondents.

BELCHER, C. C. This is an appeal by the plaintiff, a corporation, from a judgment rendered in its favor against the defendants, and the case comes here on the judgment roll. It is claimed that the judgment was not for as large a sum as plaintiff was entitled to recover. The facts found by the court are in substance as follows:

In 1880 the plaintiff was a corporation engaged in the business of printing and publishing. The defendant McKenney was engaged in compiling a book called the "Pacific Coast Directory," and the defendants Hicks and Judd were partners engaged in the business of book-binding. An arrangement had been entered into between McKenney and Hicks & Judd, by which they were to bind the directory for him, and were to attend to the distribution and sale thereof, and to collect and receive all the moneys arising therefrom. McKenney applied to plaintiff to print his directory, and plaintiff agreed to do so, provided Hicks & Judd would become responsible as guarantors for the price of the printing. Thereupon Hicks & Judd entered into a written agreement to pay plaintiff for printing the directory "out of the first money received in collections for the same." The plaintiff then printed and delivered to defendants 5,000 copies of the directory, and the price of the printing amounted to $3,264.92. Hicks & Judd disposed of the book, and received in collections for the same more than the sum due plaintiff. They paid to the plaintiff various sums, and thereby reduced the amount due to $2,020.92. This action was brought to recover the last-named sum, and after it was commenced a further payment was made, leaving then due only $1,510.

Subsequently, and while the action was still pending, McKenney compiled another directory, and engaged the plaintiff to print and bind the same. A written agreement was entered into between the parties, which provided, among other things, that the collections for the directory were to be paid to the plaintiff, and that out of the gross collections all expenses of printing, binding, paper, compiling, etc., together with all other legitimate expenses, should be paid; that of the balance on hand, after the payment of all such expenses, McKenney should receive one-third and the plaintiff two-thirds, the two-thirds, however, to be applied to McKenney's indebtedness to plaintiff, consisting of the said $1,510 and $400 due for other printing; and, if any surplus should remain after paying the two claims mentioned, then it should be divided equally between the parties. Pursuant to this agreement the directory was printed, bound, and delivered for distribution by the plaintiff.

While McKenney was engaged compiling materials for the last directory he employed an assistant to write sketches descriptive of certain towns to be mentioned therein, and the assistant, without his knowledge, pirated the sketches from a copyrighted work owned by one Disturnell. As soon as McKenney began to deliver the book to the subscribers therefor, Disturnell commenced an action in the United States circuit court for California against him and the plaintiff, praying for damages and an injunction restraining any further distribution. Thereupon McKenney eliminated the pirated sketches, and had a part of the book reprinted, and then delivered the volumes to the subscribers therefor, and made the collections. Disturnell prosecuted his action, and recovered judgment therein, against McKenney and the plaintiff, for the sum of $964.80, damages and costs. McKenney paid this judgment out of the money realized from the collections for the directory, and the balance of the profits arising from the publication of the work was credited by the plaintiff on its claim for $1,510. This balance paid the interest on the claim up to March 20, 1885, and $201.66 on the principal. The defendants contended at the trial that the $964.80 should also have been credited on the plaintiff's claim of $1,510, and that there was consequently left due thereon only the sum of $343.54. The court accepted the defendants' theory, and rendered judgment against them for the last-named sum.

Whether this theory was right or not is the only question presented for decision.

It is clear that McKenney was not entitled to the credit allowed, and that as to him the judgment was erroneous. He paid the $964.80 in satisfaction of a judgment against himself, and obviously could not ask to have the same money again credited on another claim. It is also clear, we think, that Hicks & Judd were not entitled to the credit allowed. They obligated themselves to pay plaintiff for printing the directory out of the first moneys received from collections, and the collections made by them were more than sufficient to make the payment. They were not parties to and had no connection with the agreement between plaintiff and McKenney as to the second directory. Under that agreement the plaintiff was to print and bind the directory, and out of the collections all expenses of printing, binding, paper, compiling, etc., were to be paid, together with all other legitimate expenses. Until all these expenses were paid, there was to be no division of the profits, and consequently nothing to be applied towards the liquidation of the $1,510. The liability, in payment of which the $964.80 was used, was incurred in getting out the directory, and in consequence of a wrong committed by an employe of McKenney, and not by reason of any fault or failure on the part of plaintiff. The payment of this liability was therefore a legitimate expense, which had to be met, and came fully within the terms of the agreement. This being so, Hicks & Judd had no right to the credit, and the judgment as to them was also erroneous.

We therefore advise that the judgment be reversed, and the cause remanded, with directions to the court below to enter judgment against the defendants on the findings for $1,308.34, with legal interest thereon since March 20, 1885.

I concur: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with directions to the court below to enter judgment against the defendants on the findings for $1,308.34, with legal interest thereon since March 20, 1885.

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77 Cal. 612

BANK OF NAPA *v.* GODFERY. (No. 11,697.)

(*Supreme Court of California.* December 27, 1888.)

1. MORTGAGES—FORECLOSURE—UNMATURED INSTALLMENTS.

   Code Civil Proc. Cal. § 728, relating to mortgage foreclosures, provides that if the debt for which the mortgage is held is not all due, as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease, and that as often as more becomes due the court may order more to be sold. The complaint, in an action on a note and a mortgage, showed that only a part of the debt was due, and when the balance matured. The complaint alleged that the whole amount called for by the note was due at the commencement of the action, and general relief, and a sale of the land for the satisfaction of the whole, was asked for. *Held*, that a decree showing the amount due, and the sums yet to become due, was proper, and plaintiff was authorized to move the court for a sale of sufficient of the property to satisfy each of the unmatured installments as they fell due.

2. SAME—VACATING DECREE—SALE FOR OTHER INSTALLMENTS DUE.

   An "amended petition" filed by plaintiff after the decree, alleging that other installments had become due, and that no sale had been made under the decree, and asking that it be vacated, and another decree granted, was not authorized. The proper practice was to file a motion reciting the proceedings, and that other installments had matured, and asking for a sale of enough of the property to satisfy the amount due, but in this case the petition will be treated as a motion.

3. SAME—SALE.

   The language of the section quoted, "as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease, and afterwards," etc., "the court may, on motion, order more to be sold," is a provision for the benefit of the debtor, and does not prevent the court from making an order for the sale, because no sale had been made to satisfy the amount found to be due when the suit was commenced.

In bank. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action by the Bank of Napa against C. H. Godfery, to recover amount due upon a promissory note, and to foreclose a mortgage securing it. Defendant appeals from a judgment for plaintiff.

F. E. Johnston, for appellant. *G. W. Towle* and *E. D. Ham*, for respondent.

WORKS, J. On the 19th day of March, 1885, the plaintiff brought this suit to recover on a promissory note for $1,200, bearing date February 7, 1884, payable two years after date, with interest at the rate of 8 per cent. per annum, payable semi-annually, and to foreclose a mortgage given to secure the payment of the same. The complaint is in the usual form, and alleges that the whole amount of the note is due and unpaid, except certain items of interest, which are stated. The prayer is that "the usual decree may be made for the sale of the premises by the sheriff of said county, according to the law and the practice of this court," and for the sale and application of the proceeds in the usual form. The complaint was not verified, and the answer is a general denial. The court found that there was due on the note a semi-annual installment of interest, amounting to the sum of $45.60, and interest thereon; that by the terms of the note and mortgage there would become due on the 7th day of August, 1885, a like installment of interest, and on the 7th day of February, 1886, another of said installments of interest, together with the whole of the principal of said note, would become due and payable; and fixed the attorney's fee at $50. The decree of the court was in accordance with these findings, and adjudged "that all and singular the mortgaged premises mentioned in the said complaint, and hereinafter described, or so much thereof as may be necessary to raise the amount due the plaintiff for the interest now due and costs in the suit, and expenses of sale and attorney's fees, be sold according to law," etc.; "and it is further adjudged and decreed that hereafter, as more shall become due, according to the terms of said note and mortgage, and remain unpaid, the plaintiff may apply to the court for a decree that more of the mortgaged premises be sold to satisfy the same, with costs and attorney's fees."

On the 15th day of March, 1886, after the whole of said note, principal and interest, had become due, the plaintiff filed in the court below what is termed an "amended petition," reciting fully the proceedings had in the cause, and alleging that the other installments of interest and the principal of said note had become due, and the amounts thereof, and that no sale had been made under the former decree of the court; that the same remained wholly unexecuted; and that the mortgaged premises were worth less than the amount due. The prayer of this pleading is "that the former decree, so far as it relates to the sale of the whole or any part of the mortgaged premises, be vacated and set aside," and for a second decree of foreclosure. The defendant demurred to this "petition" on the ground that it did not "state facts sufficient to authorize the court to grant the relief prayed for, or any relief whatever." The demurrer was overruled, and the defendant failing to answer over, a default was entered against him, and the court entered a second "judgment and decree," reciting the amounts which had become due on the note since the former decree, and ordering the sale of the "unsold portion" of the real estate in the usual form. The former decree was not vacated as prayed for. The defendant appeals from both of the judgments, and from the order overruling the demurrer to the amended petition, and brings the case up on the judgment roll.

We have set out these proceedings thus fully, not that they may be adopted as models of correct practice, but that the questions presented and decided may be better understood.

The first point made by the appellant is that so much of the findings and decree of the court first entered, as relate to the installments of interest, and the principal not due, are outside of the issues, and the findings cannot, for that reason, support that part of the decree adjudging the time when these several amounts would become due, and authorizing the plaintiff to apply for a sale of the property remaining unsold for their satisfaction as they matured. This contention is based upon the assumption that the complaint does not allege the facts showing when these unmatured portions of the note would become due, and that, therefore, the judgment could only be for the amount of interest actually due, and for the sale of the property, or so much thereof as might be necessary to satisfy the same. Arguing from these premises, it is further contended that as there were no valid findings or decree for the future sale of the property, or any part of it, to satisfy the sums of money not yet due, there was no foundation for the subsequent proceedings by which a second decree of sale was given, and therefore defendant's demurrer to the amended petition should have been sustained.

In the original complaint it was alleged that the whole amount called for by the note sued on was due at the time of the commencement of the action, and a sale of the land for the satisfaction of the whole was asked for. But the note and mortgage were set out in full, and showed that only a part of the debt was due, and when the balance would mature. The prayer of the complaint being general, the plaintiff was entitled to any relief consistent with the facts pleaded. *Truebody* v. *Jacobson*, 2 Cal. 269; *Hall* v. *Lonkey*, 57 Cal. 80. The real issues in the case, as presented by the pleadings, were whether or not the plaintiff was entitled to recover upon the note, and to a foreclosure of the mortgage according to their terms. The fact that plaintiff treated the whole of the amount of the note as being due did not make it so, as against the terms of the note set out in, and made a part of, the pleading, nor could the issues be thereby confined to the mere question whether the note was then due or not. The court below found the facts in accordance with the instruments which were the foundation of the action. The findings were strictly within the issues as we construe the pleadings. This being true, the question is presented, what were the rights of the plaintiff under the findings, and the judgment based upon them, authorizing a subsequent decree of sale for the unmatured portions of the note as they fell due?

The Code provides, (section 728:) "If the debt for which the mortgage, lien, or incumbrance is held is not all due, so soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease; and afterwards, as often as more becomes due, for principal or interest, the court may, on motion, order more to be sold. But if the property cannot be sold in portions, without injury to the parties, the whole may be ordered to be sold in the first instance, and the entire debt and costs paid, there being a rebate of interest where such rebate is proper."

We are quite clear that the decree of the court showing the amount due, and the sums yet to become due, was proper. Under the section quoted, the plaintiff was authorized to move the court for a sale of sufficient of the property to satisfy each of the unmatured installments as they fell due. The "amended petition" was not authorized, if it must be treated as a complaint. There is no such pleading known to our practice in this class of cases as a "petition," but, if it had been properly named, the pleading, treated as such, was entirely out of place, being filed after the case had been disposed of by a final decree. The proper practice on the part of the plaintiff would have been to have filed in the court below a motion, reciting the proceedings in the case, and that other installments of the money due upon the note had matured, and asking for a sale of the property, or enough thereof to satisfy the amount due. We are not inclined to be technical, however, under the circumstances of this case, and therefore hold that the "petition" filed may properly be treated as such a motion as the Code authorizes, and that, as such, it was sufficient, and the demurrer to it, which sets forth no ground of demurrer known to the Code, was properly overruled.

The appellant claims that the court had no power to make the order for the sale, because no sale had been made to satisfy the amount found to be due when the suit was commenced. This position is based upon the language of the section above quoted, "as soon as sufficient of the property has been sold to pay the amount due, with costs, the sale must cease, and afterwards," etc., "the court may on motion order more to be sold." We construe this to be a provision for the benefit of the debtor, to prevent the sale of more of his property than is necessary to pay the amount due. But here, instead of selling a part of the land to satisfy the amount due, and then ceasing, he forbears and sells none at all. It would be a strange perversion of justice to hold that the forbearance of the creditor to enforce the collection of the amount due, and thereby impose upon the defendant the cost of several sales, must lose him his whole debt. We cannot give the section such a construction. It is evident to our minds that the appellant is seeking the aid of this court to avoid the payment of a just obligation, and, while we cannot commend the course taken to enforce its payment, we hold that the statute has been substantially complied with, and the proper result has been reached.

The judgment and order appealed from are affirmed, with 10 per cent. damages.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.; THORNTON, J.

77 Cal. 605

SEPULVEDA *v.* SEPULVEDA. (No. 12,508.)

(*Supreme Court of California.* December 27, 1888.)

DEED—NATURE OF ESTATE CONVEYED.

Plaintiff was given by her husband's will a life-estate in his undivided one-fifth interest in certain land, with remainder to her children. No reference was made in the will to her community interest. By the death of two sons she acquired greater interests in the land. By a deed, in 1880, she conveyed to her son A. all her interest in a portion of the land. In a partition suit A. admitted that this deed was not intended to convey to him plaintiff's life-estate. By deed, in 1882, she conveyed to A. all her interest in the rest of the land. In 1884 she made a third deed, conveying to him all her life-estate, as well as her claim in the community property. The consideration expressed was one dollar and support during life, and the deed stated that it was intended to correct any mistake as to the interest intended to be conveyed, and that such interest was an undivided one-tenth interest and a life-interest in the remaining undivided one tenth. *Held*, that the provisions of the last deed must govern, and the grantee acquired the one-tenth undivided community interest and the undivided one-tenth life-interest, but not the property inherited from the children.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Chapman & Hendrick, for appellant. *Bicknell & White* and *Howard & Robarts*, for appellee.

HAYNE, C. Suit to declare a trust, and for a conveyance. José Diego Sepulveda died in April, 1869, being then the owner of an undivided one-fifth of the Rancho los Palos Verdes, and of the whole of a piece of land on Date street, in the city of Los Angeles, (both of which were community property,) and leaving him surviving the plaintiff, who was the widow, and Aurelio W. Sepulveda, who was their son, and certain other children and grandchildren. The deceased left a will by which the plaintiff was given a life-estate in all the property, with remainder in equal shares to the children, but which made no reference to the community rights of the plaintiff. This will was admitted to probate, and plaintiff qualified as executrix thereof. The administration was unclosed at the commencement of the suit. In November, 1869, one of the sons died, and the plaintiff inherited from him an additional interest in the above-mentioned property; and in December, 1872, another son died, and the plaintiff inherited from him a still further interest. In November, 1880, she "conveyed to said Aurelio W. Sepulveda all her right, title, and interest in the said Rancho Palos Verdes." This deed was introduced in evidence in a partition suit of the rancho, which was then pending, and upon it, and the admission of Aurelio that it was not intended to cut off the life-estate of the plaintiff herein, the court decreed that she had a life-estate in the property, and awarded the fee (subject to the life-estate) to the children. In March, 1882, the plaintiff made a second deed to Aurelio, by which she conveyed to him all her right, title, and interest in the property on Date street. This deed recited that it was made in consideration of one dollar, and of the care and maintenance of the plaintiff. In May, 1884, the plaintiff made a third deed to Aurelio, by which she conveyed to him "all her life-estate in, as well as her interest, claim, and estate in, the community property acquired by her and her deceased husband, José Diego Sepulveda, during their marriage, in the Rancho Palos Verdes." This deed recites that it is made in consideration of one dollar, and in further consideration "that the party of the second part shall maintain her during her life;" and contains the following clause: "This deed is made to correct any misunderstanding that might exist as to the nature of the interest heretofore conveyed by the said party of the first part to the party of the second part in said rancho; it being understood that the party of the first part intended to then, and by this conveyance does, convey an undivided one-tenth interest in said Palos Verdes, as also a life-interest in the remaining one-tenth undivided of said rancho. It is further understood that, if the party of the second part should die before the party of the first part, then the above-mentioned property shall be given back to the party of the first part."

The plaintiff attacks these deeds for want of consideration, and for fraud, alleging, in substance, that she was old, and ignorant of the laws and of her rights, and reposed confidence in her son, and made the deeds at his request, and under his advice, for the purpose of enabling him the better to attend to certain litigation and other matters; that she was ignorant of the actual contents of the deeds; and that he fraudulently took advantage of her ignorance, etc. These charges of fraud and want of consideration are completely negatived by the findings; and, as the evidence is not brought up, we must take the findings to be true.

The plaintiff contends, however, that even if the deeds are taken to be valid, yet that upon a proper construction they must be held not to intentionally cover the interests in the Rancho Palos Verdes which she inherited from her two deceased children. The first deed, being of all the right, title, and interest in the ranch, was, of course, sufficient to pass the interest which she had theretofore inherited from her said children. The argument is, however, that, so far as the ranch is concerned, the third deed amounts to an admission that it was not the intention to pass the interests mentioned. And we think this view must be sustained. The deed of 1884 first grants in terms the community interest and the life-interest. Then it specifies what these interests were, viz., one-tenth of the rancho, and a life-estate in another tenth. If the plaintiff had any community interest (the doctrine of election being lost sight of) it would be an undivided one-tenth. And if she had a life-estate it would (under her theory) be a life-estate in one-tenth of the rancho. It is clear, therefore, that the deed is confined to the interests which she was supposed to derive in one way or another from her husband. It certainly cannot be construed to apply to the interests which she derived from her children. Now, this deed expressly declares that it was made to correct any misunderstanding that might exist as to the operation of the other deed; to show what it was "intended to then * * * convey." The parties, therefore, did not intend, by their first deed, to convey anything more than the interests which the plaintiff acquired on her husband's death; or, in other words, the first deed was not intended to pass the interests which plaintiff acquired from her children. Aurelio accepted the deed of 1884, and the defendants expressly aver in their answer that it was made "for the sole purpose and with the intent of correcting and dispelling any doubt, if any existed at the time, as to what she intended to convey, and did convey, to the defendant, Aurelio W., by the deed of conveyance dated November 1, 1880." And, this being the case, he cannot be permitted to fall back on the deed of 1880, or to say that the last deed is not to govern. *Emeric* v. *Alvarado*, 64 Cal. 587, 2 Pac. Rep. 418. There being, therefore, a solemn admission that the first deed did not correctly set forth the intention of the parties, a court of equity will give the necessary relief. The deed of 1884 being set out in full, its construction is a matter of law; and, so far as this branch of the case is concerned, it was not necessary to bring up the evidence. The learned counsel for the respondents have not argued that the decree in the partition suit is a bar to appellant's claim, and we deem it sufficient to say that we have considered that question, and do not think that such decree operates as a bar to the claim. The appellant is, in our opinion, entitled to a decree for a reconveyance of the interests she inherited from her deceased children, and a corresponding portion of the rents and profits. We therefore advise that the judgment be reversed, and the cause remanded to the court below, with directions to determine from such additional evidence as may be introduced what is the appellant's share of the rents and profits, and to render judgment upon the findings in accordance with the principles of this opinion.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded to the court below, with directions to determine from such additional evidence as may be introduced what is the appellant's share of the rents and profits, and to render judgment upon the findings in accordance with the principles of the above opinion.

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78 Cal. 34

MUDGE *et al.* *v.* STEINHART *et al.* (No. 11,489.)

(*Supreme Court of California.* December 29, 1888.)

1. ATTACHMENT—FOR FRAUD—PROPERTY OF NON-RESIDENT—VALIDITY.
   Under Code Civil Proc. Cal. § 537, a writ of attachment can issue only "in an action upon a contract, express or implied." *Held*, that where the property of a non-resident, who was not served with summons, was attached in an action founded upon his fraud and collusion with plaintiff's debtor, whereby the latter's property was put out of the reach of his creditors, the attachment was absolutely void, and gave the court no jurisdiction to render even a judgment *in rem* against the property attached.
2. JUDGMENT—IN ABSENCE OF ANSWER—PRAYER.
   Under Code Civil Proc. Cal. § 580, providing that where there is no answer the relief "cannot exceed" that prayed for in the complaint, it is improper to grant the plaintiff any relief other than that prayed for.
3. WRITS—SERVICE BY PUBLICATION—MAILING.
   It is not improper to deposit a summons and complaint, in an action against a non-resident, in the post-office of the city where the plaintiff's attorney resides, instead of the city where the order of publication was made.
4. SAME—MAILING AMENDED COMPLAINT.
   An amended complaint, being the existing pleading on part of the plaintiff, is the proper pleading to deposit in the post-office under an order of publication.

In bank. Appeal from superior court, Santa Clara county; FRANCIS E. SPENCER, Judge.

Action by Enoch R. Mudge, Joseph Sawyer, Lowell Lincoln, and Charles H. Jay, partners as Mudge, Sawyer & Co.; Edmund W. Converse, Walter Stanton, Daniel A. Davis, Moses W. Richardson, partners as Converse, Stanton & Davis; Seth M. Milliken, William A. Milliken, Joseph E. Blaton, and Owen E. Gibbs, partners as Deering, Milliken & Co.; and The Importers' and Traders' National Bank of New York, against Israel Steinhart, Adolph Feist, and Abraham L. Frank, surviving partners of the firm of Feist, Frank & Co.; Felix Feist, Simon Marks, William Scholle, and Jacob Scholle, surviving partners of the firm of Scholle Bros.; Martin Herman, Alexander Herman, and Cesar Piatti, as administrator of the estate of Meyer Levy, deceased. Defendant William Scholle alone appeals.

McAllister & Bergin and *Wm. H. Sharp*, for appellant. *Wm. Mathews*, for respondents.

SEARLS, C. J. This is an appeal by William Scholle, one of the defendants, from a final judgment in the above-entitled cause, subjecting certain real property, situate and being in the city and county of San Francisco, to sale, to satisfy claims of the several firms, and a corporation composing the parties plaintiff. Defendant Scholle, the appellant, was at the date of the complaint a non-resident of the state of California, and a resident of New York city, in the state of New York. The summons was served upon him by publication; and, no answer having been filed by or for him, judgment was taken by default. It appears from the judgment that certain real property of appellant in the city and county of San Francisco had been, before the service of summons, attached to satisfy the demands and costs of the plaintiffs in the action; and the extent of the judgment, as against appellant, is to decree this real property to be sold to satisfy the amount found due from him to the plaintiffs.

Various objections are urged by appellant to the validity of the judgment, among which are: (1) That the relief granted by the court is other and different from that prayed for in the complaint. (2) That as against appellant there was no proper service of summons, by publication or otherwise. (3) That the case was not one in which a writ of attachment could issue; and, as this was the only basis of jurisdiction against appellant, the judgment cannot be upheld.

As the last-named objection seems the most important, we will consider it first. The allegations of the amended complaint, the prayer for judgment, and facts as to service of summons essential to an understanding of the foregoing points, may be stated thus: The firm of Feist, Frank & Co., composed of Adolph Feist, Abraham Frank, Jacob Levy, and Israel Steinhart, were engaged in business in San Francisco, and, as such firm, purchased goods, wares, and merchandise from the several firms, etc., the plaintiffs herein, all of whom were New York merchants. Being largely indebted for goods thus purchased, the firm of Feist, Frank & Co., for the purpose of cheating and defrauding their creditors, by collusion with appellant and the other defendants herein, and without consideration, made a large number of promissory notes for various large sums of money to various persons, who conspired with them to accomplish the result in view. Numerous actions were instituted in this state against Feist, Frank & Co., among which was one by appellant and others, upon eight of said pretended and fraudulent promissory notes for the sum of $24,124.42, in which action a writ of attachment issued and was levied upon the property of Feist, Frank & Co. Judgment was obtained by appellant and his associates, and execution issued, under which property of the value of $200,000 was sold, and purchased by the appellant, in the name of one of the other defendants. Plaintiffs had obtained judgments against the firm of Feist, Frank & Co., who are insolvent, before the institution of this action.

The amended complaint herein contains full and ample charges of fraud on the part of appellant, whereby, as is averred, he obtained large sums of money from the firm of Feist, Frank & Co., and contains most of the essential allegations of a creditor's bill. An order was made by the superior judge of Santa Clara county on the 15th day of February, 1884, directing the service of summons as against appellant, by publication, and directing a copy thereof, and of the complaint, to be forthwith deposited in the post-office, directed to appellant at New York city, etc. An amended complaint had been before that time filed, a copy of which, with the copy of summons, was on the same day, viz., February 15th, deposited in the post-office at San Francisco, the place of residence of plaintiffs' attorney, directed to appellant, etc., as by the order required. The appellant, being a non-resident of the state of California, and not having been served with summons except by publication, and not having appeared in the action, we must, in order to uphold the judgment, be able to see that the appellant had property in this state which was brought within the control of the court, and subjected to its jurisdiction by process adapted to that purpose, or that the judgment was sought as a means of reaching such property.

Recurring to the complaint, we find respondents sought by their allegations and prayer to obtain a personal judgment against appellant, and to subject to the satisfaction of that judgment certain real property in Santa Clara county, averred to have been purchased with the fruits of appellant's fraudulent acts. In this respondents failed, and their judgment only decreed the sale of a lot of land in San Francisco, which had been levied upon and brought within the jurisdiction of the court, under a writ of attachment issued in the cause. The contention of appellant is that, inasmuch as the action is clearly one in tort, and not founded in contract, express or implied, the attachment was improperly issued, and that its levy created no lien which the court could enforce. In discussing the jurisdiction of the court over property of non-residents not personally served, the supreme court of the United States, in *Cooper* v. *Reynolds*, 10 Wall. 319, used the following language: "Now, in this class of cases, on what does the jurisdiction of the court depend? It seems to us that the seizure of the property, or that which, in this case, is the same in effect,—the levy of the writ of attachment on it,—is the one essential requisite to jurisdiction, as it unquestionably is in proceedings purely *in rem*. Without this the court can proceed no further. With it, the court can proceed to subject that property to the demand of plaintiff. If the writ of attachment is the lawful writ of the court, issued in proper form under the seal of the court, and if it is, by the proper officer, levied upon property liable to the attachment,—when such a writ is returned into court, the power of the court over the *res* is established." This language has been quoted and approved in many of the cases which have followed it, including *Pennoyer* v. *Neff*, 95 U. S. 714.

The question presented for consideration is, Was the writ of attachment in this case the lawful writ of the court? An appeal lies from an order dissolving or refusing to dissolve an attachment, (Code Civil Proc. § 963;) hence irregularities, merely, in its inception, or as to its form, cannot be considered here, being subjects of direct attack by such appeal. This may be regarded as a collateral attack, which can only be sustained for causes which render the writ absolutely void, and not merely voidable. *Pennoyer* v. *Neff*, 95 U. S. 714. With the antiquity and scope of writs of attachment as they existed in the lord mayor's court of London, we have nothing to do. In this state the writ depends for its force upon the statute, and, being merely a statutory provision, it can have no force except in the cases provided by the statute. Under section 537 of the Code of Civil Procedure, the writ can only issue "in an action upon a contract, express or implied." *Walker* v. *McCusker*, 65 Cal. 360, 4 Pac. Rep. 206. The existence of a contract, express or implied, is an essential basis without which no writ of attachment can properly issue; and, as in this case the action was founded, not upon contract, but upon the fraud and wrongful acts of the defendant, we are of opinion the writ of attachment issued therein was absolutely void, and cannot be invoked to uphold the jurisdiction of the court. In such a case the writ cannot be said to be the lawful writ of the court. The rule, as enunciated by this court in *Belcher* v. *Chambers*, 53 Cal. 635, and in the cases cited *supra*, may be stated thus: (1) A personal judgment of a state court against a non-resident, who has not been personally served, and who has not appeared in the action, is without validity. (2) The state, having within her territory property of a non-resident, may hold and appropriate it to satisfy the claims of her citizens against him, and her courts may inquire into his obligations to the extent necessary to control the disposition of such property; and in such a case service of summons by publication or other form authorized by the law of the state is sufficient to inform the non-resident of the object of the proceedings, provided the court obtains jurisdiction of the property by seizure, or some equivalent act *in rem*, or in the nature of a proceeding *in rem;* the object being to enforce proceedings against the property. Manifestly, as we think, the process by which jurisdiction over the property is obtained must be one known to the law; as, for instance, by direct proceedings to declare and enforce a lien upon the property, or, in a case warranting a writ of attachment, by such writ, etc. In the present case we may suppose the object of the action was to follow up and enforce a lien upon the real estate in Santa Clara county, and that to that extent the court acquired jurisdiction to act, but, failing in that, it does not follow that respondents could resort to a writ of attachment, and thus confer jurisdiction upon the court to condemn other property, and that in a case where a writ of attachment could not under any circumstances properly issue.

As to the other objections it may be said briefly that the relief granted, being other and different from that prayed for in the complaint and specified in the summons, was improper. "The relief granted to the plaintiff, if there be no answer, cannot exceed that which he shall have demanded in his complaint." Code Civil Proc. § 580.

The deposit of the summons and complaint in the post-office at San Francisco, where the attorney for plaintiffs resided, and had his office, instead of the post-office at San José, where the order of publication was made, was not improper; and the amended complaint, which took the place of the original, and was the existing pleading on the part of plaintiffs, was the proper pleading to deposit under the order.

The judgment of the court below is reversed, and the cause remanded.

We concur: THORNTON, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

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77 Cal. 642

In re WALKERLEY'S ESTATE. (Nos. 12,629, 12,630.)

(*Supreme Court of California.* December 29, 1888.)

EXECUTORS AND ADMINISTRATORS—ALLOWANCE TO WIDOW.

Code Civil Proc. Cal. § 1465, providing that the probate court may set apart, for the use of the widow, the property of decedent exempt from execution; and section 1466, authorizing such reasonable allowance for the support of the family as may be necessary, according to their circumstances, during the settlement of the estate, —are independent of the action of the deceased, as expressed in his will, and of creditors, heirs, and legatees, so far that when the necessity exists the court may provide for the support of the family until, in course of administration, they can receive the share of the estate to which they are entitled, subject to the proviso that, if the estate is insolvent, such provision shall not extend beyond one year.

In bank. Appeals from superior court, Alameda county; N. HAMILTON, Judge.

Appeals from order of court setting apart to the surviving widow of William Walkerley, deceased, certain household furniture, etc., and allowing such widow a family allowance.

L. Quint, for appellant. *Hall & Rogers*, for respondent. *C. Bartlett*, for executors. *Frederick E. Whitney*, for absent heirs.

SEARLS, C. J. There are two appeals in this case, based upon the same record, one from an order of the court setting apart to the surviving widow of William Walkerley, deceased, certain household furniture, books, etc., being furniture exempt from execution, and the other from an order allowing such widow a family allowance of $420 per month. The two appeals will be considered together.

William Walkerley died on the 16th day of September, 1887, leaving no family except Blanch Walkerley, his widow, and a child conceived, but not yet born, at the date of the entry of the order in question, (December, 1887.) His estate was valued at about $782,000, which was incumbered to the extent of $260,000, and is solvent and fully able to pay the monthly allowance awarded to the widow, which is found to be a reasonable allowance for her maintenance according to the circumstances of the family, and that she is without other means of support, and has no income from the estate. The furniture is that left in the dwelling-house of deceased where the widow resides, which is found to be exempt from execution, and need not be enumerated. Deceased left a last will, which was admitted to probate, together with a codicil thereto. The original will bequeathed to the wife the furniture in question, to her sole use forever, the use of his residence during her widowhood, and an annuity of $2,400 per annum for life. By the codicil, executed shortly before his death, deceased, on learning that a child was to be born to him, and as is therein stated for the purpose of providing for such child, "and to make a more liberal provision for my said wife than I have made in my will," annulled the provisions in the original will relating to his wife, and in lieu thereof gave and bequeathed to her the sum of $100,000 to be paid to her when certain property is sold as by the will directed, and in the mean time to be and remain a lien upon such property, bearing interest at 5 per cent. per annum; said interest to be paid to her semi-annually. The property alluded to is not to be sold during the life of the wife, or at least for 25 years, so that, in effect, she is to receive the interest as aforesaid during her life, or for 25 years. At the date of the entry of the orders, no interest had yet, however, become due to the widow. All of the estate was the separate property of deceased. It was competent for the court, under section 1465 of the Code of Civil Procedure, upon the coming in of the inventory, to set apart for the use of the widow the property exempt from execution, which includes the furniture in this case, and under section 1466 of the same Code to make such reasonable allowance for the support of the family as may be necessary, according to their circumstances, during the progress of the settlement of the estate.

These and kindred provisions contained in the same chapter are independent of the action of the deceased as expressed in his will, and of creditors, heirs, legatees, and devisees, so far that when the necessity exists therefor the court may provide for the decent support and maintenance of the family until, in due course of administration, they can become the recipients of the share of the estate to which they are entitled as heirs or otherwise. Instead of requiring the widow and children of deceased persons, who leave estates and homes, to dwell in the open air, to subsist upon meat which they cannot obtain, and drink which they cannot reach, the law humanely provides that they may remain in the homestead, retain the furniture and utensils exempt from execution, and have a support from the estate commensurate with their circumstances and necessities, until such time as they can come into the estate, which support, in case of the insolvency of the estate, cannot be longer than one year from the granting of letters testamentary or of administration.

The argument of the appellants, that the widow is provided for under the will, will become potent when it can be shown that she has received, or may receive, the largest bestowed by that instrument. Upon such a showing the court will no doubt terminate the allowance which until that time seems to be just and necessary. This is no new doctrine. At common law, the widow was entitled to tarry for 40 days after his death in the chief house of her deceased husband without being liable for rent, and to reasonable sustenance in the mean time out of her husband's estate; and this, whether her dower be sooner assigned to her or not. In most of the states of our union there are statutes conferring upon the probate courts power to provide an allowance for the support of the family for longer or shorter periods. Some of these statutes limit a family allowance to cases of intestacy, or to cases in which no provision is made by will, or, if made, where such provision is waived by the widow. Our statute is not so limited. The conclusion we reach is that under our law the probate court may in its discretion, in all cases where the necessity therefor exists, make for the support of the family a reasonable provision during such reasonable period as, in view of all the facts, may be necessary, subject, of course, to the proviso that if the estate is insolvent it shall not extend beyond one year. That this provision should cease when the widow comes into such share of the estate as renders it no longer necessary is no argument against the power to make and continue it until that event happens, which we may well assume will be upon receipt of the first installment of interest.

The orders appealed from, and each of them, are affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

SMITH *v.* KEAGLE, Tax Collector. (No. 12,861.)

(*Supreme Court of California.* December 31, 1888.)

TAXATION—TAXABLE PROPERTY—MORTGAGE TO STATE.

Const. Cal. art. 13, § 4, provides that a mortgage shall, for the purpose of taxation, be treated as an interest in the property; and with certain exceptions the value of the property so affected, less the value of such security, shall be taxed to the owner. Section 1 provides that property belonging to the state shall be exempt from taxation. *Held*, that the owner of land on which there is a mortgage to the regents of the state university is entitled to have the amount of the mortgage deducted from the value of the property for the purposes of taxation, notwithstanding such amount, as an interest of the state, will not be otherwise taxed. Following *People* v. *Board*, 19 Pac. Rep. 257.

In bank. Appeal from superior court, San Joaquin county.

It is claimed by James C. Smith, petitioner, that the board of supervisors of the city and county of San Francisco, while sitting lately as a board of equalization, exceeded its powers by ordering and causing to be deducted from the assessments made by the assessor on certain lots of land the value of certain mortgages on said lots respectively, and which mortgages were the property of the state, being held by the regents of the University of California, and by the State Deaf and Dumb Asylum. The facts set forth in the petition are admitted by the return thereto, leaving the only issue one of law,—that is, when private realty is mortgaged to the state, whether the owner of the land is entitled to have the value of such mortgage deducted from the value of the land for purposes of taxation.

Louttit, Woods & Levinsky, for appellant. *Ansel Smith*, for respondent.

PER CURIAM. On the authority of *People* v. *Board*, 19 Pac. Rep. 257, (No. 12,786, filed September 27, 1888,) the judgment of the court below herein is reversed, with directions to overrule the demurrer, and allow the defendant to answer.

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78 Cal. 4

DAVIDSON *v.* CUCAMONGA FRUIT & LAND CO. (No. 12,849.)

(*Supreme Court of California.* December 29, 1888.)

PUBLIC LANDS—GRANT BY STATES—ACTUAL SETTLERS—PATENTS.

Under Const. Cal. art. 17, § 3, providing that state lands "suitable for cultivation shall be granted only to actual settlers," and Pol. Code Cal. § 3500, requiring an applicant for such lands to state in his affidavit that he is an actual settler, a certificate of purchase issued to one who is not an actual settler, though his affidavit states that he is such, confers no rights, and neither he nor his assignee can maintain an action to annul a patent to another.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Action by S. M. Davidson, executor, etc., of H. B. Thomas, deceased, against the Cucamonga Fruit & Land Company, to annul a patent to defendant, and to adjudge plaintiff's title to be valid. Plaintiff appeals.

Bicknell & White and *Chapman & Hendrick*, for appellant. *Curtis & Otis* and *J. C. Lynch*, for respondent.

BELCHER, C. C. The facts of this case may be briefly stated as follows: In January, 1869, John Mullan made application to purchase from the state of California a certain tract of land in San Bernardino county, containing 660 acres. The application was approved by the surveyor general on the 21st day of August, 1869, and on the 15th day of October following Mullan paid to the county treasurer of San Bernardino county 20 per cent. of the purchase price, and interest on the balance up to January, 1870, and thereafter, in the same month, received from the register of the state land-office a certificate of purchase which was in the usual form. On the 1st day of May, 1880, Mullan not having paid the interest due on the balance of the purchase price, the register of the land-office forwarded to the district attorney of San Bernardino county a statement of all the lands in that county upon which payments had not been made; and thereafter the district attorney, having given the notice required by law, commenced an action in the superior court of the county, in the name of the people of the state, to foreclose the interest of Mullan in said land, and to annul his certificate of purchase. Afterwards such proceedings were had in the action that on the 4th day of January, 1881, judgment was given and entered foreclosing the interest of Mullan in the land and annulling his certificate. Mullan did not pay the amount due the state, nor the costs which had accrued, within 20 days after the entry of the judgment, and thereupon a certified copy of the judgment was filed in the office of the register, and a like copy in the office of the county recorder. On the 29th day of December, 1884, on motion of the assignee of Mullan, an order was made and entered by the superior court vacating the judgment above recited, and after that order was made the assignee paid to the county treasurer all the interest then unpaid on his certificate. On the 25th day of October, 1882, one Charles R. Higgins made application to purchase from the state 280 acres of the land described in Mullan's certificate, and on the 30th of December following his application was approved by the surveyor general. Thereafter, within 50 days, Higgins made the first payment, and on the 29th day of March, 1883, a certificate of purchase was issued to him for the land described in his application. On the 27th day of September, 1883, Higgins sold, assigned, and transferred to H. B. Thomas his certificate, and all his right to the land mentioned therein. On the 28th day of August, 1885, Thomas died, leaving a last will and testament, in which the plaintiff was named as executor. The will was admitted to probate, and the plaintiff was appointed and duly qualified as executor thereof. On the 15th day of November, 1885, plaintiff made full payment to the county treasurer for the land described in the certificate issued to Higgins, together with a fee for the patent, and surrendered to the register of the land-office the certificate, and demanded a patent for the land. The certificate issued to Mullan was assigned to the defendant herein, and in the month of September, 1886, the register of the land-office, without any hearing before him to determine which party was entitled to purchase the land, prepared a patent for the land described in the certificate, and sent it to the governor, together with a certificate that the laws in relation thereto had been complied with, that payment in full had been made, and that the Cucamonga Fruit Company was entitled to it. This patent was, on the 20th day of September, 1886, signed by the governor, attested by the secretary of state, sealed with the great seal of the state, countersigned by the register, and delivered to the defendant. This action was brought in February, 1887, to obtain a decree—*First*, that the plaintiff's title to the land described in the certificate issued to Higgins is good and valid, and that defendant has no right, title, or interest therein; *second*, that the patent issued to defendant is null and void; *third*, that the defendant be enjoined from asserting any claim to the land, or any part thereof. The court below found that the lands in controversy were agricultural lands, and that Higgins was not at the time he made his application to purchase the same, or at any time, an actual settler thereon. Judgment was thereupon entered in favor of defendant, from which, and from an order denying him a new trial, plaintiff appealed.

The principal question to be considered here is, did the plaintiff have such an interest in the land as would enable him to maintain an action to annul the defendant's patent? It is well settled that in order to maintain the action plaintiff must connect himself with the source of title, and must show that his rights are injuriously affected by the patent. *People* v. *Stratton,* 25

Cal. 242; *Durfee* v. *Plaisted*, 38 Cal. 80; *Smelting Co.* v. *Kemp*, 104 U. S. 636. In the last-named case the court, by FIELD, J., speaking of a patent issued by the land department of the general government, said: "If, in issuing a patent, its officers took mistaken views of the law, or drew erroneous conclusions from the evidence, or acted from imperfect views of their duty, or even from corrupt motives, a court of law can afford no remedy to a party alleging that he is thereby aggrieved. He must resort to a court of equity for relief, and even there his complaint cannot be heard unless he connect himself with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent; and he must possess such equities as will control the legal title in the patentee's hands. It does not lie in the mouth of a stranger to the title to complain of the act of the government with respect to it." This language is equally applicable where one is seeking to annul or set aside a patent issued by the land department of the state.

Now, the only title shown by the plaintiff was the certificate of purchase issued to Higgins. This certificate, it is true, was *prima facie* evidence of title, (Pol. Code, § 3514;) but *prima facie* evidence can be contradicted and overcome by other evidence. When Higgins made his application for the land, the constitution provided that "lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers," (article 17, § 3,) and the Code at that time required the applicant to state in his affidavit "that he is an actual settler thereon," (Pol. Code, § 3500, as amended in 1880.) These provisions are imperative, and the rule is well settled that an applicant must not only state in his affidavit all the facts required to be stated therein, but the facts as stated must be true, or he can acquire no rights under his application. *McKenzie* v. *Brandon*, 71 Cal. 209, 12 Pac. Rep. 428; *Harbin* v. *Burghart*, 18 Pac. Rep. 127.

Higgins stated in his affidavit that he was an actual settler on the lands applied for, and whether he was or not was an issue presented by the pleadings. The court found, as we have seen, that his statement in this regard was not true, and the correctness of this finding is not questioned. It necessarily follows that Higgins was not entitled to receive a certificate of purchase, and that the certificate issued conferred upon him no rights. This being so, he was a stranger to the title, and neither he nor his assignee can be heard to question the defendant's rights under its patent.

It is unnecessary to consider the other questions argued by counsel, and we therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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78 Cal. 31

HARNETT *v.* CENTRAL PAC. R. Co. (No. 12,114.)

(*Supreme Court of California.* December 29, 1888.)

1. APPEAL—REVIEW—WEIGHT OF EVIDENCE.
   Where the evidence is conflicting, an order of the trial court granting a new trial will not be disturbed on appeal.
2. NEW TRIAL—APPLICATION—SUFFICIENCY OF SPECIFICATIONS.
   On a motion for a new trial, specifications of particulars in which the evidence is alleged to be insufficient to sustain the verdict are sufficient if they give the opposite party notice in plain and direct language of the matters that will be urged on the hearing.

3. APPEAL—REVIEW—HARMLESS ERROR.

It is immaterial that the trial court came to an erroneous conclusion on the only point discussed by it on granting a new trial, where it appears that the order can be justified on other grounds on which the motion was based, and on which the court expressed no opinion.

THORNTON, J., dissenting.

In bank. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

William Harnett, by his guardian *ad litem*, sued the Central Pacific Railroad Company to recover for injuries received. Judgment was rendered for the plaintiff. From an order granting a new trial plaintiff appeals.

George A. Lamont and *Matt Clarken*, for appellant. *W. H. L. Barnes*, for respondent.

PATERSON, J. Appeal from an order granting a new trial. The question of fact in the case is whether the plaintiff, a minor, was forcibly ejected from a switch-engine, and, through the negligence of defendant's employes, run over and injured, or whether he fell, or of his own volition jumped from the engine.

The evidence is very conflicting. Following the rule so often referred to and applied, therefore, the order of the court should not be disturbed.

It is claimed, however, that the specifications of particulars as to the insufficiency of the evidence to justify the verdict fail to show wherein the evidence is insufficient. The specifications are in the following language: "The evidence was insufficient to show that the plaintiff was, by any servant or employe of the defendant, negligently or carelessly pushed, shoved, forced, or driven from said engine. On the contrary, the evidence established that the plaintiff, with his companions, contrary to the orders of the person in charge of the switch-engine No. 44, got upon the foot-board in front of said engine, which was a place of great peril to him, and attempted to steal a ride thereon. The evidence showed that, as soon as they were discovered, the engineer in charge of said engine slowed down the same, intending to come to a full stop, and then remove the plaintiff and his companions from the position of danger which they occupied. The evidence showed that the plaintiff and his companions jumped from said engine before it had stopped, and thereby received the injuries complained of. The evidence showed that the injuries received by the plaintiff were caused proximately by his own negligence, and willful disregard of the orders and directions of the servants and employes of the defendant, and not in consequence of any act or omission of the defendant or its servants or employes. The whole case showed no negligence, either in fact or in law, of the defendant." It would be difficult to state in more specific terms the particular points of insufficiency on which the moving party proposed to rely in its proceeding for a new trial. It gave the plaintiff notice in plain and direct language of the matters that would be urged on the hearing of the motion,—which is the object of the statute requiring such specifications,—and could not have misled him in preparing his amendments to the proposed statement. As stated by the judge, in his decision granting a new trial: "The whole case was tried upon the one theory that the injury was caused by the act of the fireman in pulling the hat and hair of plaintiff, and actually pushing him from the engine." How plaintiff came to jump or fall was the main question.

It is contended by appellant that the opinion of the court, filed with the order, shows that the new trial was granted upon the affidavits filed by defendant in support of its motion on the ground of newly-discovered evidence, and upon no other ground; that reasonable diligence was not exercised by defendant in procuring evidence; that the evidence is immaterial, and is simply cumulative. It is true, the court, in an opinion which we find in the tran·

script, discusses the question whether the defendant is entitled to a new trial on the ground of newly-discovered evidence, and concludes that the affidavits are sufficient, and a new trial should be granted on the ground named. The court, in its opinion, does not discuss any other ground specified in the motion for a new trial, and, as the order subsequently entered granting the new trial does not specify the grounds upon which it is based, we cannot say what the views of the court were upon the grounds not discussed. It matters not whether the court has or has not come to an erroneous conclusion in discussing one of the grounds for new trial. As stated by Mr. Justice McFARLAND, in *Nalley* v. *McDonald*, 19 Pac. Rep. 418, (filed October 25, 1888:) "The order should be affirmed if it can be justified on any of the grounds upon which the motion for a new trial was based. * * * A motion for a new trial on the ground of the insufficiency of the evidence to support the verdict is addressed to the sound discretion of the trial court; and when, on such motion, the court below has granted a new trial, the order granting it will not be disturbed unless there has been a clear abuse of discretion." We see no such abuse in this case.

Order affirmed.

We concur: SEARLS, C. J.; WORKS, J.; McFARLAND, J.; SHARPSTEIN, J.

I dissent: THORNTON, J.

78 Cal. 107

JAMES *v.* MCCANN, Judge. (No. 12,901.)

(*Supreme Court of California.* January 12, 188

NEW TRIAL—NOTICE OF APPLICATION—TIME OF MAKING.

In a probate proceeding, the court, of its own motion, submitted two issues of fact to a jury, impaneled for that purpose, which found on these issues, and was discharged. The court took no further action in the matter, and the case was not decided. *Held*, that this was not the verdict of a jury, within the meaning of Code Civil Proc. Cal. § 659, which provides that "the party intending to move for a new trial must, within 10 days after the verdict of the jury, * * * file with the clerk a notice of his intention," etc., but was merely advisory to the judge; and a notice of intention to move for a new trial, and the presentation of the statement for settlement, were premature.

In bank. On application for writ of mandate.

Application for writ of mandate to compel the superior court of Santa Cruz county to settle a statement on motion for a new trial in a probate proceeding. The application was denied on the ground that the verdict of the jury in the proceeding was not the verdict of the jury in an action tried by a jury, within the meaning of Code Civil Proc. Cal. § 659, which provides that "the party intending to move for a new trial must, within 10 days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk, and serve upon the adverse party, a notice of his intention, designating the grounds upon which the motion will be made, and whether the same will be made upon affidavits, or the minutes of the court, or the bill of exceptions, or the statement of the case."

Z. W Goldsby and *H Skirm*, for petitioner. *J. M. Lesser*, for defendant.

SHARPSTEIN, J. Application for a writ of mandate to compel the respondent to settle a statement on motion for new trial in a probate proceeding. It does not appear from the petition for the writ that the action was tried by a jury, nor is there a decision by the court. The proceeding, so far as any appears to have been had, was under chapter 3, art. 5, Code Civil Proc. By the allegations of the parties certain issues of fact were raised, and the court, of its own motion, submitted two of them to a jury, which was impaneled for that purpose, and the jury found upon these issues, and was discharged. The court took no further action in the matter, and the case has not been decided. The verdict of the jury in this proceeding is not the verdict of the jury in an action tried by a jury, within the meaning of section 659, Code Civil Proc., but was merely advisory to the judge, and of no force or effect until adopted by him. In that state of the case we think the notice of intention to move for a new trial, and the presentation of the statement for settlement, were premature.

Application denied.

We concur: BEATTY, C. J.; MCFARLAND, J.; WORKS, J.; THORNTON, J.; PATERSON, J.

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78 Cal. 99

MOYLE *et al.* *v.* LANDERS *et al.* (No. 11,906.)

(*Supreme Court of California.* January 11, 1889.)

APPEAL—NOTICE—ESTOPPEL TO DENY.

Service of a notice of appeal was admitted by defendants' attorney one day after the death of the principal defendant. Neither appellants nor their counsel knew that the death occurred before the service, and though the administrators who were subsequently appointed and substituted as defendants and their counsel knew it, and had many opportunities of informing appellants, they concealed the fact until after the expiration of the time within which further notice might have been given, when, the same attorney still continuing to act for the administrators, they moved to dismiss the appeal for want of service, on the ground that at the death of the client the power of his attorney to accept service ceased. *Held*, that the respondents by their conduct were estopped from denying due service, and the motion should be denied.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by James W. Moyle and others to declare a trust in real estate, and to recover a money judgment against Michael Landers. Judgment for defendants, and plaintiffs appeal.

L. E. Bulkely, for appellants. *H. G. Sieberst* and *D. L. Smoot*, for respondents.

WORKS, J This is an action to recover a money judgment, and to declare a trust in certain real estate. There was judgment on demurrer for the defendants in the court below, and the plaintiffs appeal. The defendant Michael Landers died after judgment.

One Sieberst appeared as attorney for all the defendants during the proceedings in the court below. The death of Landers occurred October 20, 1886. The notice of appeal was served on said Sieberst on the 21st of the same month. Sieberst, without disclosing the fact of Landers' death, if he knew it, acknowledged service of the notice as attorney for all of the defendants. In this court there was a suggestion of the death of the defendant Landers by the appellants, and upon their motion the respondents, Amy Landers, wife of said Michael Landers, and William J. Landers, his brother, who had been appointed administratrix and administrator of said estate, were substituted as parties in his stead. The said personal representatives now move the court to dismiss the appeal herein, as to them, on two grounds: *First*, on the ground that the service of the notice of appeal on Sieberst was no service as to the defendant, who was then dead; *second*, that the appeal-bond is insufficient.

1. It must be conceded that the question is one of jurisdiction, and that, independent of any acts or conduct on the part of said respondents, estopping them to question the jurisdiction of the court, it must be shown that notice of appeal was served as provided by law. The authority of Sieberst as attorney for Landers ceased with the death of the latter and service of the notice upon him, and his acknowledgment of such service could not bind the personal representatives subsequently appointed. *Judson* v. *Love*, 35 Cal. 463. And if this were the only question presented, the appeal should be dismissed. *Shartzer* v. *Love*, 40 Cal. 93; Hayne, New Trials & App. § 210, p. 631.

There was no service of notice of any kind upon the personal representatives, or either of them, before or after the order of substitution of them as respondents, which order was made and entered September 26, 1887.

The appellants meet the motion by an affidavit of the appellant Moyle, which alleges the service of the notice of appeal on Sieberst, who indorsed thereon, "Service and receipt of a copy of the within notice of appeal, after filing, is hereby admitted, this 21st day of October, 1886. H. G. SIEBERST, Attorney for Defendants, Respondents;"—and alleges, further, that W. J. Landers and Amy Landers were respectively duly appointed and qualified as administrator and administratrix of the estate of Michael Landers; "that soon thereafter, and on or about the 27th of November 1886, at the request of W. J. Landers, administrator, he [deponent] went to his office, and he then stated that his object in wishing me to call was to talk about a settlement of this suit, so far as the administrator and administratrix were concerned. After considerable conversation, he fixed another time a few days later, saying that he wished to talk further with H. G. Sieberst and D. L. Smoot, the attorneys. At the second time he said that it had been decided to make a settlement with us, but it could not be consummated until after ten months had expired, so that no other parties could come in and make a claim on similar grounds, and requested me to keep quiet, and give myself no further trouble about the appeal. He also stated that, as administrator and administratrix, they had retained H. G. Sieberst as their attorney and counsel to appear for them to attend to this suit in the supreme court, and for no other purpose, and had paid him his fee, which was $1,000; that D. L. Smoot had also been retained by them in other matters connected with the estate; and that he advised with the said Smoot in this and in all matters pertaining to the estate. Deponent further says that said W. J. Landers asked deponent for a copy of the transcript on appeal herein, which deponent gave to him that on the 3d of June, 1887, and within seven months after the first publication of notice to creditors of the estate of Michael Landers, I served upon said W. J. Landers, administrator, a duly-verified creditors' claim against said estate, which contained, in substance, the complaint in this action, and enumerating all the several sums of money therein alleged to have been fraudulently obtained from plaintiffs by said Landers in his life-time, and the total amount and interest claimed against the estate by reason thereof, and the parcels of real estate which had been purchased in said Landers' name with the funds thus fraudulently obtained, and a statement that this suit therefor was still pending and undetermined; that at this time I asked said Landers, administrator, for an admission of service of said paper, but he said he desired to submit it to D. L. Smoot, their attorney, for his instructions; that several times after this I called on him for said admission of service, and he each time told me that said Smoot had not returned it to him. Finally, on September 14, 1887, and before the expiration of the ten months after first publication of notice to creditors of said estate, I delivered to him another exact copy of said creditors' claim, duly verified, specifying the amount claimed in the pending suit then on appeal in the supreme court, and on that date I obtained his written admission of service, in the following words and and figures, to-wit: 'I acknowledge the presentation of the within claim to me as administrator of the estate of Michael Landers, deceased, this 14th day of September, 1887, at San Francisco, Cal. WILLIAM J. LANDERS, Administrator.' Deponent further says that on July 16, 1887, and before the expiration of the ten months allowed by law for the presentation of claims against the estate of Michael Landers, he delivered to Mrs. Amy Landers, administratrix, personally, at her residence, 812 Shotwell street, in the city of San Francisco, and left with her, an exact copy of the said creditors' claim, and referred to the suit then and now pending on appeal in the supreme court above specified. Deponent further says that H. G. Sieberst, at the time of Michael Landers' death, and for a long time prior thereto, had been his intimate friend, had his office on the same floor with him, and was in the habit of meeting him daily at his office, or at his dwelling; and if said Michael Landers died on the 20th day of October, 1886, of which this deponent then had no intimation, and has now no personal knowledge, said Sieberst knew of his death when he signed the admission of service of notice of appeal for him and his co-defendants, and purposely concealed the fact from deponent. And deponent never did for a moment suspect that said Michael Landers was dead at the time he received said admission of service from Sieberst, nor that it was so claimed, until he saw it in said Sieberst's affidavit on which he based his first motion to dismiss the appeal, in December, 1887. And deponent is informed and believes, and upon such information and belief states the fact to be, that said D. L. Smoot knew as early as June, 1887, of the deceit practiced by said H. G. Sieberst in giving admission of service of notice of appeal, and that said Smoot counseled and advised with the said administrator and administratrix upon the subject, and it was agreed between them to remain quiet, and give no intimation to plaintiffs (appellants) of the time when said Michael Landers died until after the time had expired in which further notice of appeal could be made on them, that all of them aided and assisted and conspired with said Sieberst to carry out the deception and fraud thus initiated by said Sieberst, and that the said Smoot and W. J. Landers, administrator, and Amy Landers, administratrix, have been in collusion at all times on the subject; that on the 9th day of December, 1887, when the former motion was made by H. G. Sieberst to dismiss the appeal, W. J. Landers, administrator, was in the court-room, and heard the statement in an affidavit of appellant's counsel that he and Amy Landers had been substituted as respondents in this appeal by order made September 26, 1887, and that no objection had been made thereto, and in fact no one ever did make any objection to said substitution, although the said administrator and administratrix knew of it on the 28th of September, 1887. Affiant further states that he has examined the records of a probate court, and the value of the estate of Michael Landers, deceased, is appraised at $120,330.08, of which $104,880 is in real estate, nearly all of which is claimed by the complaint herein as property purchased with funds embezzled from the plaintiff, and said Amy Landers, administratrix, is the heir to one-half of said estate, and she is now in the possession and enjoyment of the same as administratrix; no distribution having been made of the property of said estate. Deponent further says that subsequent to the substitution of the administrator and administratrix as respondents herein, and in pursuance of the provisions of section 954, Code Civil Proc., the appellants caused to be executed a new undertaking on appeal herein, which was approved by the chief justice of this court, and filed with the clerk on the 24th day of October, 1888."

Counsel for appellants also makes affidavit that he left this state for the East September 29, 1886, and did not return until January 14, 1887; that before leaving he prepared the necessary notice of appeal; that within a few days after his return he examined the transcript, and saw Sieberst's acknowledgment of service of the notice as attorney for all the defendants; that he learned of Landers' death soon after his return, but did not then know, nor did he at any time learn or receive any information, that he was dead at the time the notice was served, until December 5, 1887, when he was so informed by the affidavit of Sieberst in this case; that the order of substitution was made as above stated, and notice of such proceeding was published in the newspapers of the city where said parties resided; and that no objection has ever been made to such substitution.

Mr. Smoot, one of the attorneys mentioned in appellants' affidavit, files his sworn denial of the statements contained therein, so far as they apply to him, and also denies all knowledge of any attempt or intent to deceive the appellants or their attorney in the matter of the service of said notice of appeal. All that can be said, therefore, so far as Mr. Smoot is concerned, is that he may be attempting to profit by the wrong of another.

The respondent W. J. Landers files his affidavit, substantially denying the charges made in appellants' affidavit, so far as they refer to himself, and alleges generally that he has done nothing to prevent the appellants from ascertaining the death of Landers when the alleged service of notice occurred.

So far as the appellants' affidavit charges fraudulent conduct and intent as to Sieberst and Amy Landers, it remains wholly unanswered. We must therefore treat them as so far confessed. These are grave charges, involving the professional honor and integrity of an attorney, and if untrue would undoubtedly be met by a denial. Sieberst was the attorney for Landers. After the appointment of his personal representatives he continued to act as their attorney. As shown by the affidavit, he knew, while acting as the attorney for the latter, that they had, by the order of this court, been substituted as respondents in place of Landers, and, being present in court, made no objection, and remained silent until it was too late for appellants to serve and file a new notice. Having then become the attorney for the personal representatives, he had authority to bind them. Not only so, but it is directly charged, and not denied, that his silence was for the fraudulent purpose of defeating appellants' appeal, and that the administratrix was a party to such fraud. To allow this motion to prevail, under such circumstances, would be a travesty on justice, and bring the administration of the law into just reproach.

We are met with the claim, on the part of the respondents, that this is a purely jurisdictional question; that this court can only obtain jurisdiction in the way provided by law; and that it cannot be conferred by the consent or voluntary submission of the parties; and, in support of this contention, they cite *Bonds* v. *Hickman*, 29 Cal. 462; *Judson* v. *Love*, 35 Cal. 466; *Shartzer* v. *Love*, 40 Cal. 96; *Reed* v *Allison*, 61 Cal. 465.

As we have already said, the rule stated in these cases must be conceded to be the true one, but in our judgment they do not meet the case presented here. There was no question of fraud in either of the cases cited. The appellant simply failed to take the necessary steps to perfect the appeal, and in one of the cases there was a stipulation that the notice had been given, but this was contradicted by the certificate of the clerk and affidavit. We think it may very properly be questioned whether an express stipulation of the parties, waiving the steps necessary to perfect an appeal, or that such steps have been taken, made in good faith, should not be bindingupon them, and confer jurisdiction. Hayne, New Trial & App. § 210, p. 642, and cases cited.

But this is not the question before us. The question here is whether parties who have fraudulently prevented the service of the notice, by the concealment of material facts, and a failure to enter their objection to the jurisdiction of the court at the proper time, and, for the fraudulent purpose of preventing the proper service of the same, have delayed making their objection until it was too late to remedy the defect, should not now be estopped to attack the notice given, or to question the jurisdiction of the court. We are of the opinion that the respondents should not now be heard to question the jurisdiction of this court for the want of the service of a proper notice of appeal, under the circumstances of this case.

2. The respondents contend, further, that the appeal should be dismissed because the undertaking on appeal was insufficient. The appellants meet this by showing that a new undertaking has been filed in this court. This latter undertaking is also attacked on various grounds, based, however, upon the theory that this court had not obtained jurisdiction of the case. It might be conceded that if no notice of appeal had been given the undertaking would be ineffectual for any purpose; but, as we have ruled against the respondents upon the point which forms the basis of their objections to the undertaking, the latter must be held to be without foundation.

Motion denied.

We concur: McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

I concur in the order: PATERSON, J.

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78 Cal. 9

HOPE *v.* BARNETT *et al.* (No. 12,664.)

(*Supreme Court of California.* December 29, 1888.)

1. TRIAL—VERDICT—FINDINGS.

A finding that at the commencement of this suit a certain fence was at the side of and along a road will not be deemed inconsistent with another, that, 10 years before, said road, in the part in which the fence was placed, had been open to public travel, when it does not appear that the road had not in said 10 years been so changed that the fence which had been in it was on its side.

2. **SAME—INCONSISTENT FINDINGS.**
A finding that a certain fence "is not an obstruction or encroachment on any highway, and does not now, nor did it ever, constitute a nuisance on any highway," is not in conflict with a finding that, some 10 years before, the road, in the part of which said fence was placed, was open to public travel, since it refers to a different time, and the words "nor did it ever" are immaterial.

3. **HIGHWAYS—DEDICATION—ACQUIESCENCE.**
The fact that a road had been open to public travel, worked and used as a public road, for a period of 18 months or 2 years, does not show a dedication, unless the land-owner knew and acquiesced in the user, nor a case within Pol. Code Cal. § 2619, providing that "all roads used as such for a period of five years are highways."[1]

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action in ejectment and for damages by Annie M. Hope against W. S. Barnett and others. Judgment for plaintiff. Defendants appeal.

S. S. Price and *Thomas McNulta*, for appellants. *Fernald, Cope & Boyce*, for respondent.

WORKS, J. Action in ejectment and for damages for detention of real estate, and tearing down and removal of a fence. Answer denying all of the material allegations of the complaint, and, further, that the defendant Barnett was, at the time of the alleged ouster, overseer of the road-district in which the real estate was situate; that the premises mentioned in the complaint were a public highway; that the fence mentioned was erected by the plaintiff, and by her permitted to stand in, and was an obstruction to, a certain public highway; that said defendant, as such overseer, notified plaintiff to remove the fence; that, without claiming the right to maintain the fence, plaintiff failed and neglected to remove the same for more than 10 days after said notice was given, whereupon said defendant, as such overseer, removed the fence with as little damage and injury to the materials thereof as was possible; and that the other defendants were employed by and assisted said overseer in removing said fence, and acted solely as his agents in so doing. The defendant Barnett also pleaded, by way of counter-claim, that the real estate in controversy was a public highway, and had been for 12 years, and as such was under the exclusive control of the board of supervisors and road overseer; that he, and the other defendants acting for him, had removed said fence, and that the same had been replaced in said highway by plaintiff; and asked that the same be declared a nuisance, and abated. There was a trial by the court, and findings and judgment for the plaintiff for the possession of the land and $100, and against the defendants on their counter-claim.

1. The first point made by the appellants is that some of the findings are inconsistent with each other, and contradictory. It is claimed that because finding 2 is to the effect that the fence in question was erected "along a public road known as the 'Modoc Road,'" and finding 6 shows "that the Modoc road, from which this same fence was removed, and in that part from whence it was removed, had been open to public travel, worked and used as a public road, for a period of eighteen months," etc., they are conflicting, for the reason that one finding is that the fence is on the boundary of and the other that it is in the road. The second and sixth findings are as follows: (2) "That said premises have been for more than ten years inclosed on the north-east side thereof, and along a public road known as the 'Modoc Road,' by a good and substantial post and board fence, about four hundred rods in length, and $800 in value, and the property of plaintiff; that said premises were, on the 14th day of Feb-

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[1] As to what constitutes a dedication of land to the public as a highway, see City of Eureka v. Croghan, (Cal.) 19 Pac. Rep. 485, and note; Rube v. Sullivan, (Neb.) 37 N. W. Rep. 666, and note; Meier v. Railway Co., (Or.) 19 Pac. Rep. 610; Town of Edinville v. Railway Co., (Iowa,) 41 N. W. Rep. —.

ruary, 1887, wholly inclosed by boundary fences, the said fence along said Modoc road being one, and were used as agricultural and pasture lands." (6) "The court further finds, as matter of fact, that the Modoc road from which the fence and alleged obstruction was removed by the defendants, and in that part where said fence was placed, and from whence it was removed, had been open to public travel, worked and used as a public road, for a period of eighteen months or two years, in all that part from whence said fence was removed, at a period about ten years ago or more, but the fence had stood in said road for ten years and more at the time it was removed by the defendants; and that said road where the said fence had so stood for ten years and more had not at any time been abandoned by order of the board of supervisors, or by the judgment of any court of competent jurisdiction, but had been held adversely by the plaintiff, and those under whom she claims, for a period of ten years or more; that during the years 1871–72 certain steps were taken, and attempted proceedings were had, before the board of supervisors, seeking to establish the road as a public highway under the act of February 1, 1872, but all the requirements of said act were not complied with."

It will be seen that the two findings as to the situation of the fence relate to different times. The second relates to the 10 years preceding the action, and finds that during that time the same inclosed the premises in controversy along the public road. The sixth finding is that, at a period 10 years before, the Modoc road had been open to public travel, for a period of 18 months or 2 years, in that part whence said fence was removed, but the fence had stood in said road for 10 years or more. The evidence is not before us. We cannot say that, between the times to which the findings relate, the line of the road had not been so changed as to render it true that at one of the dates mentioned the fence was in the road and at the other along its border. Therefore we must hold that the findings do not conflict.

Finding 4 is also claimed to be inconsistent with the sixth, for the reason that it is to the effect "that no part of the premises constitute, nor did they ever constitute, a public road, or any part of any public highway;" and that the fence "is not an obstruction or encroachment on any public highway, and does not now, nor did it ever, constitute a nuisance in any public highway." The first clause of the fourth finding does not conflict with the sixth, because one relates to the premises in controversy, and the other to the fence; and, taking all three of the findings above mentioned together, they cannot, in the absence of the evidence, be held to conflict in any of their parts. As we have said, finding 2 is to the effect that at the time of bringing the action the fence was not in the road, but along the side of it. Finding 6 is that, 10 years before, it was in the place where the road had, previous to that time, been used and worked. Finding 4, as to the location of the fence, is confined to the time of bringing the action, supports the second finding, and does not contradict the sixth, which relates to another time. So far as the fourth finds that the fence does not constitute a nuisance in a public highway, it is in accord with the other findings; and the finding that it never did is immaterial, if we admit that it conflicts with other findings.

2. It is further urged that the sixth finding shows a dedication of the road to public use, and, as there is nothing in the other findings to show that it has ceased to be a public highway, the defendants were entitled to judgment. The sixth finding is set out above. We are unable to see anything therein showing, or tending to show, a dedication of the real estate to public use as a highway. While it was not necessary that there should have been a formal grant of the land to constitute a dedication, there must have been some act, or assent to the use of it by the public, sufficient to show an intention to dedicate the property to such use. *Harding* v. *Jasper*, 14 Cal. 642, 647. Where the dedication is sought to be established by user as a highway, it must appear that such user was with the knowledge of the owner, and with his consent or

without objection on his part. *Sullivan* v. *State*, 52 Ind. 309; *Summers* v. *State*, 51 Ind. 201; *Harding* v. *Jasper, supra.*

It was held by this court in *Bolger* v. *Foss*, 65 Cal. 250, 3 Pac. Rep. 871, that under section 2619 of the Political Code, as then in force, providing that "all roads used as such for a period of five years are highways," such user for the term of time prescribed constituted such road a public highway without reference to the question of consent by the owner. But the court was careful to say that this was not a right gained by prescription, but by the express terms of the Code. The finding we are considering shows neither a dedication nor an establishment of a highway by virtue of the provision of the Code referred to. It only shows a use of the road for "eighteen months or two years" before the fence was erected, and fails to show that such use was with the knowledge or consent of the plaintiff. Therefore the defendants were not entitled to judgment on the findings. Judgment affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.; PATERSON, J.

(78 Cal. 58)

MORGAN *et al.* *v.* LONES. (No. 12,913.)

(*Supreme Court of California.* December 31, 1888.)

1. HUSBAND AND WIFE—COMMUNITY PROPERTY.

   Plaintiffs' testatrix, a married woman, obtained a possessory title under deeds from prior occupants to land afterwards coming within the "Town-Site Act." Her husband, the defendant, with means of his own, whether separate or community did not appear, paid for the lots under said act, and procured a deed to testatrix. In his affidavit filed to obtain the deed, he stated that his wife was "the owner of the lots," and that he was in possession and entitled thereto as against all persons except her, in whose name he wished the deed to be made. *Held*, that the lots were community property; no intention of defendant to make a gift to testatrix being apparent.

2. ESTOPPEL—IN PAIS.

   The statements in defendant's affidavit that testatrix was the owner of the property, not being made to her, nor with intent to deceive her, or to induce her to take any action whatever, and no such results appearing to flow from them, do not estop him from denying that the transaction was a gift to the wife.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action by John T. Morgan and Hugh McCauley, executors, etc., of Mary J. Lones, deceased, against Henry A. Lones, surviving husband of said testatrix, to quiet title to land. Judgment for plaintiffs for part only of the land in controversy, and for defendant as to the residue. Plaintiffs appeal.

Caldwell & Little, for appellants. *Cross & Simonds*, for respondent.

HAYNE, C. Action to quiet title to certain lots in Nevada City. The court below gave judgment in favor of the plaintiffs as to a portion of the lots, and in favor of the defendant as to the remainder. The plaintiffs appeal from so much of the judgment as is in favor of the defendant. The decision turns upon the question whether the lots as to which defendant obtained judgment were the community property of the defendant and his wife, Mary J. Lones, or her separate property. The facts are as follows: The marriage took place in 1861. At that time, and up to the issuance of the United States patent to the city trustees in July, 1869, the land was public land. After the marriage the defendant entered into possession under deeds from prior occupants. In this condition of affairs a patent from the United States government to the board of trustees of the city was issued under the following provision of the act of congress of 1867, viz.: "Whenever any portion of the public lands have been or may be settled upon and occupied as a town-site, not subject to entry under the agricultural pre-emption laws, it is lawful, in case such town be incorporated, for the corporate authorities thereof, and if not incorporated, for the judge of the county court for the county in which such town is situated, to enter at the proper land-office, and at the minimum price, the land so settled and occupied, in trust for the several use and benefit of the occupants thereof, according to their respective interests; the execution of which trust as to the disposal of the lots in such town, and the proceeds of the sales thereof, to be conducted under such regulations as may be prescribed by the legislative authority of the state or territory in which the same may be situated." Rev. St. § 2387; 14 U. S. St. at Large, 541.

The mode of acquiring the title from the corporate authorities was prescribed (at the time in question) by the state legislature by the act of March 24, 1868. See Laws 1867–68, p. 487; Deer. Pol. Code, 720. Under its provisions the husband filed with the clerk of the board of city trustees an affidavit sworn to by himself, in which he stated, among other things, that his wife was "the owner of the lot," and that he, the affiant, was "in possession of, and entitled to the possession of, the same, against all other persons, to the best of affiant's knowledge and belief, excepting Mrs. Mary J. Lones, in whose name affiant wishes the deed to be made." The affidavit as to each lot is substantially the same. The required payment is stated by the findings to have been made by the husband "out of his own separate estate." What the husband said in his evidence in regard to this was: "I paid my own money for them." But, for the purposes of this appeal, it is immaterial whether the payment was made out of his separate property, or out of the community property; as it is not contended that the property was the separate property of the husband. The deed from the city trustees was made to the wife in December, 1870, and she died in 1887.

We think the property was not the separate property of the wife. In any view that can be suggested, it was not "acquired" until after the marriage. And it was acquired by purchase. The grant from the government was on generous terms, the entry by the city being "at the minimum price." Still there was a price, and it had to be paid before the beneficiaries could get their deeds. The transaction, therefore, cannot be considered as a gift from the government. And the price was not paid out of the separate property of the wife. Such being the case, unless there is some special circumstance taking the case out of the general rule, the property (if not the separate property of the husband) would at least be community property. It would not be the separate property of the wife.

The argument against this conclusion is founded upon the statement in the affidavits filed by the husband upon the application for the city deed. It is said, in the first place, that the statement in said affidavits that the wife was "the owner" operated as an estoppel against the husband. It is to be observed that this position is not that the city deed constituted an estoppel, independent of the declaration of the husband. Such a position could not be maintained; for, aside from any other reason, the act of the state legislature (as it then stood) expressly provided that "no conveyance as to any such lands, made as in this act provided, shall be deemed to conclude the rights of third persons." Section 9. And the provision that "no action shall be maintained," unless brought within two years, is a period of limitation applicable to suits brought by third persons. The position is that the declaration itself constituted an estoppel. But it was not made to the wife for the purpose of deceiving her, and it does not appear that it did deceive her, or induce her to take any action upon it; hence there was no estoppel. *Reynolds* v. *Lounsbury*, 6 Hill, 536; *Moore* v. *Boyd*, 74 Cal. 167, 15 Pac. Rep. 670; *Boggs* v. *Mining Co.*, 14 Cal. 279. The case of *Harris* v. *Harris*, 71 Cal. 314, 12 Pac. Rep. 274, is not in conflict with this conclusion. There the land was acquired by pre-emption; and, so far as this aspect of the case is concerned, the decision was founded upon an express provision of statute that it must be shown that the pre-emptor had not "directly or indirectly made any agreement, in any way or manner, with any person whatsoever, by which the title which he might acquire from the government of the United States should inure, in whole or in part, to the benefit of any person except himself." Act 1841, Rev. St. U. S. § 2262. The husband had consented (either expressly or impliedly) to the use of the community funds; and the court said that, in view of such consent, to give him a right because of the use of said funds would amount to an indirect agreement, which would be "in violation of the spirit and letter of the pre-emption law." There is no such provision in the town-site act under consideration, and that is the distinction between the two cases in this regard.

But it is urged, in the second place, that the statement in the affidavits shows that there was a gift from the husband to the wife. If it had appeared that there was an intention to give on the part of the husband, the case would fall within the rule laid down in *Higgins* v. *Higgins*, 46 Cal. 263. But it is not found that there was any such intention; and, aside from the affidavits above mentioned, there is no evidence on the subject. And we do not think that the naked statement in the affidavits shows that there was such intention. It may be that the husband desired the property to stand in the name of his wife for other reasons. Or (in view of the fact that the wife also had lots for which a city deed was to issue) it may be that a single application was made in order to save the trouble of making out two sets of papers. The presumption is that property acquired by purchase during marriage is community property, and the party who claims that it is separate property must prove it to be such by clear and satisfactory evidence. *Smith* v. *Smith*, 12 Cal. 216; *Meyer* v. *Kinzer*, Id. 247; *Ramsdell* v. *Fuller*, 28 Cal. 42. The statement in the affidavits is not sufficient to overcome this presumption.

The other matters do not, in our opinion, require special notice.

We therefore advise that the judgment appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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89 Cal. 638

SHAKESPEAR *v.* SMITH *et al.* (No. 11,541.)

(*Supreme Court of California.* December 29, 1888.)

1. SCHOOLS AND SCHOOL-DISTRICTS—SCHOOL FUNDS—VALIDITY OF WARRANT.
   An order for the payment of school funds, drawn with the concurrence of two only of the three trustees of a district, one of whom is interested in it, is void.
2. SAME—NEGOTIABILITY OF WARRANT.
   Such an order is not a negotiable instrument, in the sense of the law-merchant, and a third person can acquire no greater rights under it than the original holder had.
3. PARTIES—PROPER DEFENDANTS.
   In an action to restrain payment of such an order, the holder, and the county superintendent of schools upon whom it is drawn, are proper parties defendant, under Code Civil Proc. Cal. § 379, permitting any person to be made a party who has or claims an interest in the controversy adverse to plaintiff, or who is a necessary party to a complete determination.

Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Action by David Shakespear against W. A. C. Smith, George B. Kennedy, the Bank of Napa, and John L. Shearer. Plaintiff appeals.

Dennis Spencer, *W. F. Henning*, and *Garret W. McEnerney*, for appellant. *Wallace & Johnston* and *Henry Hogan*, for respondents.

SEARLS, C. J. This is an action by plaintiff as a tax-payer and resident of St. Helena school-district No. 10, county of Napa, on his own behalf, and in behalf of all other tax-payers of said school-district, for the surrender and cancellation, and to declare null and void a certain order of W. A. C. Smith and C. N. Hale, two of the trustees of said school-district, on the county superintendent of schools, in favor of George B. Kennedy or order, which said order, with the assignments and indorsements thereon, is in the words and figures following:

"ORDER UPON THE COUNTY SUPERINTENENT OF PUBLIC SCHOOLS.

"No. 294. ST. HELENA, January 8, 1886.

"The county superintendent of public schools of Napa county will draw a requisition on the county auditor against the special tax school fund for nine hundred thirty and 93-100ths dollars in favor of George B. Kennedy or order, on account of a contract for repairing school-house in full during the present school year in St. Helena school-district. W. A. C. SMITH,
"C. N. HALE,
"School Trustees of St. Helena District."

Indorsed: "Pay to W. A. C. Smith or order. GEO. B. KENNEDY Pay Bank of Napa or order for collection. Account of W. A. C. SMITH."

The complaint shows that plaintiff and defendants W. A. C. Smith and C. N. Hale were trustees of the school-district mentioned, and as such they, or a majority of them, contracted with the defendant George B. Kennedy to repair the school-house of their district, in consideration of which they agreed to pay $892.51 on or before September 10, 1885, or in lieu thereof to give an order to the school superintendent for a like amount; that at the instance of the trustees Kennedy performed certain extra labor upon the school-house which added to the contract price aggregated $930.93, as specified in the foregoing order. Upon the allowance of the order plaintiff voted against and defendants Smith and Hale for such allowance. On or before November 8, 1885, Kennedy sold, transferred, and assigned to Trustee Smith his interest in the contract, and the proceeds to accrue therefrom, and said Smith was interested in the claim prior to and at the date of its allowance by the board of trustees. The Bank of Napa, another of the defendants, is alleged to have an interest in the claim or order, and is therefore made a party defendant. Defendant Shearer is the superintendent of schools for Napa county, and the complaint asks that he be enjoined from drawing any requisition upon the auditor of the county for payment, etc.

A demurrer was interposed by the defendants upon the grounds (1) that the amended complaint does not state facts sufficient to constitute a cause of action; and (2) that Shearer and the Bank of Napa are improperly joined as defendants, and that C. N. Hale should have been made a party defendant. The demurrer was sustained, and, plaintiff declining to amend, judgment was entered for defendants, and against the plaintiff, for costs. In fact, there were separate demurrers by different defendants, but for convenience in reference we may treat them as one.

We are of opinion the demurrer should have been overruled. The order in question was drawn by the concurrence of two only of the trustees, one of whom was interested in it, and, being incompetent to act, it was void for want of the sanction of a competent majority of the board. *San Diego* v. *Railroad Co.*, 44 Cal. 111; *Andrews* v. *Pratt*, Id. 309; *Pickett* v. *School-Dist.*, 25 Wis. 552. In such cases the court will not pause to inquire whether a trustee has acted fairly or unfairly. Being interested in the subject-matter, he may not, as a trustee, deal with himself, and thus be subjected to the temptation to advance his own interests. The order in question is not a negotiable instrument in the broad sense that an innocent holder for a valuable consideration is protected. *Argenti* v. *San Francisco*, 16 Cal. 256; *People* v. *Gray*, 23 Cal. 126; *Martin* v. *San Francisco*, 16 Cal. 286; *Keller* v. *Hicks*, 22 Cal. 457; *Dana* v. *City of San Francisco*, 19 Cal. 486; *People* v. *Supervisors*, 11 Cal. 170.

Such an order, like county warrants, "acquires no greater validity in the hands of third parties than they originally possessed in the hands of the first holder, no matter for what consideration they have been transferred, or in what faith they may have been taken. If illegal when issued, they are illegal for all time. *People* v. *Supervisors*, *supra*. See, also, Civil Code, § 3095, for an enumeration of different classes of negotiable instruments. The term "negotiable" is frequently used in a broad sense, to describe any written security which may be transferred by indorsement and delivery, or by delivery only, so as to vest in the indorsee the legal title, and thus to enable him to maintain in his own name an action thereon. In this broad sense the instrument we are considering is a negotiable instrument, but not in the commercial and more restricted sense which applies the term only to such instruments as carry with them the legal title by indorsement or delivery, as well as when transferred before maturity, the right to recover their full face value, without reference to defenses affecting their validity. It follows that, not being a negotiable instrument in the sense of the law-merchant, the Bank of Napa is in no better position as a holder than Smith or Kennedy, under whom it holds.

There is no misjoinder of parties defendant. "Any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein." Code Civil Proc. § 379. This section of the Code adopts substantially the former rule in equity, under which not only parties interested in the cause of action, but also in the relief to be obtained, or who would be affected by granting or withholding such relief, were proper parties. Kennedy, Smith, and the Bank of Napa are directly interested according to the allegations of the complaint, and Shearer is interested in the relief sought in the question whether or not he shall be enjoined from drawing a requisition upon the auditor. It may be proper to say that, so far as appears from the complaint, Kennedy has an honest claim against the school-district, to the payment of which he and his assignees are entitled; that the only vice in the transaction consisted in its allowance by a party in interest, which raises an implication of fraud, and renders the order void. Either Kennedy or his assignee, as the case may be, may still (unless prevented by the bar of the statute of limitations) present the claim to the board of trustees, and, if properly allowed, it will become a legitimate claim, as against the district, and, if being a proper and just claim, the board shall for any cause reject it, an action to establish its validity will be in order.

The judgment is reversed, and the cause remanded, with directions to the court below to overrule the demurrers to the amended complaint.

We concur: McFarland, J.; Thornton, J.

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78 Cal. 113

Dale *v.* Purvis. (No. 12,552.)

(*Supreme Court of California.* January 14, 1889.)

Appeal—Review—Objections to Instructions.

On appeal, objections to instructions given by the trial court should point out in what particulars such instructions are erroneous, and an objection that "the court erred in giving the instructions, and each of them, asked by plaintiff," is too indefinite to call for a review of the instructions.

Beatty, C. J., dissents from the result.

In bank. Appeal from superior court, Stanislaus county; William O. Minor, Judge.

Action by J. B. Dale against B. B. Purvis, to recover six mules taken by the latter as sheriff, by virtue of an execution issued on a judgment against one V. B. Dale in favor of one D. W. Carmichael. Judgment for plaintiff, and defendant appeals. The objection to instructions given by the trial court was as follows: "The court erred in giving the instructions, and each of them, asked by plaintiff."

Hatton & Fulkerth, for appellant. *Turner & Maddux*, for respondent.

WORKS, J. This is an action to recover six mules. The defendant answered that he was the sheriff of Stanislaus county, and as such took and held the mules, first under attachment, and subsequently under an execution issued upon a judgment in favor of one Carmichael, and against V. B. Dale, father of plaintiff, and that at the time they were so levied upon and taken by defendant said mules were the property of said V B. Dale. The controverted question in the case was whether the sale to plaintiff, who claimed to have purchased said mules from his father, was "accompanied by an immediate delivery, and followed by an actual and continued change of possession." The case was tried by a jury, who returned a verdict for the plaintiff. The defendant appeals, and insists that the verdict is not sustained by the evidence as to the question of delivery and continued possession. We have examined the evidence, and find it sufficient to sustain the verdict of the jury. To set out or comment upon the evidence would extend this opinion to no purpose.

Appellant contends that certain of the instructions given by the court were erroneous. Counsel in their points and authorities object to the instructions, in the language of their specifications of errors of law: "The court erred in giving respondent's instruction 4." The only commendable feature of such a mode of attack is its extreme brevity; and, although brevity, in the argument of counsel, is pleasing to the court, we think, in the present instance, it has been a little overdone. We respectfully suggest to counsel that, in order to call upon us to review the action of the court below, they should point out in what respect the instruction attempted to be brought in question is erroneous. Such a requirement is absolutely necessary to the proper dispatch of the business of this court, and should in fairness to opposing counsel be insisted upon if the point is seriously urged. We have, however, examined the instructions, and find no error in them. This failure on our part may further tend to convince counsel of the necessity of greater particularity in pointing out defects relied upon We see no error in the record, and feel satisfied that a correct result was reached.

Judgment and order denying a new trial affirmed

We concur: SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.

BEATTY, C. J., (*dissenting.*) I dissent. In my opinion, all the evidence in the case shows without substantial conflict that the delivery to the plaintiff by his vendor of the mules in controversy was merely formal, and that it was not followed by any actual change of possession. To all outward appearance both vendor and vendee continued in precisely the same relation to the property after the sale as before. There was nothing in the *status* of the property after the sale to indicate a change of ownership. In this case, as in most cases of sales of personal property which is in the possession and under the control of the vendor, the parties might easily have dealt with it after the sale in such a manner as to make the change of ownership manifest. Instead of doing so, they left it in precisely the situation in which it had been before, and the transaction in my opinion, falls within the policy and the letter of the statute of frauds. Civil Code, § 3440.

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78 Cal. 118

SILCOX *et al.* *v.* LANG *et al.* (No. 12,267.)

(*Supreme Court of California.* January 15, 1889.)

1. PLEADING—VERIFICATION BY ATTORNEY—SUFFICIENCY.
   Under Code Civil Proc. Cal. § 446, authorizing an attorney or other person not a party to verify a pleading when the facts are within his knowledge, an attorney's verification reciting that affiant "is the attorney for defendants, and as such attorney the facts are more fully known to him than said defendants," is insufficient.

2. APPEAL—RECORD—REFUSAL OF CHALLENGE.
The court's refusal to allow a peremptory challenge to a juror is not an "irregularity in the proceedings of the court" reviewable on affidavits, but is an "error in law occurring at the trial," and so only to be presented by bill of exceptions or statement. Code Civil Proc. Cal. §§ 657, 658.

3. SAME—REVIEW—OBJECTIONS WAIVED.
If the court's attention is not called to the fact that he has omitted to rule on a demurrer before proceeding to trial, objection is waived.

4. INJUNCTION—ACTION ON BOND—PLEADING—MOTION TO STRIKE OUT.
In an action on an injunction bond, an answer averring that, before entry of judgment for defendants in the injunction suit, the parties settled all matters in controversy in that case, is so clearly bad that it may be reached by motion to strike out. It does not allege that any future damages were settled for, and the right to damages for the injunction could not arise until the temporary order was dissolved.

5. SAME—EVIDENCE.
In an action on an injunction bond, when the answer merely denies plaintiff's right to do the acts complained of in the injunction suit, denies damages, and pleads a settlement, the judgment roll in the injunction suit is properly excluded as immaterial.

6. SAME—SETTLEMENT.
When the answer sets up a settlement, but the evidence fails to show that the matter in litigation was included therein, or that more than one of several plaintiffs participated or consented, or that any one who acted was empowered to bind them, a verdict for defendants cannot stand.

In bank. Appeal from superior court, Trinity county; T. E. JONES, Judge.

Action by Richard Silcox, Ah Mi, Ah Song, Ah Lin You, Fang You, Ye Bang, and Ah Hew against Max Lang and W F. Smith, on an injunction bond. Verdict and judgment for defendants. Plaintiffs appeal.

Code Civil Proc. §§ 657, 658, so far as they enter into this case, are as follows:

"Sec. 657. The former verdict or other decision may be vacated, and a new trial granted, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party: (1) Irregularity in the proceedings of the court, jury, or adverse party, or any order of the court or abuse of discretion, by which either party was prevented from having a fair trial; * * * (7) error in law occurring at the trial, and excepted to by the party making the application.

"Sec. 658. When the application is made for a cause mentioned in the first, second, third, and fourth subdivisions of the last section, it must be made upon affidavits. For any other cause it may be made, at the option of the moving party, either upon the minutes of the court, or a bill of exceptions, or a statement of the case."

J. W. Turner and *C E. Williams*, for appellants. *D. G. Reid*, for respondents.

WORKS, J. This is an action on an injunction bond. The complaint alleges the bringing of the action, the giving and approving of the bond, issuing of the injunction, judgment in favor of the defendants, dissolution of the injunction, and damages. There was a demurrer to the complaint, which was overruled. The defendants answered, denying the right of the plaintiffs to do the acts which they were enjoined from doing in the former action, and denying the damages. They also answered, by way of confession and avoidance, as follows: "That on or about the ——— day of ———, 1885, and before the entry of the judgment mentioned in plaintiffs' complaint, R. Silcox, acting for himself and as the agent of the other plaintiffs herein, and J. W. Philbrook, acting as the attorney for the plaintiffs herein, on one side, and James A. Johnson and his attorney, W. J. Tinnin, on the other, settled all matters in controversy between plaintiffs herein and James A. Johnson, in the case of *James A. Johnson* vs. *R. Silcox et al.*, being number 163. That said settlement was made by R. Silcox selling all his rights, title, and interest in the property and mine mentioned in plaintiffs' complaint herein, and each party or parties to said suit of *James A. Johnson* vs. *R. Silcox et al.* (No. 163) were to pay their or his own costs, and stop all proceedings in the case, and all matters in controversy between the plaintiffs herein and James A. Johnson were then and there settled in full, and a large sum of money was paid by James A. Johnson to R. Silcox, acting for himself and the other plaintiffs herein, to make such full settlement." The answer was not verified. Motion was made to strike it out for that reason. The attorney for defendants asked leave to verify the same himself, and tendered the following verification: "D. G. Reid, being duly sworn, deposes and says, in behalf of the defendants in the above-entitled action, that he has read the foregoing answer, and knows the contents thereof, and that the same is true of his own knowledge, except as to those matters which are therein stated on information or belief, and as to those matters that he believes it to be true; that he is the attorney for defendants, and as such attorney the facts are more fully known to him than said defendants, and therefore he makes this affidavit." Objection was made on the ground that the affidavit was insufficient, and stated no reason why the verification was not made by a party. The objection was overruled, and the answer permitted to be filed; to all of which the plaintiffs excepted. Thereafter a motion was made, on substantially the same grounds, to strike out the answer, which was denied. There was also a motion to strike out the affirmative answer set out above, on the ground that the same was "sham, redundant, and immaterial matter," which was also overruled. There was also a demurrer to this count of the answer, which was never ruled upon. There was a trial by a jury of eight. In impaneling the jury each of the parties challenged a juror peremptorily. The plaintiffs then announced that they were satisfied with the jury. The defendants challenged a second juror, and announced that they were also satisfied, whereupon the plaintiffs offered to challenge another juror, to which the defendants objected, on the ground that it was contrary to section 601 of the Code of Civil Procedure, and that plaintiffs had waived the right to challenge such juror, and could not do so without good cause. The objection was sustained, and the right to challenge denied. Other jurors were called to supply the places of those who had been challenged, whereupon the plaintiffs renewed their challenge to the same juror, and the right to such challenge was again denied. The jury being sworn, the plaintiffs offered in evidence the judgment in the injunction case, which was objected to and excluded. The plaintiffs having rested their case, defendants proposed to offer evidence; whereupon the plaintiffs objected to "any evidence going to prove the allegations of the separate defense in the answer, upon the grounds that the same does not state facts sufficient to constitute a defense to the action." The objection was overruled, and the evidence heard. The jury returned a verdict for defendants and judgment was rendered accordingly. A new trial was denied, and the plaintiffs appeal from the order and judgment.

1. The objection to the filing of the answer and the motion to strike it out raises the question as to the sufficiency of the verification by the attorney. The Code provides that "where a pleading is verified it must be by the affidavit of a party, unless the parties are absent from the county where the attorney resides, or from some cause unable to verify it, or the facts are within the knowledge of his attorney or other person verifying the same." Code Civil Proc. § 446.

Here are three conditions, the existence of either of which authorizes a verification by the attorney: (*a*) The absence of the party from the county where the attorney resides; (*b*) the inability of the party from some other cause to verify; (*c*) that the facts are within the knowledge of the attorney.

The affidavit before us does not bring the case within either of the first two conditions. It shows no reason why the pleading might not have been verified by the parties. It attempts to state the third condition, but fails to do so. The attorney is only authorized to verify where the facts are within his knowledge. In other words, he must deny or affirm from actual knowledge of the facts, and not upon information and belief, as the party is permitted to do. The affidavit here does not show that the facts were within the knowledge of the attorney, but that the facts are more fully known to him than said defendants. This is insufficient. It attempts to fix the extent of his knowledge by a comparison with that of some one else, the extent of whose knowledge is not shown. The affiant may have known something of the least material of the facts. The party, while without knowledge of all of the facts, might have had such information and belief as would have enabled him to verify as to all of them. The practice of attorneys verifying for their clients should be discouraged, and to that end the provisions of the Code referred to should receive a strict construction. Therefore, to authorize a verification by an attorney, it must be shown by the affidavit, in direct terms, that the facts are "within his knowledge," where the right to verify is based upon this clause of the statute. The object of the verification is to insure good faith in the averments of the party. *Patterson* v. *Ely*, 19 Cal. 28. This end could not be attained by the approval of such a verification as the one before us.

In New York the statute is similar in its requirements to ours, but it provides that the attorney "shall set forth in the affidavit his knowledge or the grounds of his belief on the subject, and the courts of that state have held that this clause qualifies the first, and authorizes him to verify on information and belief, as the party may do." *Stannard* v. *Mattice*, 7 How. Pr. 4; *Soutter* v. *Mather*, 14 Abb. Pr. 440. But the clause upon which such verification is approved, in the cases cited, is omitted from our statute, leaving the positive and unqualified requirement that the facts must be within his knowledge to authorize the attorney to verify the pleading. *Newman* v *Bird*, 60 Cal. 372; *In re Hotchkiss*, 58 Cal. 39. And as he can only verify by reason of the fact that he has personal knowledge of the facts, it follows, necessarily, that he must verify from such knowledge, and not from information and belief.

For the reasons stated the court below erred in permitting the answer to be filed, and in refusing to strike it out on appellants' motion.

2. The motion to strike out the special or affirmative answer should also have been sustained. It wholly failed to show a settlement of the matter in controversy in this action, and is limited by its terms to such controversies as then existed. The cause of action here did not arise, and could not have been prosecuted, until the final disposition of the original injunction proceeding, or, at least, until the dissolution of the temporary injunction; and there is nothing in the answer to show that controversies that might arise in the future were included in the settlement. While a demurrer to the answer would have been more appropriate as a means of testing its sufficiency, it was so clearly bad as to render the motion to strike out proper.

3. We think the court also erred in denying the appellants' challenge to the juror under the circumstances above stated. The right to challenge a certain number of jurors peremptorily is absolute under the statute. Code Civil Proc. § 601. The fact that the appellants had once passed the jury, including the juror afterwards sought to be challenged, did not cut off this right. The proper practice in the selection of a jury in a civil case is to fill the panel, and upon one of the jurors being challenged for any cause, or "without cause," to immediately call another to take his place, so that a party, in determining whether to challenge or not, may do so with a full panel before him. *People* v. *Scoggins*, 37 Cal. 676; *Taylor* v. *Railroad Co.*, 45 Cal. 323, 330.

The fact that a party may pass the panel as satisfactory to him, at a certain stage of the examination, cannot be held to cut off his right to challenge one of the jurors so passed at a later stage. Such changes may have been made by subsequent challenges as to render it desirable to him that the particular juror should not sit, and of this the party must be the sole judge. The right of challenge may be exercised at any time before the juror is sworn. See on this point *Bridge Co.* v. *Pearl*, 80 Ill. 251; *Hunter* v. *Parsons*, 22 Mich. 96; *Hartzell* v. *Com.*, 40 Pa. St. 462, 466; *Spencer* v. *De France*, 3 G. Greene, 216.

But the respondents contend that the question as to the correctness of this ruling is not properly presented. It is treated by the appellants as an "irregularity in the proceedings of the court" by which they were prevented from having a fair trial, and they attempt to present the facts by affidavits. The respondents contend that if the ruling was erroneous it was an "error in law occurring at the trial," and should have been presented by bill of exceptions or statement. We think the respondents are right in this contention. The impaneling of a jury is a part of the trial, within the meaning of the Code, and any ruling of the court with respect thereto, if erroneous, is an error of law occurring at the trial, and not a mere irregularity. The term "irregularity" cannot be applied to a ruling or decision made upon a question of law regularly presented for such decision during the trial. In such case the action is not irregular, but the decision rendered is erroneous. See Hayne, New Trials & App. § 100.

The term "irregularity," as here used, is of very uncertain import. We do not wish to be understood as attempting to determine, in this case, what should be considered as within the term used. But see 1 Abb. Law Dict. 644; Hayne, New Trials & App. § 28 *et. seq.;* Id. § 41, and cases cited. It is enough for the purposes of this case to say that the ruling here complained of was not an irregularity within the meaning of the statute, and could not be properly presented by affidavit. Therefore, although the ruling was erroneous, the cause could not be reversed on that ground.

4. The action of the court in excluding the judgment roll in the injunction case was proper, for the reason that all of the facts upon which it would have been material were admitted by the answer.

5. The objection of the plaintiff to any evidence in support of the facts set up in the affirmative count of the answer should have been sustained, for the reasons stated above for holding that the motion to strike out said count should not have been overruled.

6. It is contended that the verdict was not sustained by the evidence, and we are of that opinion. It is evident that the verdict was founded upon the answer of settlement above set out, and, admitting the settlement to have been well pleaded, the evidence wholly fails to show that the matter here in litigation was included in such settlement; and as to all the plaintiffs except Silcox there is no evidence tending to show that they participated in the settlement, or consented thereto, or that any one acting in the matter had any authority to bind them.

7. The fact that the court proceeded to try the case without ruling on the demurrer to the answer is complained of, but it is not shown that plaintiffs called for any such ruling, or called the attention of the court to it in any way. They must therefore be held to have waived it. *Brooks* v. *Douglass*, 32 Cal. 212; *McCarthy* v. *Yale*, 39 Cal. 586.

Complaint is made as to certain rulings upon the evidence, but they relate to the forms of questions, and will probably not arise upon a second trial. For that reason we do not extend this opinion by considering them separately.

Judgment and order denying a new trial reversed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

78 Cal. 144

PEARSON *v.* CREED *et al.*, (HEARST, Intervenor.) (No. 12,619.)

(*Supreme Court of California.* January 23, 1889.)

1. QUIETING TITLE—POSSESSION.
   In an action to quiet title to land, an issue as to plaintiff's possession of the land at the commencement of the action is immaterial.[1]
2. SAME—PAYMENT OF TAXES—ADVERSE POSSESSION.
   So are issues as to the assessment and payment of taxes by defendants, while in possession of the land, and as to adverse possession by them, where they do not claim that such possession continued for five years before action brought.
3. SAME—DECREE—OBJECTIONS TO EVIDENCE.
   Defendants, having shown no title to the land, are not prejudiced by a judgment adjudging one-half of the land to plaintiff, and one-half to an intervenor who claims under purchase from plaintiff after the commencement of the action, and they cannot object to the admission in evidence of a record copy of the deed from plaintiff to intervenor, where plaintiff would otherwise be entitled to the whole of the land.
4. TAXATION—TAX DEED—VALIDITY.
   A tax deed which recites that the land was assessed to a certain person, "and all owners and claimants," is void, and is not validated by proof that the assessment was regular and valid. WORKS, J., dissenting.
5. VENDOR AND VENDEE—BONA FIDE PURCHASERS.
   The tax deed under which defendants claimed having been regularly recorded, and the action pending at the time of the intervenor's purchase, he must be held to have had notice of defendants' claim; but, such tax deed being void, such notice could not affect his rights.

In bank. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

Action by John W. Pearson against W. H. Creed and P. D. Wigginton, to quiet title to land. George Hearst intervened, claiming title to one-half the land in controversy by virtue of purchase from Pearson after the commencement of the action. The intervenor was allowed to introduce in evidence the record of the deed to him from plaintiff, after giving evidence that the original could not be found. Title to one-half the land was adjudged to be in plaintiff, and to the remaining half to be in the intervenor, Hearst. Defendants appeal.

Wigginton & Hawes, for appellants. *Geo. A. Nourse*, for respondent. *Edward Lynch*, for intervenor.

THORNTON, J. Action to quiet title to a tract of land in Fresno county. Judgment passed in favor of plaintiff and intervenor. The defendants, Creed and Wigginton, appeal from the judgment and an order denying a new trial. The evidence is sufficient to justify the decision of the court below. The decision is not against the law. There are findings upon all the material issues. The issue as to the possession of plaintiff at the commencement of the action was entirely immaterial. The question of title, as between plaintiff and defendants, was to be passed on, and the defendants might have been in possession without title, and the plaintiff might have had title, though out of possession. The title of the litigants here did not turn on their possession, had at the time of or prior to the commencement of the action.

As far as was necessary to the determination of the issue joined as to the assessment for taxes of the land in suit set up by defendants, the facts were sufficiently found. It is averred in a cross-complaint filed by defendants, which was answered by plaintiff, that the land was assessed to C. E. Gaxiola by the assessor between the first Mondays of March and July, for the year 1880. This was denied in the answer of plaintiff. The same matters were averred in a cross-complaint of defendants to intervenor's complaint, which was on motion stricken out, but allowed to stand as answer to intervenor's complaint. Under the statute all the averments of the answer in relation to the matter of assessment must be considered as denied by the intervenor. As said above, the facts were sufficiently found as to the issue joined as to the assessment.

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[1] Concerning the necessity of complainant's possession of the lands in suits to quiet title, see Gage v. Curtis, (Ill.) 14 N. E. Rep. 30, and note; Ely v. Railroad Co., (Ariz.) 19 Pac. Rep. 6, and cases cited; Illingsworth v. Stanley, (Kan.) Id. 352.

The issues joined as to the levy of assessment and payment of taxes by defendants during the time they were in possession, and as to any adverse possession of defendants, were entirely immaterial. The defendants set up no possession by them, adverse or otherwise, prior to March 1, 1881, and as the complaint herein was filed on the 21st of August, 1884, their possession, conceding it to have been adverse from the 1st of March, 1881, did not continue for the period of five years before action brought, which was required to give them a title. The assessment and payment of taxes on the land while they were in possession were only necessary to make out their title by adverse possession. If the adverse possession did not continue for five years before action brought, the payment of taxes by defendants invested them with no right to the land sued for.

As a deduction from the foregoing views, it was entirely immaterial whether the court found on the issues last mentioned or not.

The defendants claim under a tax deed in which it is recited that the land in suit was assessed "to C. E. Gaxiola, and all owners and claimants." That such a deed is void on its face has been frequently held by this court. *Grimm* v. *O'Connell*, 54 Cal. 524; *Hearst* v. *Egglestone*, 55 Cal. 367; *Brady* v. *Dowden*, 59 Cal. 51; *Bosworth* v. *Webster*, 64 Cal. 2. Conceding that the assessment of this land was regular and valid, it cannot impart validity to the deed. "A void deed cannot be made valid by proof of a valid assessment." *Grimm* v. *O'Connell*, and *Hearst* v. *Egglestone*, *supra*.

We are inclined to think that a proper showing was made to let in the deed from Pearson to Hearst. But if this deed were excluded there should be no reversal. Pearson would then be entitled to recover the whole land against defendants, who show no title. It is of no moment to the defendants that the court has adjudged one-half the land to Hearst and the other half to Pearson. They were not at all prejudiced by the judgment. The case might have been as well tried without the intervention of Hearst as with it.

We will add here (though it is hardly necessary or material) that Hearst must be held to have had notice of the title of defendants, who claimed under a deed regularly recorded, and of the pendency of the action, if a proper notice of its pendency was filed. As to any title to the land, the rule is that the purchaser must look out,—*caveat emptor*. The law fixed notice on Hearst of the title of defendants, and of the pendency of the action, whether they appeared in the abstract of title which was presented him when he paid his money and received his deed or not. But this notice could not affect his rights, for, if he had notice, he had notice of a claim of title which was naught. We find no error in the record.

Judgment and order affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

WORKS, J. I dissent. I cannot agree to the doctrine announced in *Grimm* v. *O'Connell*, 54 Cal. 524, and cases following it, that a recital in a tax deed showing that the property was wrongly assessed when it was not, as a matter of fact, renders such deed void. The recital referred to is not a necessary part of the deed, and is not required to be set out. Pol. Code, §§ 3776, 3786. The certificate of purchase is required to state, when known, the name of the person assessed. This is not a requirement that it shall state how or to whom it was assessed. If assessed to unknown owners, no recital is required. The deed is required to cite the matters recited in the certificate.

The decisions referred to are based upon the assumption that the deed must state to whom or how the property is assessed. The result of the decisions is that, although the assessment and sale were properly made, the deed must be held void, and the title defeated, solely because of a false recital in the deed, which, if true, would show the assessment to have been invalid; and this, too, where the recital is one which, by a fair construction of the sections of the Code relating to the subject, need not be set out in the deed at all, and should be treated as surplusage.

In my judgment, the cases cited in support of this doctrine were wrongly decided, and should be overruled.

(78 Cal. 149)

HILL *v.* MILLER. (Nos. 12,523, 12,643.)

(*Supreme Court of California.* January 25, 1889.)

PARTNERSHIP—FIRM PROPERTY—PATENTS FOR INVENTIONS.

When one entering a partnership puts in an invention as a part of the capital stock, a patent obtained thereon during the existence of the partnership becomes partnership property, without a written assignment of an interest from the patentee to his partner.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action by Joseph F. Hill against Samuel H. Miller, for a settlement of partnership accounts. Judgment for plaintiff. Defendant appeals.

Joseph H. Budd and *Grove L. Johnson*, for appellant. *McKune & George*, for respondent.

THORNTON, J. Action to establish partnership in a hay-press, and to settle partnership accounts in which a judgment for plaintiff was entered and given. Defendant moved for a new trial, which was denied, and he prosecutes these appeals,—one from the judgment, and the other from the order denying a new trial. The evidence is sufficient to justify the decision of the court below. The court below found that the defendant put in the hay-press as a part of the capital stock, for which a patent was afterwards issued to him. The patent was obtained for the hay-press while the copartnership was in existence, and while the plaintiff and defendant as copartners were manufacturing the hay-presses. We think the court properly held that the patent so issued under an agreement that the hay-press should go into the partnership as part of its stock belonged to the partnership. It is a matter of no consequence that there was no written assignment of a half interest in the patent by defendant to plaintiff. The plaintiff, as a partner, became in equity the owner of one-half of the patent, though the agreement was by parol. On this point see *Somerby* v. *Buntin*, 118 Mass. 279, which is adverse to defendant's contention, and which sustains the conclusion here reached. We find no error in the record.

The judgment in cause No. 12,523 and the order in cause No. 12,643 are affirmed.

We concur: WORKS, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J

78 Cal. 41

PEOPLE *v.* O'BRIEN. (No. 20,456.)

(*Supreme Court of California.* December 29, 1888.)

1. CRIMINAL LAW—APPEAL—OBJECTIONS TO EVIDENCE.
   In a prosecution for murder, an objection to the admission in evidence of the coat worn by the deceased at the time of the homicide, because it was not shown to be in the same condition as when taken from the body of the deceased, will not be considered, where such objection was not specifically made, but counsel for the defendant objected on another ground.
2. SAME—TRIAL—INSTRUCTIONS.
   An instruction that the jury should gather the intent with which the homicide was committed from all the circumstances surrounding it is not erroneous, as precluding the consideration of the testimony of the defendant on the question of intent, where the jury are also instructed to weigh the testimony of all the witnesses and to judge the testimony of defendant fairly, and apply the same tests to his testimony, so far as they were applicable, that they would apply to that of other witnesses.
3. HOMICIDE—INSTRUCTIONS—SELF-DEFENSE.
   An instruction that the plea of self-defense cannot be sustained in behalf of a person who seeks his adversary, armed at the time with a deadly weapon, and provokes a quarrel, and during such quarrel feloniously uses a deadly weapon, and takes the life of his adversary, is not erroneous, where the jury are also instructed that a person is not deprived of the right to defend himself because he invited his opponent by words to a fight, or because he began the affray, if he afterwards, and before the fatal blow is struck, endeavors to withdraw from the combat.
4. CRIMINAL LAW—NEW TRIAL—NEWLY-DISCOVERED EVIDENCE.
   A new trial will not be granted on account of newly-discovered evidence that the deceased was seen to raise a dagger to strike the defendant at the time of the homicide, where the defendant and another witness had testified to the same effect.
5. SAME—REFUSAL TO GIVE INSTRUCTIONS.
   Where the jury are fully and correctly instructed on certain points, the refusal of the court to give further instruction on the same points is not error.

PATERSON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

P. Reddy, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

PER CURIAM. Defendant was convicted of murder in the second degree. The judgment directs imprisonment for 10 years in the state prison at San Quentin.

The first point made by appellant is that the court erred in admitting in evidence the coat worn by the deceased at the time of his death. It is said that there was no evidence to show that it was in the same condition at the trial that it was in when taken from the body of the deceased,—no evidence that there were any cuts in the coat or vest, or that the part of the body on which the wound was inflicted was covered by the coat or vest. It has been held that clothing worn by the deceased at the time of the homicide is admissible in evidence as a part of the *res gestæ.* It is frequently important evidence, tending to prove the violence of the blow, and the course or direction of the bullet or knife. *People* v. *Hong Ah Duck*, 61 Cal. 391; *People* v. *Knapp*, 71 Cal. 1, 11 Pac. Rep. 793.

It is true, as stated by counsel for appellant, that there is nothing to show whether the coat was in the same condition as when taken from the body of the deceased, but no objection was made to the introduction of the coat in evidence upon that ground. The ground of objection was "that the best evidence is already in,—the evidence of the wound as shown by the doctor,—and that is superior to any holes in the old clothes." To entitle the defendant to the benefit of the point he now makes, we think there should have been a specific objection to the clothes on the ground that the prosecution had not shown that they were in the same condition at the trial as when they were taken from the deceased.

It is claimed that the court erred in refusing to give the following instruction: "And if you entertain a reasonable doubt, after consideration of all the evidence in the case, as to whether the defendant acted in self-defense, you should acquit the defendant." The instruction was properly refused. The court fully and correctly instructed the jury on the question of self-defense and reasonable doubt.

The following instruction was refused: "You are instructed that if, after consideration of all evidence in the case, you have a reasonable doubt as to whether the defendant or the deceased was the aggressor, you should give the defendant the benefit of that doubt." For the same reasons, in holding that the refusal to give the first instruction quoted was not error, we think there was no error prejudicial to the defendant in refusing to give this instruction.

The court gave the following instruction: "As to the question of intention, gentlemen, you must arrive at it from all the circumstances surrounding the commission of the alleged act which is charged to be criminal. Of course you will understand that we cannot look into the mind, and see what its workings are. We cannot bring a photograph of the human mind, and exhibit it to you so as to demonstrate clearly and absolutely what the workings of such minds are. Hence, from necessity, the law says you shall gather the intention with which an act is done from all the circumstances surrounding the commission." It is contended that the jury were bound under this instruction to look to the circumstances alone for evidence or proof of the intent with which the act of the defendant was committed. The latter testified that he stabbed the deceased with the intention and for the purpose of preventing the deceased from stabbing him. It is said that the defendant's testimony on the question of intent, being no part of the *res gestæ*, or of the "circumstances surrounding the commission of the act," therefore, under the instruction last quoted, the jury could not consider the defendant's testimony on the question of intention. We cannot agree with counsel in his view of the effect of this instruction. The jury were instructed that, in determining whether the defendant had reasonable grounds for believing that he was in danger of losing his life or receiving great bodily harm, etc, they "should consider all these facts, in connection with all the other evidence in the case, in determining whether the deceased commenced the affray, and whether the defendant acted in self-defense." The court further said: "You will weigh carefully the testimony of all the witnesses in the case, and give to their testimony such credit and weight as in your consciences you believe them entitled to." Speaking of the defendant's testimony, the jury were told not to disregard or discredit it solely because the defendant was accused of crime, but that they should judge of his testimony fairly and considerately, applying the same tests, as far as they were applicable to his testimony, that they would apply to all the other witnesses in the case.

The most serious question in the case is that which relates to the following instruction, which was given by the court: "To justify a homicide, the danger menacing the defendant must be present, or apparently so to him; and it must be imminent, or appear so to him, at the time of his acting; and the killing must be done on a well-founded belief that it was necessary for the defendant to kill the deceased at the time to save himself from death, or from great bodily injury. The appearance of danger to life or limb which will justify a man in taking the life of another, must be an honest one,—one that is well grounded, or apparently so to him, and must arise out of a reasonable cause. A case which originates in the fault of the person himself, in a quarrel which he has provoked and brought on, in a danger which he has voluntarily brought upon himself by his own misconduct, cannot be considered reasonable or sufficient in law to support a well-grounded apprehension of imminent danger to his person, and which will support the plea of self-defense. * * * And again, let me say to you, gentlemen, that no person, when he is safe and secure from danger, has a right to seek his adversary, being armed at the time with a dangerous or deadly weapon, and, after seeking his adversary, then provoke a quarrel with that adversary; and during that quarrel, thus provoked or invited by himself, to feloniously use a dangerous or deadly weapon, and take his life, and then come into court and claim that he acted in self-defense. The right to take human life, and justify it on the ground of self-defense, is based upon necessity, or apparent necessity, at the time of the killing."

It is claimed that under this instruction the defendant could not have the benefit of the plea of self-defense, however remote or trifling the fault might be, and no matter what the intention of the defendant was at the time the cause originated with him; that the jury were informed, if they found the defendant guilty of any misconduct, they should deny him the benefit of the plea of self-defense without regard to the degree or character of his misconduct. If the instruction had not been qualified by others given directly in connection with it, we should be inclined to hold with the appellant, but the court in the same instruction said: "And in that connection, gentlemen, I am asked to instruct you, and I do instruct you in the words asked, and which you will consider as part of the charge of the court, binding upon you, that a party is not deprived of the right to defend himself because he may have by words invited the other to fight. Such invitation does not warrant the party challenged to make an assault with a deadly weapon. Neither is a party deprived of the right to defend his person from a felonious assault because he began the affray, if he afterwards, and before the fatal blow was struck, in good faith endeavored to withdraw from the combat. * * * To justify a person in killing another in self-defense it must appear * * * that the person killed was the assailant, or that the slayer had really and in good faith endeavored to decline any further struggle before the mortal blow was given."

Taking the different portions of the instruction together, we think the jury must have understood the court to say that a person who arms himself with a deadly weapon for the purpose of seeking his adversary, and provoking a quarrel with him, cannot feloniously use such weapon to take the life of his adversary, and then come into court and claim that he acted in self-defense. The jury were told in very clear terms that a party is not deprived of the right to defend his person from a felonious assault because he began the affray, if he afterwards, and before the fatal blow was struck, in good faith endeavored to withdraw from the combat. We therefore cannot say that the court erred.

We have discussed the charge of the court upon the assumption that it is a part of the record herein. On the 27th day of April, 1888, there was filed in the court below a bill of exceptions, duly certified and signed by the judge, but the oral charge of the court is not incorporated into the bill. There is in the transcript a copy of what purports to be a charge to the jury given by the judge at the trial of this case, and filed by the clerk on February 8, 1888, but it is in no way authenticated. The clerk certifies "the foregoing [including this document] to be full, true, and correct copies of the various papers of record and on file in my [his] office in the above-entitled cause, and that the same constitute the transcript on appeal;" but the copy is not approved by the judge, and has not even the certificate of the official reporter as to its correctness. As was said in *People* v. *January*, 19 Pac. Rep. 258, "the clerk cannot give verity to what purports to be the instructions given or refused, by inserting them in the judgment roll."

It is claimed that the motion for a new trial ought to have been granted on the ground of newly-discovered evidence. Waiving the objection which is made by the attorney general that acts of diligence in discovering what the witnesses would testify to are not shown in the transcript, we think that the newly-discovered evidence is cumulative. The court below doubtless considered it to be such, and was of the opinion that the verdict of the jury would not be different if the testimony of the proposed witnesses could be had on a new trial. The principal fact stated in the affidavits on motion for a new trial is that the affiants therein saw Rosengrave raise a knife or dagger to strike the defendant at the time of the difficulty. But the testimony of the defendant, and of the witness White, is to the same effect, and the case, so far as the defendant's theory is concerned, was put fairly before the jury upon the hypothesis that Rosengrave had, in fact, first assaulted the defendant with a knife or dagger.

Judgment and order affirmed.

I dissent: PATERSON, J.

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78 Cal. 136

In re CASEMENT'S ESTATE. (No. 12,815.)

(*Supreme Court of California.* January 17. 1889.)

1. WILLS—CONTEST—DECISION AS TO LEGATEES—FINAL ORDER—APPEAL.
In an action to determine which of three corporations is the legatee meant in a will, an order awarding the legacy to the executors as part of the residuary fund, and determining that neither claimant is entitled thereto, is not a final distribution from which an appeal can be taken by one of the claimants.

2. SAME—HARMLESS ERROR.
In such case it is not error of which the claimant can complain that the court improperly vacated an order previously made, by which the executors were discharged from their trust, and reinstated them, and awarded the fund to them, as the claimant, not being the legatee entitled thereto, could not be affected by the orders mentioned.

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Proceedings for distribution under the will of Emily Casement, deceased. From an order made therein the Old People's Home, a corporation claiming a legacy under the will, appeals.

Charles F. Hanlon, for appellant. *J. M Fulweiler*, for respondents.

WORKS, J. The deceased died testate, and by her will bequeathed "to the Old Ladies' Home of San Francisco $1,000." After the issuance of letters testamentary, the Protestant Episcopal Old Ladies' Home filed a complaint, claiming to be entitled to the legacy above mentioned, and asking that the same be distributed to it. An answer was filed by the Old People's Home, making the same claim, and a like answer and claim was made by the Sisters of Mercy. While these different claims were pending, there was an order made by the court that the executors be finally discharged from their trust, and that the money be paid to the clerk of the court, to be held by him until the rights of the claimants thereto be determined by the court. Subsequently the court ordered that "J. W. Fulweiler be, and he is hereby, appointed to represent the executors of the estate of Emily Casement, deceased, as the residuary legatee in the matter of the contested legacy, and that said matter be heard March 20, 1888." Thereafter the said Fulweiler, pursuant to said order, filed what is termed a complaint on the part of O. W. Hollenbeck and John Butler, alleging that they, as such executors, were the residuary legatees under said will, and were the executors of said estate, setting out the bequest contained in said will; and further alleging that there was no such institution in said San Francisco, Cal., known as the "Old Ladies' Home;" that there were three institutions in said city that, among other things, cared for old ladies, or old women, as follows: "The Protestant Episcopal Old Ladies' Home," "The Old People's Home," and the "Sisters of Mercy;" that it was not the intention of the said deceased to bequeath the said sum of $1,000 to either of said claimants; that each of them were corporations organized under the laws of the state of California prior to the year 1870, and were inhibited by the laws of said state from taking property by will; that, theretofore, said court had made its order discharging said petitioners from their trust as the executors of the last will and testament of said deceased; and praying that said order of the court, discharging said petitioners as such executors, be vacated and set aside. Each of the corporations above named filed answers to this complaint, reasserting their claims to the legacy, and denying the material allegations of the petition. The court entered an order vacating the former order of the court, discharging the executors, and proceeded to a hearing of the questions presented by the several claims of said legacy. The findings of the court are to the effect that neither of said claimants is entitled to said legacy; that the executors are the residuary legatees under said will, and, as such, entitled to the same; and the judgment of the court is rendered accordingly. The Old People's Home moved for a new trial, which was denied, and it appeals from the judgment and the order denying a new trial.

The appellant contends that the court below had no power to vacate the order discharging the executors, and to reinstate them as such executors by a subsequent order. Conceding this, we do not see how the appellant was or could have been injured thereby. The only material questions presented by the several claimants were whether either, and, if so, which one, of them was entitled to the legacy in question. The reinstatement of the executors was unnecessary to the determination of these questions. The court found and adjudged that the appellant was not the legatee named in the will, and that it was not, therefore, entitled to the money. This being the case, it was wholly immaterial to it whether the legacy went to one of the other claimants, or back to the persons who were claiming to be the executors of the will, and, as such, entitled to the money as residuary legatees. Therefore, if the court erred in making the order complained of, it was harmless.

It is contended that the order of distribution, made in connection with the order discharging the executors, was conclusive, and could not be set aside on motion. This may also be conceded, for the purposes of this case, as it in no way affected the rights of the appellant, or any of the other claimants of this legacy. It simply provided that the money be paid to the clerk, and held by him until the rights of the claimants be determined.

So it is urged that the judgment of the court that the executors were entitled to the legacy as residuary legatees was void, because there were no executors. We may concede this, also, and how is the appellant injured? It was enough that the judgment was against the appellant's claim. So much of the decree as provides that the same be paid to the executors may be treated as surplusage, so far as this appeal is concerned. The same may be said of the claim made that the court erred in failing to find upon the issue that the executors were barred and estopped to claim the legacy by said decree of distribution, and by failing to file a petition for the legacy within the time required by law. If the appellant was not entitled, it cannot be heard to complain that the property was decreed to some one else in the same condition, and therefore these were immaterial issues, in view of the finding and judgment against appellant's claim.

The next contention is that parol evidence was competent to show that the testatrix meant the appellant by the ambiguous term she adopted in her will. The court may have so understood it, as such evidence was heard without objection. It is argued by counsel for appellant, with great earnestness, that such evidence was competent to explain what is claimed to be an ambiguity in the terms of the will, but there is no such question before us. All of the evidence offered by the appellant was admitted by the court below. We think it may be seriously questioned whether the court did not err, in this respect, in appellant's favor, but we express no opinion upon it.

The question whether or not a charitable corporation can take by will is very elaborately argued, but there is nothing in the record to indicate that the court below held to the contrary, or that it based its decision upon any such ground. The court below heard the evidence, and found against the appellant. As the case is presented to us, we must assume that the court found that the evidence was insufficient to entitle the appellant to the legacy. It will be seen by the statement of the case that the name of the legatee in the will is not identical with the name of either of the three claimants. The bequest was to the "Old Ladies' Home of San Francisco." The corporate name of the appellant is "The Old People's Home," and one of the other claimants, "The Protestant Episcopal Old Ladies' Home," and the other the "Sisters of Mercy."

The point is made by counsel for appellant, and elaborately argued, that there was such an ambiguity in the will as might be so explained as to show that the appellant was interested as the beneficiary under the will, and that the evidence introduced was sufficient to show that fact. As we have said, the court below must have acquiesced in the view that the evidence was competent, as the testimony of witnesses on the point was heard. There was evidence on the part of appellant and the respondent the Protestant Episcopal Old Ladies' Home, attempting to show that each of them was the person referred to in the will; and the court below having heard all the evidence, and found it to be insufficient to entitle either of them to the legacy, we cannot disturb the finding. We may suggest, however, that, as the final order of distribution did not dispose of this legacy, and no disposition has yet been made of it, that it is still subject to the claim of the parties to this action. We may say further that the respondent the Protestant Episcopal Old Ladies' Home comes more nearly within the provisions of the will than either of the other claimants, and that, under the liberal rules of construction applicable to legacies to charitable institutions, the court might properly have distributed the money to it. But, as it is not appealing, the question is not before us.

We are of opinion that there has been no final judgment or order of distribution in this case from which an appeal can be allowed. If any errors have been committed in construing the will the court below can correct them on making final distribution.

Appeal dismissed.

We concur: THORNTON, J.; MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

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78 Cal. 141

PEOPLE *ex rel* Attorney General *v.* EICHELROTH, County Physician.

(No. 12,460.)

(*Supreme Court of California.* January 19, 1889.)

PHYSICIANS AND SURGEONS—"SUITABLE GRADUATE."

The words "suitable graduate in medicine," as used in the county government act Cal. § 25, subd. 5, providing that the board of supervisors shall appoint some suitable graduate in medicine to attend the indigent sick, etc., mean a person legally licensed to practice medicine under the laws of the state, and are not confined to college graduates.

In bank. Appeal from superior court, Tuolumne county; C. V. GOTTSCHALK, Judge.

Proceedings in the nature of *quo warranto* against W. E. Eichelroth, county physician of Tuolumne county. Judgment for defendant, and plaintiff appeals.

Geo. A. Johnson, Atty. Gen., and *F. P. Otis,* for appellant. *P. Reddy, W. H. Metson, F. W. Street,* and *F. D. & G. W. Nicol,* for respondent.

PATERSON, J. This is an action to oust the defendant from the office of county physician of Tuolumne county, on the ground that he was not at the time of his appointment, and is not now, "a suitable graduate in medicine."

On March 8, 1887, the board of supervisors of Tuolumne county appointed the defendant physician for the county hospital and jail and indigent sick of said county for the term of one year. The act under which the appointment was made provides that "the board shall also appoint (not let to the lowest bidder) some suitable graduate in medicine to attend such indigent sick or otherwise dependent poor." County Government Act, § 25, subd. 5. The case was submitted upon an agreed statement of facts, and the court below rendered judgment for the defendant.

The defendant has been in the continuous practice of medicine and surgery for about 43 years, in this state, since 1852. During the 14 years last past he has been the county physician of Tuolumne county, and while engaged in the practice of medicine and sugery has attended to the indigent sick of said county. He studied medicine for one year in the university of Yena, Germany, and has been superintendent of hospitals in different parts of this country; but has never received a diploma from any medical college, and never was graduated at any college, school, or university which confers the degree of doctor of medicine. Under the act of April 3, 1876, the state medical society of this state appointed a board of examiners. The defendant went before said board of examiners, and, after being duly examined, received from said board, on the 13th day of December, 1876, a certificate and license in due form, signed by the members of the board, authorizing him to practice medicine and surgery in this state.

The case turns on the meaning of the words "some suitable graduate in medicine." Technically the word "graduate" implies a degree and regular curriculum. Webster defines the verb "graduate," "to pass to, or to receive, a degree in a college or university." But we do not think it necessary to give to the word, as used in this statute, a strict and technical definition. In the construction of a statute, the intention of the legislature is to be ascertained, not so much from the phraseology in which the intent has been expressed, as the general tenor and scope of legislation on the subject. *Palache* v. *Insurance Co.*, 42 Cal. 419; End. Interp. St. § 76. The purpose of legislation on the subject before us was to prevent persons not properly qualified from practicing medicine in this state, and to prevent injury to helpless people under the protection of the county, through the incompetency of the physician in charge of the hospitals and jails. For that purpose the board of examiners, composed of competent physicians, was provided for; and said board was required to make such an examination of applicants as would show their qualification to practice medicine and surgery. The tests of qualification to practice medicine in this state are of two kinds: *First*, the diploma from a medical college or incorporated society; and, *second*, a satisfactory examination before the board. The evidence required in the first class of cases to entitle the applicant to practice is a diploma and certificate of the board; and in the second class a certificate showing that the holder thereof has been duly examined and is entitled to practice. We do not think it was the intention of the legislature to provide that while those confined in the jails or hospitals might be treated by a physician holding a diploma from some medical institute, authorized by law to confer the degree of doctor of medicine, a physician who had passed a satisfactory examination before the board of examiners of the state medical society of this state should not be qualified or allowed by law to treat such patients. The words "suitable graduate in medicine," we think, as used in the act before us, mean one legally licensed to practice medicine and surgery under the laws of this state. It cannot be said that the meaning of the words is clear, and in such cases the statute should be give such construction as will not deprive the person interested in its construction of a substantial right. *People* v. *Hodgdon*, 55 Cal. 72.

Judgment affirmed.

We concur: BEATTY, C. J.; THORNTON, J.; WORKS, J.; McFARLAND, J.; SHARPSTEIN, J.

78 Cal. 150

DOE *v.* SANGER *et al.* (No. 12,847.)

(*Supreme Court of California.* January 25, 1889.)

PLEADING—COMPLAINT—DEMURRER—AMBIGUITY—BAR OF LIMITATIONS.

A complaint is not demurrable for ambiguity and uncertainty because it might appear on the proofs that some part of the damages claimed was barred by limitation.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

Trespass by J. S. Doe against Casper M. Sanger, Daniel Wells, Jr., W. H. Metcalf, Charles F. Bradley, and the Oro Grande Mining Company. Judgment for plaintiff. Defendants appeal.

Harris & Gregg, for appellants. *R. S. Mesick*, for respondent.

FOOTE, C. This is an action of trespass upon certain mining property. A demurrer was filed to the amended complaint, and overruled, an answer was filed, a trial had, and judgment rendered for the plaintiff, from which this appeal is taken, and the reason urged for its reversal is, as alleged, that the demurrer ought to have been sustained.

The trespass is averred, in the amended complaint, to have taken place "on or about the 30th day of June, 1886, and prior thereto from about the 1st day of November, 1883, until said 30th day of June, 1886." The suit was brought on the 28th day of April, 1887. The grounds of the demurrer are that the complaint is ambiguous and uncertain, and that part of the damages claimed is barred by subdivision 2, § 338, Code Civil Proc.

There is no uncertainty or ambiguity as to the nature and character of the cause of action set up in the complaint. It might happen that under a pleading in the answer of the statute of limitations it would appear upon the proofs made that some portion of the damages claimed by the complaint was barred, but that would not make the allegation of the complaint doubtful as to what damages were claimed, their character, and during what time they were alleged to have been suffered.

The fact that a cause of action, as set out in the complaint, does not on its face show whether or not it is barred by the statute of limitations, would not defeat a recovery. It could only be determined on the trial of the case whether the whole or any part of the damages claimed was barred by the statute. Unless it appears upon the face of the complaint that the cause of action is barred by the statute of limitations, that "objection cannot be raised by demurrer." *Wise* v. *Hogan*, 19 Pac. Rep. 278, and cases cited.

No prejudicial error appearing, we advise that the judgment be affirmed.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

BEATTY, C. J. I concur in the judgment of affirmance for the reasons stated; and upon the further ground that where it appears, as in this case it does appear, that the matter in respect to which a complaint is peculiarly within the knowledge of the defendant, such ambiguity is not a ground of demurrer of which defendant can avail himself.

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3 Cal. Unrep. 60

WIXON *v.* DEVINE. (No. 12,788.)

(*Supreme Court of California.* January 25, 1889.)

In bank. Appeal from superior court, Sierra county; F. D. SOWARD, Judge.

Van Clief & Wehe, for appellant. *Smith & Ford* and *S. B. Davidson*, for respondent.

PATERSON, J. 1. The judgment of the court below was entered on July 6, 1887. Notice of appeal was filed and served nearly a year thereafter, to-wit, June 29, 1888. As there was no motion for a new trial, therefore the evidence should not be considered.

2. There are no assignments of error, or specifications of insufficiency of the evidence, in the bill of exceptions.

3. The findings cover the issues, are against the appellant, and, although the record is not in a condition to require of us an examination of the evidence, it is apparent from a cursory review of it that the findings are correct.

Judgment affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; THORNTON, J; MCFARLAND, J.

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78 Cal. 109

In re OXARART'S ESTATE. (No. 12,744.)

(*Supreme Court of California.* January 12, 1889.)

DESCENT AND DISTRIBUTION—ADJUDICATION OF HEIRSHIP—CONTINUANCE.

Code Civil Proc. Cal. § 1664, provides for the adjudication of the right of a person claiming to be heir of a decedent upon a petition filed for that purpose, which adjudication shall be conclusive, and that, when no such adjudication has been made under said section, the heirship and right to distribution of any person may be determined upon proceedings for final distribution of an estate. *Held*, that the fact that a petition has been filed, and citation issued thereon, is no ground for a continuance, at the instance of the petitioner, of proceedings by the executor of the estate for final distribution, begun on the day citation issued on said petition.

In bank. Appeal from superior court, Los Angeles county; W. P. GARDINER, Judge.

Proceedings for the settlement of the estate of Gaston Oxarart, deceased, of whose will Simon F. Gless was executor. Adele Freeman filed a petition claiming to be the sole heir of testator, and asking an adjudication of her rights. The executor filed a petition for distribution under the will, and Mrs. Freeman moved for a continuance of a hearing thereof until a decision could be had upon her petition, which was denied, and she appeals.

Code Civil Proc. Cal. § 1664, under which Mrs. Freeman filed her petition, and upon which she relies in support of her motion for a continuance, provides that any person claiming to be heir to a deceased person, whose estate is in process of administration, may, at any time after the expiration of one year from the issue of letters testamentary or of administration, file a petition to have the persons to whom distribution should be made determined. Notice thereof shall be given as therein prescribed, and the manner of proceeding shall be as in other civil actions. The judgment of the court shall determine the heirship to the deceased, and the ownership and distribution of his estate, and shall be final. "Nothing in this section contained shall be construed to exclude the right, upon final distribution of any estate, to contest the question of heirship, title, or interest in the estate so distributed, where the same shall not have been determined under the provisions of this section."

J. W. Towner, for appellant. *Chapman & Hendrick*, *Smith & Clark*, *T. B. Brown*, and *M. V. Biscailuz*, for respondent.

THORNTON, J. The decedent died testate in the county of Los Angeles on the 26th day of April, 1886. By his will the deceased devised all his estate to the respondent herein, Simon F. Gless. This will was allowed and admitted to probate on the 4th day of February, 1887, and letters testamentary were on the same day issued to the devisee above named, who was by the will appointed executor thereof. On the 9th day of February, 1888, the appellent herein, Adele Freeman, filed a petition in the superior court of Los Angeles county under the provisions of section 1664, Code Civil Proc., claiming to be the only surviving child and heir of the testator, and setting forth that the will of the decedent omitted to provide for the petitioner, his only child, and that it did not appear from the will this omission was intentional. The petition seems to have complied with the requirements of section 1664. On the same day in February, 1888, the court below made an order directing service of notice to all persons interested in the estate to appear in said court, and file their appearance therein, in person or by attorney, on or before the 31st day of May, 1888, and to set forth their claims of heirship, etc., on said estate, as required by the section above referred to. The foregoing notice was issued and placed in the hands of the sheriff for service on the 16th of February, 1888. On the same day, after the making of the order above mentioned, Gless filed in the same court his final account as executor of the estate of Oxarart, and a petition for the distribution thereof. Thereupon, on the same day, the court made an order fixing the 21st day of February, 1888, for the hearing of this account and petition. On the 16th of February, 1888, the petitioner herein, Adele Freeman, served on Gless notice of motion for a continuance of the hearing of the above petition for distribution until the determination by the court of the claim of heirship in the estate of Oxarart, made by her, and of the rights of all persons in the estate, in accordance with the prayer of her petition, filed as above stated. The notice stated as the ground of the motion the following: "That when a petition has been duly filed under said section 1664, and said petition and other proceedings thereupon are pending, distribution cannot be made until the court has ascertained and declared the rights of all persons as aforesaid in the manner prescribed in said section; and upon the ground that said Adele Freeman, having filed her petition claiming to be heir to the said deceased, and entitled to distribution of his estate, is entitled to have her rights and claims ascertained and determined in the mode and manner provided in said section in preference to any other mode allowed by law in cases where proceedings are not had or taken under said section, and before any order of distribution is made in said estate." When the matter of the petition for distribution was called for hearing on the 21st of February, 1888, the motion for a continuance was first heard and denied. To this ruling petitioner, Adele Freeman, excepted, and appeals from the judgment herein.

That the question of the heirship of Adele Freeman might as well have been heard and determined on the hearing of the petition for distribution of the estate is too plain to admit of doubt. That the trial of such question is regular when the application for distribution is brought on for hearing, and no previous determination of such question has been had in proceedings taken under section 1664, we think is clear. This appears from the provisions of the section. See last sentence of section 1664.

We cannot conceive that the pendency of the proceeding under section 1664 excludes the usual proceeding for the determination of the question of heirship at the hearing of the application for distribution. When, in advance of any determination of the court of the questions involved in the proceeding under section 1664, an application is made for distribution, we see no reason why the court should not hear the latter, determine all questions of heirship, and dismiss the other proceeding.

It will be observed that the application for a continuance here was not made on the ground that the applicant was not ready to proceed with the hearing of the question of her right as heir of Oxarart. She did not urge as a ground for postponement of the hearing that the witnesses she wanted to offer to establish her claim were not present, although regularly and in time summoned, or that she desired to introduce documentary evidence in existence, which she could procure, but which in the exercise of all proper diligence on her part she had been unable to procure; but entirely upon the ground that she had a short time before commenced proceedings for the trial and determination of a claim of heirship preferred by her, and which was still pending and undetermined.

From the views heretofore expressed, from which it appears that the question desired to be tried could as well be heard and determined at the hearing of the application for distribution as on the proceedings commenced under the section of the statute above mentioned, the question of postponement became one merely of discretion on the part of the court below. The exercise of this discretion by the court, unless abused, this court will not interfere with. In our judgment, the court very properly exercised its discretion in refusing to postpone the cause. If resort is to be had to the provisions of section 1664 to delay the settlement and distribution of estates, it had better never been passed. We have no doubt that the object of its enactment was to expedite such distribution, by enabling persons claiming interests in estates to have their claims determined in advance of the application for distribution, and when such application was made, and came on for hearing, the court would have no trial of such questions to make, and would at once decree to such person, ascertained to be entitled, the portion of the estate adjudged to him.

The determination of the proceedings initiated by the appellant in this court under section 1664 would have involved much delay, and would have deprived the devisee of the estate of his right on the showing made of having the question determined then and there on the application for distribution made by him.

Judgment affirmed.

We concur: McFARLAND, J.; WORKS, J.; SHARPSTEIN, J.; PATERSON, J.

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78 Cal. 154

PEOPLE *v.* HUSON *et al.* (No. 7,207.)

(*Supreme Court of California.* January 25, 1889.)

1. PRINCIPAL AND SURETY—LIABILITY OF SURETY—ESTOPPEL.
   The sureties in an official bond are estopped from denying the appointment of the principal to the office, where such appointment is recited in the bond, and due execution of the bond is admitted.
2. BONDS—OF OFFICIALS—EVIDENCE OF APPROVAL.
   The approval of a bond on which is written under the word "approved" the names of individuals, without showing that they constitute the board required to approve it, or that they approved it officially, is sufficiently shown by the testimony of the secretary of the board and by the minutes.
3. SAME—ACTION ON THE BOND—SUGGESTION OF DEFECTS.
   Under Pol. Code Cal. § 963, declaring that an official bond is not void for defects in the approval, but the state or party may by action suggest the defect, and re-

cover the demand from the officer and sureties, failure to approve an official bond does not release the sureties, and the defect is sufficiently suggested by attaching the bond to, and making it a part of, the complaint in an action upon it.

4. SAME—ACCEPTANCE—FILING.
An official bond which is delivered to and informally approved by the board required to approve it, is accepted, and becomes obligatory without an indorsement of filing.

5. SAME—EVIDENCE OF BREACH.
In an action on an official bond for failure to pay over public moneys, receipts signed by the officer showing the collection of public moneys are *prima facie* evidence to charge the sureties.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; OLIVER P. EVANS, Judge.

Action by the people against Thomas R. Huson, E. J. Lewis, and T. McCarthy. Plaintiffs appeal. Pol. Code Cal. § 963, is as follows: "Whenever an official bond does not contain the substantial matter or conditions required by law, or there are any defects in the approval or filing thereof, it is not void so as to discharge such officer and his sureties; but they are equitably bound to the state or party interested, and the state or such party may, by action in any court of competent jurisdiction, suggest the defect in the bond, approval or filing, and recover the proper and equitable demand or damages from such officer, and the persons who intended to become and were included as sureties in such bond."

T. C. Coogan, *W. W. Morrow*, and *J. B. Lamar*, for appellants. *W. M. Pierson*, for respondents.

BELCHER, C. C. This is an action to recover the sum of $1,045.10, money alleged to have been received in an official capacity, and misappropriated by defendant Huson, and is based upon what is called his official bond.

It is alleged in the complaint that Huson was appointed to the position of wharfinger by the board of state harbor commissioners on the 30th day of August, 1877, and that he entered upon the duties of his office on the 1st day of September, 1877, and continued in the office until the 30th day of December following; that the duties of a wharfinger were to collect and receive the revenue arising from dockage, wharfage, cranage, rents, and tolls on the wharves in the city and county of San Francisco, and that while Huson held and exercised the functions of his said office he collected in his official capacity a large amount of public money received from dockage, wharfage, etc., which he did not pay over, and on demand has neglected and refused to pay over to the board of state harbor commissioners. It is further alleged "that previous to entering upon the duties of his said office, the said defendant, Thomas R. Huson, took the oath of office required by law, and, together with the said defendants, T. McCarthy and E. J. Lewis, executed and delivered to plaintiffs an official bond, a copy of which is hereto attached, marked 'Exhibit A,' and, together with all its indorsements, is made a part of this complaint; that said bond was on the said 30th day of August, 1877, duly approved by the board of state harbor commissioners."

The bond referred to was dated August 30, 1877, and the condition expressed in it reads as follows: "The condition of the foregoing obligation is such that, whereas, the above-bonded Thomas R. Huson has been appointed wharfinger by and for the board of state harbor commissioners of said state, now, therefore, if the said Huson shall well, truly, and faithfully perform all official duties now required of him by law, and all such additional duties as may be imposed upon him by any law enacted subsequently to the execution of this bond, and shall pay the said board of state harbor commissioners all moneys collected by him by virtue and authority of said appointment, then this obligation to be void; otherwise to remain in full force and effect." It was indorsed: "Approved. WILLIAM BLANDING. BRUCE B. LEE. A. M. BURNS."

Only the defendants, McCarthy and Lewis, answered to the complaint. They denied, among other things, "that the defendant Huson was on the 30th day of August, 1877, duly or legally or at all appointed a wharfinger by the board of state harbor commissioners, or was appointed a wharfinger until the 31st day of August, 1877," and they further denied that his bond was ever approved or accepted by the board. When the case was called for trial, "it was admitted by both parties that the bond, which is designated as 'Exhibit A,' and is a part of this complaint in this action, was duly executed, and that all the signatures and indorsements of the bond are genuine and are what they purport to be." The trial was by the court, without a jury, and judgment was given for defendants. No findings were filed, and it does not appear upon what grounds the decision was rendered. The plaintiff moved for a new trial, and, the motion being denied, appealed from the order. Since the appeal was taken respondent Lewis has died, and as to him the appeal has been dismissed.

In support of the judgment, it is urged on the part of respondent McCarthy that there was no evidence in the court below that Huson was ever appointed wharfinger. The answer to this position is that the complaint alleged his appointment, and the answer denied only that he was appointed on the day named, and admitted that he was appointed on the next day. The complaint also alleged the execution and delivery of the bond, and this was not denied. The bond recited the appointment, and was admitted at the trial to have been duly executed. The sureties were therefore estopped from denying the appointment, and no proof of that fact was necessary. "The general rule is that sureties are estopped to deny the facts recited in the obligations signed by them, and this whether the recitals are true or false in fact. Having once solemnly alleged the existence of the facts, they cannot afterwards be heard to deny it." Brandt, Sur. § 29; and see *People* v. *Jenkins*, 17 Cal. 500.

It is further urged that the bond was never approved by the board, and this is rested upon the fact that it does not appear that the persons whose names are written under the word "Approved" on the back of the bond constituted the board of harbor commissioners, nor, if they did, that they approved it as such. There are two answers to this objection: *First*, the secretary of the board testified that the bond was approved, and that the minutes of the board showed that fact; *second*, the settled rule is that the failure of the proper officers to approve an official bond will not invalidate it, nor release the sureties from their liability upon it. Pol. Code, § 963; *People* v. *Edwards*, 9 Cal. 286; *People* v. *Evans*, 29 Cal. 430; *Mendocino Co.* v. *Morris*, 32 Cal. 145. And under the section of the Code above cited, if a copy of the bond be attached to and made a part of the complaint, it is a sufficient suggestion of any defect in the bond, or in the approval or filing thereof. *Hubert* v. *Mendheim*, 64 Cal. 213.

It is also claimed that there was no evidence of the filing of the bond, and hence no proof of its delivery to and acceptance by the board. But, as we have seen, the pleadings admitted its delivery, and there was, at least, an informal approval of it. Under these circumstances, we think it must be held that the bond was accepted by the board, and became obligatory on its makers, even without an indorsement of filing.

There was uncontradicted evidence that Huson, while acting as wharfinger, collected public moneys, and neglected to pay them over to the board. This was a clear violation of duty, and a breach of the obligation of his bond. There were also certain receipts offered in evidence, which were signed by Huson, and showed the collection by him of public moneys. They were objected to on the ground that they were only hearsay evidence, and were excluded by the court. In our opinion they were *prima facie* evidence to charge the sureties on the bond, and were admissible. *Placer Co.* v. *Dickerson*, 45 Cal. 12.

Looking at the whole record, we think the court erred in denying the plaintiffs' motion for a new trial, and we therefore advise that the order be reversed, and the cause remanded.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order denying plaintiff's motion for a new trial is reversed, and cause remanded.

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SAN DIEGO LAND & TOWN CO. *v.* NEALE *et al.* (No. 12,743.)

(*Supreme Court of California.* December 31, 1888.)

1. EMINENT DOMAIN—COMPENSATION—EVIDENCE.
   Where land owned by defendants, the value of which could not be ascertained from any current rate of price, was condemned by plaintiff, owning an adjoining tract, for the purposes of a reservoir, evidence was admissible as to the value of defendants' land as "a reservoir site," although such tract was of no value for such purpose, except when used in connection with plaintiff's tract,—the evidence also showing that plaintiff's land was of comparatively little value for a reservoir, unless it could be used in connection with defendants' tract. SEARLS, C. J., and McFARLAND, J., dissenting.
2. SAME—ELEMENTS OF VALUE.
   But in such a case it was not proper to take into consideration the fact that a dam was "already in course of construction" by plaintiff for the reservoir, and the consequent increase in value of the land of defendants sought to be condemned.[1]
3. SAME.
   And where the reservoir was to be used for irrigation purposes, the fact that the land to be condemned or the adjacent land would be considerably enhanced in value, by having irrigation facilities afforded to it, could not be considered in estimating the value of defendants' land.
4. SAME—OPINION EVIDENCE.
   Witnesses having knowledge of the surroundings, and of values, though not experts, were properly allowed to testify as to the value of defendants' land.
5. TRIAL—RECEPTION OF EVIDENCE—IRRELEVANT TESTIMONY.
   The fact that one side is permitted to introduce irrelevant evidence will not justify the introduction of irrelevant evidence by the other side.
6. NEW TRIAL—MOTION—REHEARING ON PART OF THE ISSUES.
   Code Civil Proc. Cal. § 656, defines a new trial as a "re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees." *Held*, where all the material issues of a case have been disposed of, a motion for a new trial may be made as to a part of the issues.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; E. PARKER, Judge.

Luce & Henderson and *Henderson & McDonald*, for appellant. *Hunsaker, Britt & Lamme* and *J. E. Deakin*, for respondents.

HAYNE, C. Proceeding to condemn land for the purposes of a reservoir. It appears from the findings that the use was a public use; that the value of the land to be taken was $280 per acre, amounting in all to $98,126; that the damage to the remainder of the tract amounted to $1,805; and that the value of the improvements was $300. The plaintiff moved for a new trial as to the issue concerning the value of the land sought to be taken, but as to no other issue, and appeals from the order denying the motion.

The defendants make a preliminary objection that a party cannot move for a new trial as to a part of the issues. So far as we are advised, this precise question has not been decided in this state. But upon principle, and according to the analogies of existing rules, we think that the objection is not well taken. There is nothing in the Code either expressly forbidding or expressly authorizing such a course. The implication from the language, however, seems to sanction it. The definition of a new trial is as follows: "A new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury or court, or by referees." Code Civil Proc. § 656. Now, as the law-makers cannot be supposed to have thought that the majority of cases involved only one issue of fact, there is at least some implication that they intended that there might be such a thing as a new trial of a single issue, whether there were other issues or not. The analogies of other provisions and previous decisions support this view. Thus, a party may appeal from a part of a judgment or order. See cases collected in note 4, § 185, Hayne, New Trials & App. So it has been held that, where a party serves his notice of intention to move for a new trial upon only one of two defendants, it is proper to grant a new trial as to the one served, but not as to the other. *Wittenbrock* v. *Bellmer*, 57 Cal. 12. And it has always been the practice (except in cases of a peculiar character) for any party who is dissatisfied with the result to move for a new trial as to himself, leaving the judgment to stand as to the other parties. And in one sense such a motion is a motion for new trial as to a part of the issues. So it is settled that, upon an appeal from the judgment, the appellate court may order a new trial as to a part of the issues, leaving the decision in force as to the remainder. *Marziou* v. *Pioche*, 10 Cal. 546; *Jungerman* v. *Bovee*, 19 Cal. 364; *Kinsey* v. *Green*, 51 Cal. 379; *Le Clert* v. *Oullahan*, 52 Cal. 253; *Watson* v. *Cornell*, Id. 91; *Swift* v. *Canavan*, Id. 419; *Billings* v. *Everett*, Id. 661, *Phipps* v. *Harlan*, 53 Cal. 87. And, if this can be done, it is difficult to assign a satisfactory reason why the party could not ask the trial court for the same relief in the first instance. The cases which hold that a motion for new trial is premature if made before all the material issues are disposed of are not in conflict with our conclusion, for in the case before us all the material issues were disposed of before the motion was made. We see no inconvenience that can result from the practice. The time to move as to the remaining issues would not be extended by a motion as to a part; and the party would lose his right to attack the findings as to the remaining issues unless the time should be extended, which could only be for a short period without the consent of the parties. And, this being so, the result would simply be the elimination of a part of the controversy, which is not in itself undesirable. The question arose in Nevada upon a similar statute, and the court, after an elaborate examination of the subject, held that a motion for new trial as to a part of the issues was permissible. *Lake* v. *Bender*, 18 Nev. 361, 4 Pac. Rep. 711, and 7 Pac. Rep. 74. We are satisfied with the rule laid down in that case. It is possible that there may be cases where the issues are so inseparably blended as to render a separation impracticable. We express no opinion as to that. But it is clear that the present case is not of that character. The preliminary objection should therefore be overruled.

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[1] Respecting the elements of damage which may be considered in awarding compensation in condemnation proceedings, see Railroad Co. v. Story, (Mo.) 10 S. W. Rep. 203; Cox v. Railroad Co., (Iowa,) 41 N. W. Rep. 475, and note; Railroad Co. v. Ross, (Kan.) ante, 197, and note.

Upon the merits, the general features of the case are as follows: The plaintiff was the owner of a portion of a valley called the "Sweetwater Valley," and of the right to divert the waters of the Sweetwater river, and before the commencement of the proceedings had commenced to build a dam upon its own land. The defendants were the owners of a tract above the dam. There was no practical site for a dam upon defendants' land, either on the part sought to be condemned or on the remainder of the tract. But it was shown that the water collected by the plaintiff's dam would back up and flood a portion of their tract, and this is the part sought to be condemned.

We are satisfied that there was error occurring at the trial sufficient to require a reversal of the order appealed from; but, as several questions have been argued which will arise upon a retrial, we have examined them with the care which their importance demands.

1. It is contended that there was error in admitting evidence of the value of defendants' property "as a reservoir site," and in instructing the jury upon that theory; and the cases of *Gilmer* v. *Lime Point*, 19 Cal. 47, and *Railroad Co.* v. *Pearson*, 35 Cal. 247, are cited. It must be admitted that these cases in some degree sustain the position. In *Gilmer* v. *Lime Point*, the court below refused to allow a witness to be asked what was the value of the property "as a site for a fortification," and, while the judgment was reversed on another ground, the appellate court said that the exclusion of the question was proper. In the other case the lots of one of the defendants bordered on the Sacramento river, and one of the reasons for reversing the judgment was that evidence had been admitted to the effect that "in connection with the Sacramento river she claimed the right to wharf out and erect landings and warehouses." The court referred to this as "wharf privileges," and said that no franchise might ever be granted. The language of the opinion seems to imply that it had in its mind the value of the privilege as something distinct from the land, and not as an element of the value of the land itself. But in so far as these cases sustain the position of the appellant we think they are in violation of sound principles, and opposed to the overwhelming current of authority.

The word "value" is used in different senses. Bouvier, in his definition, says: "This term has two different meanings. It sometimes expresses the utility of an object, and sometimes the power of purchasing goods with it. The first may be called the value in use; the latter, the value in exchange." For the purposes of the law of eminent domain, however, the term has reference to the value in exchange or market value. There are some cases which seem to hold that the value in use to the owner is to be taken if it exceeds the market value. But it will generally be found, on a careful examination, that such cases either relate to the damage accruing to the owner from the taking, and not to the value of the property itself, or overlook the distinction between the two things. The *consensus* of the best-considered cases is that for the purposes in hand the value to be taken is the market value. *Railroad Co.* v. *Walsh*, 106 Ill. 255; *Dupuis* v. *Railway Co.*, 115 Ill. 99, 3 N. E. Rep. 720; *Railway Co.* v. *Woodruff*, 49 Ark. 388, 5 S. W. Rep. 792; *Low* v. *Railroad Co.*, 63 N. H. 558, 3 Atl. Rep. 739; *Searle* v. *Railroad Co.*, 33 Pa. St. 57; *Railroad Co.* v. *Murphy*, 71 Cal. 122, 11 Pac. Rep. 881; and see Cooley, Const. Lim. 565; 2 Dill. Mun. Corp. § 487, by which is undoubtedly meant, not what the owner could realize at a forced sale, but "the price that he could obtain after reasonable and ample time such as would ordinarily be taken by an owner to make sale of like property," (*Railway Co.* v. *Woodruff*, 49 Ark. 390, 5 S. W. Rep. 792.) The problem, then, is to ascertain what is the market value. Now, where there is an actual demand and current rate of price there can be but little difficulty. But in many instances (as in the case before us) there is no actual demand or current rate of price,—either because there have been no sales of similar property, or because the particular piece is the only thing of its kind in the neighborhood, and no one has been able to use it for the purposes for which it is suitable, and for which it may be highly profitable to use it. In such case it has been sometimes said that the property has no market value, in the strict sense of the term. *Railway Co.* v. *Railroad Co.*, 112 Ill. 607; *Railway Co.* v. *Railroad Co.*, 100 Ill. 33; *Railroad Co.* v. *Chapman*, 16 Pac. Rep. 695, 696. And in one sense this is true. But it is certain that a corporation could not for that reason appropriate it for nothing. From the necessity of the case the value must be arrived at from the opinions of well-informed persons, based upon the purposes for which the property is suitable. This is not taking the "value in use" to the owner as contradistinguished from the market value. What is done is merely to take into consideration the purposes for which the property is suitable as a means of ascertaining what reasonable purchasers would in all probability be willing to give for it, which in a general sense may be said to be the market value, and in such an inquiry it is manifest that the fact that the property has not previously been used for the purposes in question is irrelevant. The current of authority sustains these views.

In *Boom Co.* v. *Patterson*, 98 U. S. 403, three islands in the Mississippi river were sought to be condemned for the purpose of a boom or storing place for floating logs. For general purposes the property was of insignificant value, but it was found to have a large value for boom purposes. It had never been used for such purposes, but there was nothing to prevent other persons or companies from engaging in the enterprise if they had seen fit to do so. It was held that the value for boom purposes must govern, and the court, per FIELD, J., (who, when on the state bench, had concurred in *Gilmer* v. *Lime Point*,) said: "In determining the value of land appropriated for public purposes, the same considerations are to be regarded as in a sale of property between private parties. The inquiry in such cases must be, what is the property worth in the market, viewed not merely with reference to the uses to which it is at the time applied, but with reference to the uses to which it is plainly adapted; that is to say, what it is worth from its availability for valuable uses. Property is not to be deemed worthless because the owner allows it to go to waste, or to be regarded as valueless because he is unable to put it to any use. Others may be able to use it, and make it subserve the necessities or conveniences of life. Its capability of being made thus available gives it a market value which can be readily estimated. So many and varied are the circumstances to be taken into account in determining the value of property condemned for public purposes that it is perhaps impossible to formulate a rule to govern its appraisement in all cases. Exceptional circumstances will modify the most carefully guarded rule; but, as a general thing, we should say that the compensation to the owner is to be estimated by reference to the uses for which the property is suitable, having regard to the existing business or wants of the community, or such as may be reasonably expected in the immediate future."

The same rule has been laid down in numerous other cases.

In *Harrison* v. *Young*, 9 Ga. 364, 365, a piece of land was sought to be condemned by a bridge company. The trial court refused to admit evidence as to the value of the land "as a bridge site," and restricted the evidence "to the actual value of the land for its agricultural and productive qualities." It was held that this was error, the court, per LUMPKIN, J., saying: "Who in making investments of capital in real estate is not influenced by the consideration that it will be valuable for a town, bridge, ferry, mill, manufactory, etc.?"

In *Railroad Co.* v. *Ryan*, 64 Miss. 399, the tract condemned was a narrow strip along the Mississippi river. Evidence was admitted to show that it was peculiarly valuable as a mill-site, although no mill was then upon it. Upon appeal it was held that the evidence was properly admitted, the court saying: "Clearly it is of insignificant value for agricultural purposes, and there is neither a wharf, a factory, or a saw-mill on it, and there may never be. But if its adaptability to these purposes, or any one of them, give it a present value, the owner is entitled to that value, though in fact no one now proposes to use it for any of these purposes."

In *Railroad Co.* v. *Catholic Bishop*, 119 Ill. 530, 10 N. E. Rep. 372, the property sought to be condemned for railroad purposes was a strip in front of a cemetery. For many years it had been rented as a marble yard, and evidence was introduced that it had a special value for restaurant purposes. It was held that this value should be considered, although the bishop would not rent it for such purposes, the court saying: "Because the proprietor of land elects to use it for one purpose rather than another, we do not think that its capacity for the use to which it is not put is improperly taken into consideration in estimating its value."

In *Commissioners* v. *Dunlevy*, 91 Ill. 49, two tracts were sought to be condemned for a public park; and it was held to be proper to prove what the property would be worth if subdivided into lots and blocks.

In *Sherman* v. *Railroad Co.*, 30 Minn. 229, 15 N. W. Rep. 239, the land sought to be condemned for railroad purposes, "though at the time occupied as a farm, was situated in the vicinity of the city of St. Paul, and near certain public institutions," and in view of this it was held proper to prove its value for suburban residences. And so in other cases. See *Railroad Co.* v. *Jacobs*, 110 Ill. 416; *Haslam* v. *Railroad Co.*, 64 Ill. 353; *Railway Co.* v. *Woodruff*, 49 Ark. 394, 5 S. W. Rep. 792; *Railway* v. *McGehee*, 41 Ark. 207; *Amoskeag Co.* v. *Worcester*, 60 N. H. 526; *Low* v. *Railroad Co.*, 63 N. H. 558, 3 Atl. Rep. 739; *Railroad Co.* v. *Warren*, 6 Mont. 275, 12 Pac. Rep. 641; *Goodin* v. *Canal Co.*, 18 Ohio St. 181; *Railroad Co.* v. *Railroad Co.*, 112 Ill. 608; *In re Railroad Co.*, 27 Hun, 120; *Railroad Co.* v. *Chapman*, 16 Pac. Rep. 695, 696.

We think, therefore, that it was proper to show the value of the property "as a reservoir site." This is not sanctioning a remote or speculative value. It is merely taking the present value for prospective purposes

2. But it is argued that the value "as a reservoir site" should not have been taken, because there was no practicable site for a dam upon the defendants' property, the only use of which for reservoir purposes being in connection with the land of the plaintiff. But while it might perhaps have been more accurate to say "a part of a reservoir site," or for "reservoir purposes," we think this trifling verbal inaccuracy need not be noticed, and that the evidence was properly admitted. While it is true that the defendants' property had no value for reservoir purposes except in connection with the land of the plaintiff, it is equally true that the plaintiff's property had comparatively little value for such purposes except in connection with the land of the defendant; the plaintiff's own evidence being that, "with the defendants' land included, the reservoir will hold about six thousand million gallons, and without the land of the defendants it will hold only about one-tenth that quantity." And, this being the case, we can see no more reason for saying that the plaintiff can take the defendants' portion, without regard to its value for reservoir purposes, than for saying that the defendants (if they had happened to commence proceedings first) could take the plaintiff's portion upon the same basis. The question of value is distinct from the question of ownership. As is well known, the former method of ascertaining the compensation for land taken for railroad purposes was an appraisement by commissioners; and under that system it was held that the commissioners should confine themselves to ascertaining the value, and had nothing to do with the question of ownership or the distribution of the fund. *Railroad Co.* v. *Mahoney*, 29 Cal. 118. Under the present system, the compensation is to be determined by a jury, or by the court if a jury be waived. Const. art. 1, § 14. But this change in the tribunal does not change the nature of the questions to be decided. The question of value is still as distinct in its nature from the question of ownership as formerly. Suppose, for illustration, that the two sides of a canyon suitable for reservoir purposes were owned, respectively, by two persons who are joined as defendants in a proceeding to condemn the land by a water company which did not own any of the property. It would not be pretended that such company could take the property at its value for grazing or agricultural purposes (which value might be nominal) merely because it was owned by different persons. Such a proposition would be ridiculous. Now, there is no difference in principle between such a case and one where the company itself owns half of the canyon, and is seeking to acquire the other half. Nor is there any difference in principle where the company owns some-

what more than half, or the more valuable portion. The logical result of the argument for the appellant is that if the company owned but a small portion of the canyon, it could acquire all the rest, without regard to the value for the only purpose for which it might have much value, merely because the other parties did not own the whole, and had not been able or did not choose to go into the business themselves. It seems clear that such is not the law.

3. We think, however, that the court erred in allowing a remote and speculative value to be taken into consideration. A witness was allowed to give his estimate of value upon the basis of the following question: "Assuming that the plaintiff's intended reservoir will hold six thousand million gallons of water, or water sufficient to irrigate twenty thousand acres of land lying below their dam, and that the annual rainfall is sufficient to supply such a reservoir, and that there is such a quantity of land susceptible of irrigation from such a reservoir, and that its value would be enhanced at least fifty per cent. by having irrigation facilities afforded to it, and also that the reservoir would be sufficient to supply the inhabitants of National City with water, and also that without the use of the defendants' land any reservoir constructed above the plaintiff's dam as described in the complaint would hold less than one-tenth of what the reservoir, using the defendants' land, will hold, and also that a suitable dam was on the 13th day of June, 1887, already in course of construction below this reservoir site, and assuming also that there was no other site equally suitable in that immediate neighborhood for such a purpose, are you able to give an opinion as to the value of the lands sought to be condemned on the 13th day of June, 1887, for the purposes of such a reservoir?" The witness answered in the affirmative, and gave his estimate of value upon the basis stated.

There are two elements in this question which we think should not have entered into the estimate, viz.:

(*a*) It was not proper to base the estimate of the value of the land taken upon the fact that a dam was "already in course of construction." This was, in effect, saying that the defendants should be allowed the increase in value arising from the plaintiff's improvements; or, at any rate, a jury would be likely to get that idea from it. Now, if the improvement had been affixed by the plaintiff to the land of the defendants without any color of authority, but as a mere trespasser, it might be that the defendants would be entitled to the increased value arising from such improvement, under the rule laid down in *U. S.* v. *Land in Monterey Co.*, 47 Cal. 515. We express no opinion as to that. But that is not the case here, because the dam is affixed to the plaintiff's own land. The proposition is therefore that the defendants are entitled to the benefit arising from the improvement upon the adjoining land for the purposes of which their land is sought to be taken. This seems to us inadmissible as a direct element of value. It is possible that they might get some benefit from it indirectly; that is to say, the public knowledge of a proposed improvement might cause an actual demand in the market, and a subsequent advance in the current rate of price. In such case it would be impracticable for a court to analyze the price, and determine the proportion in which any particular element contributed thereto. The scales of justice do not balance quite so delicately as that. But aside from this indirect benefit, and in a case where there is no actual current rate of price, and where in consequence the court must arrive at the value from a consideration of the uses to which the property may be put, it seems monstrous to say that the benefit arising from the proposed improvement is to be taken into consideration as an element of the value of the land. It has been a question with many courts whether the benefit arising from the proposed improvement is to be charged against the owner. See *Railroad Co.* v. *Caldwell*, 31 Cal. 373, 374. But the result of the course taken at the trial would be, not only not to charge such benefit against the owner, but to credit it to his favor, which in effect is charging it against the party who makes the improvement. There are some decisions which seem to countenance this view. But we think that the learned judges who made them overlooked the distinction above adverted to between an indirect benefit arising from an actual increase in the market price, consequent upon a knowledge by the public of the proposed improvement, and cases where there is no such actual market price, and where the value must be arrived at by allowing witnesses to base their opinions as to the value upon the purposes for which the property is suitable. We think that the correct rule in this regard is that acted on in *Cobb* v. *Boston*, 112 Mass. 183; and compare *Kerr* v. *Commissioners*, 117 U. S. 387, 6 Sup. Ct. Rep. 805.

(*b*) It was not proper to allow the witness to base his estimate of value upon the circumstance that the land susceptible of irrigation from the reservoir would be enhanced in value "at least 50 per cent. by having irrigation facilities afforded to it." This can only have been put in upon the theory that the land to be condemned would share in the increase in value, or at any rate a jury would be likely to get that idea from it. But, as stated under the preceding head, the value of the land taken is to be estimated irrespective of the benefit resulting to it from the proposed improvement, and *a fortiori* the estimate should be irrespective of the benefit resulting to adjacent lands. If the prospective increase in value of the adjacent land is to be taken into consideration, the prospective increase in value of the lots in National City should be so too. The reservoir, according to the question, was "sufficient to supply the inhabitants of National City with water;" and good water facilities must be supposed to increase the value of city lots as well as of country land, so that if the defendants are entitled to the prospective increase in the one case they are in the other. It seems clear, however, that such an increase in value is too remote and speculative to be considered.

We have not overlooked the fact that it appears from the plaintiff's own evidence that the value of the surrounding land would be increased in value at least 50 per cent. by having irrigation facilities afforded to it. But this does not help the respondent's case in this regard; for, in the first place, the record does not show that the plaintiff put in this evidence as bearing upon the issue as to value, It may have been put in upon the question of the necessity for the taking, while in the question above quoted it is expressly put as an element of the value. And in the second place the introduction of irrelevant evidence upon one side without objection does not justify the introduction of irrelevant evidence upon the other side. *Donelly* v. *Curran*, 54 Cal. 282.

It is to be observed that the question before us relates to the value of the land taken, and not to the damage to the remaining portion, which was not included in the motion for new trial. Whether the same rules would apply to the latter case is not a question which we need consider.

4. Upon the trial, witnesses who had more or less knowledge of surroundings and of values, but who could not be said to be experts in the strict sense of the term, were allowed to testify concerning the value of the land. We think this was proper. While it is true that the witnesses were not experts in the strict sense of the term, and that their opinions as to the value cannot in strictness be said to be a fact, yet it seems to be settled that from the necessity of the case the general rules of evidence suffer an exception in this particular.

The principle upon which this rests was laid down in *People* v. *Sanford*, 43 Cal. 32, 33. In that case a person who was not an expert, but who had seen the deceased at a particular time, was allowed to state what appeared to be his condition of mind. This was held to be proper, and the court, per WALLACE, C. J., (adopting the language of a North Carolina case,[1]) said: "It approaches to knowledge, and is knowledge, so far as the imperfection of human nature will permit knowledge of these things to be acquired; and the result thus acquired should be communicated to the jury, because they have not had the opportunities of personal observation, and because in no other way can they effectually have the benefit of the knowledge gained by the observations of others."

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[1] Clary v. Clary, 2 Ired. 83.

In the subsequent case of *People* v. *Monteith*, 73 Cal. 7, 14 Pac. Rep. 373, it was held, upon the authority of the preceding case, that a witness who was not an expert could be allowed to state what was the condition of the defendant as to sobriety on a certain occasion. In other states the principle of these cases has been applied to questions as to the value of property both in proceedings for eminent domain and in other cases.

In *Shattuck* v. *Railroad Co.*, 6 Allen, 117, persons who were familiar with the neighborhood were allowed to give their opinions as to the value of land taken in eminent domain, and this was held to be proper; the court, per CHAPMAN, J., saying: "This is permitted as an exception to the general rule, and not strictly on the ground that such persons are experts; for such an application of that term would greatly extend its signification. The persons who testify are not supposed to have science or skill superior to that of the jurors; they have merely a knowledge of the particular facts in the case which jurors have not. And, as value rests merely in opinion, this exception to the general rule that witnesses must be confined to facts, and cannot give opinions, is founded in necessity and obvious propriety."

So in *Robertson* v. *Knapp*, 35 N. Y. 92, upon a question as to the value of a farm, farmers and residents of the neighborhood were allowed to give their opinions as to the value, and the court, per LEONARD, J., said: "In general, the opinion of the witness is not evidence, but there are exceptions to the rule. The exceptions generally proceed on the principle that the question is one of science or skill, or has reference to some subject upon which the jury are supposed to have less knowledge than the witness. The case of the value of property forms one of the admitted exceptions."

A similar ruling was made in *Railroad Co.* v. *Bunnell*, 81 Pa. St. 426, in which case SHARSWOOD, J., delivering the opinion, said: "The market value of land is not a question of science and skill, upon which only an expert can give an opinion. Persons living in the neighborhood may be presumed to have a sufficient knowledge of the market value of property with the location and character of the land in question. Whether their opinion has any proper ground to rest upon, or is mere conjecture, can be brought out upon cross-examination. Such opinions have always been received."

A similar ruling was made in *Railroad Co.* v. *Hawk*, 18 Pac. Rep. 943, in which case, JOHNSTON, J., delivering the opinion of the supreme court of Kansas, said: "This is not a question of science or skill, requiring expert testimony, but it falls within one of the exceptions to the rule excluding mere opinions of ordinary witnesses. It is not necessary that the witnesses shall be engaged in buying and selling land, nor that they should have knowledge of an actual sale of that or similar land to make them competent. A farmer living in the vicinity is presumed to be familiar with, and to know the value of, farm lands, and there can be no doubt of his competency when it is shown that he knows the situation and character of the land, its productiveness and availability for use, and who further states that he knows the value of the same." And so in other cases. See *Railroad Co.* v. *Chapman*, 38 Kan. 307, 16 Pac. Rep. 695; *Railroad Co.* v. *Paul*, 28 Kan. 821; *Colvill* v. *Railroad Co.*, 19 Minn. 285, (Gil. 240;) *Railroad Co.* v. *Calkins*, 90 Mo. 543, 3 S. W. Rep. 82; *Vandine* v. *Burpee*, 13 Metc. 291; *Swan* v. *Middlesex*, 101 Mass. 177; *Railroad Co.* v. *Windsor*, 51 Ind. 238.

Upon the principle of these cases we think the evidence was admissible.

In addition to the appeal from the order denying a new trial, there is in the transcript a notice of appeal from the judgment. But none of the counsel have suggested that the points made arise upon that appeal, or advanced any reason why the judgment should be reversed thereon. Following the lead of counsel, we have assumed that there is no error which can be considered upon that appeal. We therefore advise that the judgment be affirmed as to all the issues except the issue as to the value of the land taken; and that the judgment as to that issue and the order denying a new trial be reversed, and the cause remanded for a new trial of said issue, the appellant to recover its costs of appeal.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment as to all the issues except the issue as to the value of the land taken is affirmed. The judgment, as to that issue, and the order denying a new trial, are reversed, and the cause remanded for a new trial of said issue, the appellant to recover its costs of appeal.

MCFARLAND, J., (*concurring.*) I concur in the judgment, but I dissent from so much of the opinion of Mr. Commissioner HAYNE as holds that there was no error in admitting evidence of the value of defendant's land as a "reservoir site," and in instructing the jury upon that theory. That would be, practically, to allow defendant to recover for an enhancement of the value of his land brought about by the very act of taking it. The rule stated in *Gilmer* v. *Lime Point*, 19 Cal. 47, and *Railroad Co.* v. *Pearson*, 35 Cal, 247, applies here, and I see no good reason for overruling those cases.

SEARLS, C. J. I concur in the judgment, and in the views expressed by MCFARLAND, J

WORKS, J., did not participate in the decision of this cause.

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78 Cal. 80

SAN DIEGO LAND & TOWN CO. *v.* NEALE *et al.* (No. 12,810.)

(*Supreme Court of California.* December 31, 1888.)

EMINENT DOMAIN—PAYMENT—RESTORATION OF PROPERTY.

Plaintiff, who sought to condemn defendants' land for the purpose of a reservoir, pending the proceedings flooded a portion of it. Code Civil Proc. Cal. § 1253, provides that if moneys, to which defendants in such proceedings are entitled, be not paid or deposited in court, defendants may have execution as in civil cases, and, if the money cannot be made on execution, the court on a showing must annul the proceedings, and restore possession of the property to defendants. *Held*, that before the issuance of an execution, and a showing that the money could not be made on it, defendants were not entitled, on motion, to an order for the restoration of the property; and this is so, although the constitution, art. 1, § 14, provides that private property shall not be taken for public use without compensation having been first made to the owner, such section not prescribing a remedy.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; E. PARKER, Judge.

Henderson & McDonald and *Luce & Henderson*, for appellant. *Hunsaker, Britt & Lamme* and *J. E. Deakin*, for respondents.

HAYNE, C. The general features of this case are shown in *Town Co.* v. *Neale, ante*, 372, which has just been decided. It appears that the plaintiff's dam, which was begun before the commencement of the proceedings in eminent domain, was completed while the same were pending, and that the flow of the water of the river was so great as to flood the part of the defendants' land which was sought to be condemned. The plaintiff did not pay or deposit in court the amount awarded to the defendants, but proceeded with its motion for new trial. The defendants then moved for an order requiring the plaintiff to restore the possession to them, or, in other words, to draw off the water from their land. The court below granted this motion, and the plaintiff appeals.

There can be no doubt that the plaintiff had no right to flood the defendants' land before payment or deposit of the compensation. The question is as to what is the proper remedy. The provisions which bear upon this subject are sections 1254 and 1252 of the Code of Civil Procedure. Section 1254 contains a provision by which, after a proper deposit, the court "may, upon notice of not less than 10 days, authorize the plaintiff, if already in possession, to continue therein, and, if not, then to take possession of and use the property during the pendency of, and until the final conclusion of, the litigation, and may, if necessary, stay all actions and proceedings against the plaintiff on account thereof." This provision, it seems to us, is merely that upon certain conditions the court may anticipate its final action, so far as to authorize or legalize a possession pending the litigation. It certainly does not expressly provide that the plaintiff may be ejected from a possession taken independently of the eminent domain proceedings, or required to tear down valuable improvements which may have been made previously thereto, and we think it contains no such implication. And the learned counsel for the defendants expressly say that "the order is not based on section 1254."

The only other provision is as follows: "Sec. 1252. Payment may be made to the defendants entitled thereto, or the money may be deposited in court for the defendants, and be distributed to those entitled thereto. If the money be not so paid or deposited, the defendants may have execution as in civil cases, and, if the money cannot be made on execution, the court, upon a showing to that effect, must set aside and annul the entire proceedings, and restore possession of the property to the defendant, if possession has been taken by the plaintiff."

This section plainly requires the issuance of an execution, and a showing that the money cannot be made upon it, before the order for restoration of possession can be made. In the record before us there is no such showing. On the contrary, it was expressly admitted on the hearing of the motion that "the plaintiff was perfectly solvent, and able to pay any judgment that the defendants might recover against it." We think, therefore, that the order cannot be sustained upon any of the provisions of the Code.

The counsel say, however, that the order is based "on section 14, art. 1, of the constitution, which declares that private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner." But this provision simply declares the right of the owner. It does not purport to prescribe the remedy for a violation of such right. And we think it may be safely affirmed that the owner is to be left to his ordinary remedy by action, and cannot resort to the summary one of a motion upon affidavits, unless his case comes within some provision of statute to that effect, which, as we have seen, is not the case.

The cases of *In re Bryan*, 65 Cal. 375, 4 Pac. Rep. 304, and *Neale* v. *Superior Court*, 18 Pac. Rep. 790, are not in conflict with the foregoing. The former case was an application for *certiorari* to review certain orders in a proceeding to open a road. The record in the case shows that the proposed road had not been opened, or, in other words, that possession of the property had not been taken. What the applicant sought to have done was not to be restored to possession, but to have said orders annulled; and the decision simply was that, inasmuch as the superior court could set aside the orders on motion, the writ of *certiorari* would not issue. In the latter case we do not understand the court to have examined into the question whether the order appealed from was erroneous, but merely to have held that it was not beyond the power of the court to make some order as to the matter.

We therefore advise that the order appealed from be reversed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

WORKS, J., did not participate in the decision of this cause.

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78 Cal. 126

LAWRENCE *v.* GAYETTY *et al.* (No. 12,545.)

(*Supreme Court of California.* January 15, 1889.)

1. **EQUITY—RESCISSION OF DEED—FRAUD—PLEADING.** In an action to set aside a deed, on the ground of fraud, allegations that defendants, the grantees, made certain promises, fully set out; that plaintiff relied upon, and had a right to rely upon, such promises, and was induced thereby to and did make the conveyance; and that defendants have not performed the acts promised, and had no intention of doing so at the time they made the promises,—sufficiently set forth the material facts constituting such a fraud as under Civil Code Cal. § 1572, subd. 4, is ground for the rescission of a contract.[1]

2. **SAME—EVIDENCE.** Where a deed conveying an undivided interest in land is executed in consideration of the grantees' oral promises to make certain improvements on the land, and do certain other acts in the future, and their performance is not made a condition subsequent, a mere failure to perform on the part of the grantees does not constitute a failure of consideration so as to entitle the grantor to rescind under Civil Code Cal. § 1689.

In bank. Appeal from superior court, Placer county; B. F. MEYERS, Judge.

Action to set aside deeds, brought by W. S. Lawrence against James M. and Peter C. Gayetty and others. Judgment for plaintiff, and defendants appeal.

Van Ness & Roche, for appellants. *J. M. Fulweilwe* and *Jo Hamilton*, for respondent.

WORKS, J. Action to set aside two deeds by the plaintiff to the defendants, of a mining claim owned by him, on the ground of fraud and failure of consideration. The complaint avers, in substance, that the plaintiff was the owner of the mine, and was poor, and unable to furnish the necessary machinery and mills to develop the same; that the property was, at the time of the conveyance, of the value of $10,000, and has since increased to the value of $40,000; that the defendant Peter C. Gayetty falsely represented to the plaintiff that he had great influence with men of capital, and was able to interest them in the development, improvement, and working of the mine, and proposed and agreed that he would build, or cause to be built, on said property, certain quartz mills and hoisting machinery, and run cuts and tunnels, and make other improvements thereon within about one month, either by himself or by said men of capital, of the value of $10,000; said work to be prosecuted diligently, and plaintiff to have possession of the property and superintend the work, provided plaintiff would convey to said Gayetty, or some one to be named by him, the one-half of said land and mining claim, plaintiff to remain the owner of the other one-half thereof, with a like interest in said improvements; that plaintiff was induced by said false and fraudulent representations to, and did, convey to the defendant James M. Gayetty, in trust for said Peter C. Gayetty, the one-half of said property; that the consideration of $150, named in said deed, was not the true consideration, and no part thereof was ever paid, and all cost of executing the deed was paid by plaintiff; that James M. Gayetty was the son of Peter C. Gayetty, and took said conveyance with a full knowledge of all the facts; that thereafter plaintiff was induced by the urgent solicitations of said Peter C. Gayetty, and to enable him to carry out his said promises, to join with the said James M. Gayetty in executing to the defendants and the plaintiff a deed for certain portions of said mining claim, describing it; that the consideration of said last-named deed was said promises and agreements, and the further consideration, as expressed in said deed, of one-half of 100,000 shares of the capital stock of a corporation thereafter to be formed; that the same was executed on the promises of said Gayetty that said persons would go on and form a corporation for mining purposes, and issue said stock, and work and develop said mine, and erect said mill and hoisting-works, and make said improvements thereon as agreed; and plaintiff, believing said representations and promises, made said conveyance, thereby vesting the legal title to said property in the defendants; that the plaintiff from his ignorance and the entire faith, confidence, and trust he had in said Peter C. Gayetty, and believing said representations and promises made by him, executed said deed first named, and without any consideration other than the false and fraudulent promises and representations aforesaid, and, also, having like faith and confidence in his and the other defendants' representations, he joined in the execution of the last-named deed; and for the whole of said property he has not received one cent of money, nor one share of stock, nor any other consideration whatever. The complaint avers that none of said representations, promises, or agreements have been complied with; that they were falsely and fraudulently made to secure the execution of said deeds, and to deceive and defraud the plaintiff, and were known to be so made by all of the defendants; that said Peter C. Gayetty neither had nor exercised any influence with any man of capital, and never intended to pay one cent, or perform any of his said promises or agreements, or either of them; that said corporation was never formed, nor any stock issued, nor money expended on any of said proposed improvements; that plaintiff, after waiting six months, and, nothing being done or attempted to be done by the defendants, or either of them, enlisted other means, and has greatly improved said property, working and developing the same by opening shafts, running tunnels, building mills and hoisting works, and making other improvements, thereby enhancing the value of the property to more than $20,000. It is also alleged that "by reason of said falsehoods and deceits of the defendants aforesaid the consideration of said deeds has wholly failed." The prayer of the complainant is that the court "order, adjudge, and decree that the defendants, and each of them, reconvey to this plaintiff whatever of the estate in said property is in him vested, and that the legal title of all of the said defendants be restored and reinvested in the plaintiff," and for general relief.

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[1] See, on the general subject of how fraud should be pleaded, Penny v. Jackson, (Ala.) 4 South. Rep. 720, and note; Tepoel v. Bank, (Neb.) 40 N. W. Rep. 415, and note.

There was a demurrer to the complaint by the defendant James M. Gayetty, on the ground of ambiguity, in that it did not show the number of shares of stock of the corporation mentioned therein, or the number of shares the plaintiff was to have as part consideration for said deed, and on the further ground that it did not state facts sufficient to constitute a cause of action, which demurrer was overruled. The defendants answered, denying the material allegations of the complaint. There was a trial by the court, and findings in substance: (1) That plaintiff was the owner of the property. (2) That on the 7th day of October, 1884, the same was of the value of $10,000, and at the time of filing the complaint of the value of $20,000. (3) That plaintiff was poor, and unable to develop the mine; and the making of the representations and promises by Peter C. Gayetty, for himself and as agent for the other defendants, was substantially as alleged in the complaint, including the promise to form said corporation and issue to plaintiff 50,000 shares of the stock thereof. (4) "That thereafter, on said 7th day of October, 1884, the plaintiff, in consideration of the full performance of the promises and agreements of the defendants, and relying upon their said representation, as set out in findings fourth and fifth, and for no other consideration, executed and delivered the deeds mentioned in the complaint, and also signed the said articles of incorporation, to assist the defendants in carrying out their said promises and agreements." (5) The recording of the deed, and the filing of the articles of incorporation of the proposed corporation in the office of the county clerk and of the secretary of state, and the issuance of the necessary certificate of incorporation. (6) That the defendants have not performed any of the promises found to have been made, and have failed, neglected, and refused to keep or perform the same. (7) The plaintiff kept and performed all of the covenants on his part. (8) "That there has been no false representation nor fraud in fact, but there has been a complete failure of consideration for the said deeds or conveyances, and for said contract with the defendants, and without the fault of the plaintiff." The conclusion of law was that "plaintiff is entitled to a decree extinguishing his contract with the defendants, and nullifying and setting aside and canceling the said deeds to the defendants, and all of them," and judgment was entered in favor of plaintiff, accordingly, from which judgment the defendants appeal.

1. The appellants contend that the complaint was insufficient, and that the court erred in overruling the demurrer thereto. It will be seen that there are two causes of action, or, rather, two grounds alleged in the complaint for setting aside the deeds, viz., fraudulent representations and failure of consideration; but these causes grow out of precisely the same state of facts. The representations alleged to have been made are not as to existing facts, but consist in mere promises to perform certain acts in the future. Independent of Code provisions, the rule is that representations, to constitute sufficient ground for the relief sought in this action, must be as to an existing and material fact, or the affirmation of a matter in the future as a fact, and not a mere opinion, statement of intention, or promise to do some act in the future. 2 Pom. Eq. Jur. §§ 877, 888; *Neidefer* v. *Chastain*, 71 Ind. 363; *Welshbillig* v. *Dienhart*, 65 Ind. 94, 98. Strictly speaking, a mere promise is not a representation, and the failure to make it good is a breach of contract, which gives a cause of action, but not the one pursued here. But the making of a promise, with no intention at the time of performing it, constitutes a fraud, for which a contract may be rescinded. Civil Code, § 1572; see, also, Bigelow, Frauds, 483 *et seq.* The mere failure to perform the covenant does not relate back to and render the same fraudulent. It is the present intent not to perform it that renders it wrongful. The complaint alleges facts sufficient to bring it within the statutory provision as to what shall constitute actual fraud. It sets out fully the promises made, and that, at the time they were made, the defendants had no intention of performing them. It is true, as counsel for appellants contend, that it is not sufficient to characterize a transaction as fraudulent, and that the facts constituting the fraud must be stated. *Kinder* v. *Macy*, 7 Cal. 206; *Meeker* v. *Harris*, 19 Cal. 279; *Capuro* v. *Insurance Co.*, 39 Cal. 123. But the facts are pleaded here. The material facts necessary to show actionable fraud are: (1) The making of the promises; (2) that the plaintiff relied upon and had a right to rely upon them; (3) that he was induced thereby to, and did, make the conveyances; (4) that the defendants have not performed the acts promised, and had no intention of doing so at the time of making them. The complaint states facts sufficient to entitle the plaintiff to have the deeds set aside, and the property restored to him on the ground of fraud; and the demurrer thereto was properly overruled.

2. The appellants further maintain that the judgment is not supported by the findings, and that, under the facts as found, the judgment should have been for the defendants. It will be noticed that upon the question of fraud the findings are in favor of the defendants. The finding is that "there were no false representations nor fraud in fact." This effectually disposes of that branch of the complaint, and leaves the plaintiff to depend, for a recovery, upon a failure of consideration. This brings us to a consideration of the question whether the facts alleged in the complaint, and found by the court, show such a failure of consideration as will authorize the setting aside of a deed conveying real estate. It seems to us that, shorn of the question of fraud, the complaint and findings present the plain, simple question whether a conveyance of real estate, fully executed on the part of the grantor, can be set aside for a failure of consideration on the sole ground that the promises and agreements which induced its execution, and which, by the terms of the contract under which the deed is made, were not to be performed until after its execution, have not been performed. The plaintiff saw proper to accept the verbal promise of the defendants to do certain things without any agreement or understanding that the failure to do the acts as promised should be a condition, or in any way affect the validity of the deed, or entitle him to a reconveyance. Counsel for respondent say that the reasonable inference from the continued failure and refusal to comply with their promises is that the defendants did not intend to comply with them at the time they were made, but this is an argument in the face of the direct finding of the court that there was no fraud. This is a finding against the contention that they had no intention of performing their part of the contract, as the making of the promises and the failure to perform are clearly found. We are compelled to treat the case as one where the promise was made in good faith, but has not been performed.

Mr Waterman, in his work on Specific Performance, § 189, says: "With regard to the failure of the consideration as a defense, it is scarcely necessary to say that by this is not meant the non-payment of the purchase money according to the agreement,—the liability to pay, though default be made, being a consideration,—but the failure of the contract by the occurrence of something which either determines the existence of the subject-matter, or materially affects it. If the subject-matter be not essentially affected, though there may be a claim for compensation, the party injured will not be entitled to be discharged from the contract. Events which, happening before the conclusion of a contract, avoid it, either by determining the existence of the subject-matter or materially affecting it, do not, properly speaking, terminate the contract, but prevent the contract from arising." It must be borne in mind that the plaintiff did not contract to convey upon the performance of the contract on the part of the defendants; therefore his promise was not dependent upon theirs, nor was there anything appearing in the deed, or in the contract under which it was made, showing, or tending to show, that a compliance with their promises was regarded as a condition subsequent, or that a failure to perform on their part should in any way affect the title conveyed to them. The case is precisely the same in principle as if the plaintiff had conveyed and taken a note for the purchase money, and the defendants had failed to pay the same. The fact that the promise is to expend money in making certain improvements, instead of a promise to pay money to the plaintiff, can make no difference as to the right to rescind on the ground that the grantees have failed to perform the covenants on their part. Certainly it would not be seriously contended that the mere failure by the vendee to pay the purchase money could entitle the vendor to rescind the contract, and recover back the land; and yet that is the ground upon which the plaintiff in this action must recover under these findings, if at all.

Counsel for respondent rely upon section 1689 of the Civil Code. In our judgment the section referred to has no application to a case like this, where the vendor has waived actual performance on the part of the vendee, by relying upon his mere promise to perform, and, relying upon such promise to perform in the future, has executed the conveyance, thereby vesting the title to the property in his grantee. The contract on the part of the vendor is wholly executed. If the mere promise, and the failure to perform, is not sufficient to set aside a deed on the ground of fraud, as we have shown, the fact that the same acts are characterized in the pleading as a failure of consideration cannot give them additional force, and thereby bring about the same result. The case of *Hartman* v. *Reed*, 50 Cal. 485, is in point against the respondent. There the conveyance was of an undivided interest in an unconfirmed Mexican grant, and the consideration was the agreement of the vendee to prosecute to a final determination before the board of land commissioners and the courts of the United States the claim of the vendor to the said rancho, which agreement was not performed. It was said in that case: "The title to the undivided third of the rancho vested absolutely in Crosby, and his agreement did not constitute a condition, upon a breach of which the title would revest in Olvera; but a breach of the agreement only gave Olvera a cause of action for damages." Leaving out of sight the question of fraud, which, as we have seen, was found against the respondent by the court below, the case cited and the one before us are identical in principle. Such a rule may work hardship in individual cases, and this may be one of those cases, but to hold that a vendee of real estate could, for a failure to pay the purchase money, repudiate his deed, and recover the land, would render real-estate titles dangerously uncertain, and result in the most serious consequences. The judgment is not sustained by the findings.

The complaint in this case and the prayer for relief were such as to entitle the plaintiff to a judgment for damages, and, as his right to such recovery was not passed upon, the judgment and order appealed from are reversed, with instructions to the court below to grant a new trial, and allow the parties to amend their pleadings, if they so desire.

We concur: McFARLAND, J., SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

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78 Cal. 202

MARRINER *v.* DENNISON. (No. 12,848.)

(*Supreme Court of California.* January 29, 1889.)

1. VENDOR AND VENDEE—BREACH OF CONTRACT—COMPLAINT.
   A complaint in an action for breach of a contract to convey real property, showing the contract to be for the conveyance of lots of certain numbers in defendant's subdivision of the M tract, and alleging that it was thereby intended to convey certain real property specifically described, but not alleging any extrinsic facts by which the lots may be identified and the intention determined, is bad.
2. SAME—INSUFFICIENCY OF DESCRIPTION—EVIDENCE TO IDENTIFY.
   The description in such contract being insufficient, and being unaided by the complaint, the memorandum of the contract is inadmissible in evidence.
3. EQUITY—RESCISSION OF CONTRACT—FRAUDULENT REPRESENTATIONS—PLEADING.
   A representation by a vendor to the vendee that he had made a prior contract to convey to another, who is insisting on its performance, if false, is sufficient to authorize a rescission of an agreement made thereon by the vendee to accept other property in lieu of that bargained for; and though other false representations that the vendor was in danger of indictment, and of being sent to state-prison for making a second sale of the property, are not such as the vendee may rightfully rely upon, and as will authorize a rescission, allegations of them in a complaint by the vendee for such rescission, which alleges other material misrepresentations, may be treated as surplusage.
4. SAME—EVIDENCE.
   Where the complaint alleges that the contract with the third person, which the vendor alleged was made before plaintiff's contract, was in fact made afterwards, evidence that it was made afterwards is material.

5. SAME—KNOWLEDGE OF DEFENDANT—EVIDENCE OF FRAUD.
Defendant's knowledge that a railroad was to be located near the land described in the original contract was a circumstance tending to show fraud, as furnishing a motive for attempting to relieve himself of the contract, though he was under no obligation to disclose the fact to plaintiff.

6. FRAUD—PLEADING—COMPLAINT.
A complaint setting out the original contract, and alleging the making of the new contract, and its procurement by fraud, should be treated as based on the fraud, and not as one for damages for breach of the original contract.

7. SAME—FAILURE TO SHOW DAMAGES—DEMURRER.
The complaint alleging that the misrepresentations were for the purpose of procuring the substitution of other property, the value of which, or facts from which the value may be inferred, are not stated, though it is stated that the property originally bargained for has largely increased in value, fails to show damage, and is bad on demurrer.

8. EQUITY—RESCISSION OF CONTRACT—PLEADING.
Though the complaint were treated as one for breach of the original contract, still, plaintiff having assumed the burden of proving the making of the new contract and its procurement by fraud, damage must be alleged in order to show ground for rescission, and, if the allegations do not authorize a rescission, there can be no recovery for breach of the original contract, which was released by the new one.

9. SAME—EVIDENCE.
In such case, plaintiff having given no evidence of the value of the substituted property, evidence of such value offered by defendant is properly excluded as immaterial.

10. SAME—INSTRUCTIONS.
Defendant's request to charge also that, if the substituted property at the time of the new agreement was of equal value with that described in the original contract, the jury should find for defendant, though a correct statement of the law, is properly refused as applicable to no issue under the pleadings.

11. SAME.
A charge that plaintiff might rescind the new agreement if it was obtained by the false representations is erroneous, as omitting the element of damage, which is essential to the right to a rescission.

12. EVIDENCE—BEST AND SECONDARY—PROOF OF COLLATERAL ISSUE.
The question being as to the making of the contract with the third person, and coming collaterally in issue, such contract may be proved by parol, though it was reduced to writing.

13. SAME—ABSENCE OF ORIGINALS.
Certified copies of a deed and contract are inadmissible in evidence without accounting for the originals.

Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Action by J. U. Marriner against G. L. Dennison. Defendant appeals.

W. H. Clark, for appellant. *M. C. Hester* and *Enoch Knight*, for respondent.

WORKS, J. Action by the vendee for damages for the breach of a contract to convey real estate. The memorandum of agreement to convey was as follows: "This agreement, made this day, between G. L. Dennison, of Los Angeles, and J. U. Marriner, of Vineland, Cal., is as follows: Said Dennison agrees to convey to said Marriner lots one, two, thirty-three, thirty-four, sixty, and fifty-nine in his sub. of the Magee tract; and for same six lots said Marriner agrees to convey to said Dennison the ten acres, with new house and improvements on same, built by him; and lot number fifty-two, building lots in Malden, Mass., bought of E. S. Converse; size of lot, 6,440 square feet, viz., 57½ feet by 115 deep." It is alleged in the complaint that by this agreement it was intended by the parties thereto that the defendant was to convey to plaintiff within a reasonable time certain real estate in Los Angeles county of which he then owned the equitable title, and which is specifically described; that plaintiff was ready, willing, and able to comply with the agreement on his part, and tendered a deed of conveyance to defendant, as provided therein, and demanded a deed for the property. The complaint further alleges, in substance, that defendant represented that he could not comply with the contract for the reason that prior to the execution of said agreement he had contracted to sell the land to another party; that he supposed the party had abandoned his purchase, but now he was insisting upon holding him to the contract; and that he (defendant) further represented to plaintiff that "he was in danger of indictment and criminal prosecution for selling the said lots to him after he had sold them to said other person, and that he was so fearful of being sent to the state-prison for said offense that he could not sleep at night," and then proposed to plaintiff to deed him other lots if plaintiff would release him from said contract. That plaintiff was unwilling to release him; but defendant then and at divers subsequent interviews made and repeated said representations with so much earnestness and apparent sincerity, and manifested such real fear of said criminal prosecution, that plaintiff, then believing defendant's said statement and representations to be true, consented to take said other lots in lieu of those contracted for. That the representations were false and fraudulent, and made to induce plaintiff to release him from said contract, and thereby avoid an action for damages for the breach thereof. That the sale of said lots by defendant to another party was in fact subsequent to said agreement, and for a price far in excess of the consideration to be paid by the plaintiff; and at the time he was so released he had received a large part of the purchase money, and that defendant had then become the owner of the legal title to the property. That plaintiff, upon the discovery of the facts, notified defendant that he rescinded the agreement whereby he agreed to release him from the original contract, and to take the other lots, and that he should require him to comply with his original contract; and tendered him good and sufficient deed of himself and wife for the property to be conveyed by them under said agreement, and again demanded a deed, which defendant failed and refused to give. It is alleged that the Dennison subdivision lots were, at the date of the contract, of the value of $3,500, and had, at the date of the release, become, and continued to be, of the value of $10,000. There is no allegation as to the value of the lots agreed to be taken in lieu of those originally contracted for. The amount of damages is alleged to be $7,000, and the prayer is for judgment for that sum. There was a demurrer to the complaint on the ground that it did not state facts sufficient, which was overruled.

The answer expressly admits the execution of the original contract, and does not deny the making of the second agreement, whereby defendant agreed to convey other lots, but denies all of the other material allegations of the complaint. In a separate count of the answer it is alleged that by a contract made and entered into on or about the 23d day of February, 1887, plaintiff and defendant mutually agreed to rescind said first agreement, and it was then mutually agreed by and between them that defendant should convey certain other lots in lieu of the lots described in said agreement, and that he had always been ready and willing to convey the same. There was a trial by jury, and verdict for plaintiff for $3,188.55. The defendant moved for a new trial, which was denied, and he appeals from the judgment and order denying him a new trial.

1. Three objections are made to the complaint: (*a*) That the contract for the conveyance of the property contains no sufficient description of the real estate; (*b*) that the allegations of fraud are insufficient; (*c*) that there is no allegation that any damage resulted from the fraudulent representations made, or facts set out from which damages can be inferred.

(*a*) The real estate is described in the agreement as lots 1, 2, 33, 34, 60, and 59, in his (defendant's) subdivision of the Magee tract. In what city, county, state, or country the land is situated does not appear. If the instrument were one attempting to convey title to property, its insufficiency would be apparent. But the rule as to the particularity of description required in executory contracts to convey is extremely liberal in favor of their sufficiency. The rule is that where the description, so far as it goes, is consistent, but does not appear to be complete, it may be completed by extrinsic parol evidence, provided a new description is not introduced into the body of the contract, and the complaint must contain the averments of such extrinsic matter as may be necessary to render the description complete. *Stanley* v. *Green*, 12 Cal. 162; *Lick* v. *O'Donnell*, 3 Cal. 63; Fry, Spec. Perf. 159 *et seq.; Torr* v. *Torr*, 20 Ind. 118; *Colerick* v. *Hooper*, 3 Ind. 316; *Baldwin* v. *Kerlin*, 46 Ind. 426; Browne, St. Frauds, § 385; *McConnell* v. *Brillhart*, 17 Ill. 360. But parol evidence cannot be heard to furnish a description. The only purpose for which such evidence can be heard is to apply the description given to the subject-matter. Thus, if the description were "my" farm in Los Angeles county, an allegation in the complaint that I owned but one farm in said county, and where it was situated, would apply the description to the proper subject-matter, and render it certain. But if the description were "a" farm in Los Angeles county, it could not be rendered certain by the allegation of such extrinsic matter. Browne, St. Frauds, § 396; *Baldwin* v. *Kerlin*, 46 Ind. 426, 431. It is not sufficient to allege that by the imperfect description given in the contract the parties intended to convey certain property. Browne, St. Frauds; *Baldwin* v. *Kerlin, supra; Ryan* v. *Davis*, 6 Pac. Rep. 339; *Eggleston* v. *Wagner*, 46 Mich. 610, 10 N. W. Rep. 37; *Bowers* v. *Andrews*, 52 Miss. 596. Thus it is said in Browne, St. Frauds, § 371: "The contract must contain the essential terms of the contract, expressed with such a degree of certainty that it may be understood without recourse to parol evidence to show the intention of the parties." Again, in section 385: "It must, of course, appear from the memorandum what is the subject-matter of the defendant's engagement. Land, for instance, which is purported to be bargained for, must be so described that it may be identified." See, to the same effect, *King* v. *Wood*, 7 Mo. 389; *Hudson* v. *King*, 2 Heisk. 560, 572; *Clark* v. *Chamberlin*, 112 Mass. 19; *Gigos* v. *Cochran*, 54 Ind. 593; *Newman* v. *Perrill*, 73 Ind. 153; *Ferris* v. *Irving*, 28 Cal. 645; *Richards* v. *Snider*, 3 Pac. Rep. 178; *Ryan* v. *Davis*, 6 Pac. Rep. 339. It is not enough, as we have said, to allege that by such incomplete description the parties intended to convey a certain tract of land. Such extrinsic facts must be alleged as will, in connection with such description, show that the particular piece of land was intended. If the facts alleged, together with the description set out, are not sufficient to identify the land, the contract must be held to be void for uncertainty.

In *Ryan* v. *Davis* it is said: "Can we say, by an examination of the description in this instrument, that it fits and comprehends the property? Or that, without being added to, it can be connected with and applied to the very property intended, by the aid of extrinsic evidence, and to the exclusion of all other property? Or, when submitted to virtually the same test as laid down by SIMRALL, C. J., *supra*, 'is the description so complete that it points directly to the subject-matter, or does it refer to something *aliunde* the instrument, which, when consulted, indicates the property.' The description in this case does not itself identify the property, nor state directly where it is; neither does it indicate any extrinsic fact which will serve to fix its identity or locality. The more particular description contained in the complaint, after the description stated as contained in the memorandum, is not the description of property directly pointed out by the description contained in the memorandum, nor made by reference to any extrinsic fact stated in the memorandum, which, when connected, indicates the property described in such more particular description. This more particular description itself indicates that parol evidence must be wholly resorted to in order to designate the premises. When the agreement itself fails to identify the property, or to furnish the means by which it may be done, by pointing to some extrinsic fact by whose aid the ambiguity may be removed, to allow parol evidence to explain what was intended, would be to allow the entire consideration of a contract in relation to lands, on the part of the person conveying the property, to be proved by parol, and render useless and nugatory the above provision of the statute of frauds."

Applying these well-established rules to the case before us, we are of the opinion that, properly aided by the allegation of extrinsic facts, the description in the contract might have been sufficient. If, for example, it had been alleged that the defendant was at the time of the contract the owner of lots 1, 2, 33, 34, 60, and 59, in his (defendant's) subdivision of the Magee tract, situate in lot 10, block O, of the San Pasqual tract, in the county of Los Angeles, state of California, according to the map of said subdivision, on record in Book 12, page 29, of Miscellaneous Records in the office of the recorder of said county, and upon which map said lots are delineated; that said lots were the only lots of said numbers, of any subdivision of defendant in any tract of land known as the "Magee Tract;" that said lots were examined by the parties hereto, before making said contract, and were verbally agreed upon as the ones for which the said contract was to be executed, and were the lots and property referred to therein, and the said subdivision was the only one then owned by the defendant, or known or designated as the "Dennison Subdivision of the Magee Tract,"—we think the complaint would have been sufficient in this respect. But the complaint under consideration contains no such allegations, or any others tending to aid the imperfect description set out in the contract. It simply alleges that, by the description given, it was the intention of the parties that the tracts of land specifically described in the complaint should be conveyed. But we have shown that this is not enough. The allegation that the parties intended to convey certain property is the allegation of a mere conclusion. Such intention must appear, as we have said, from the description given, and such extrinsic facts as are alleged in aid of it. As the description, standing alone, is admittedly insufficient, and no facts in aid of it are alleged, the complaint must be held to be bad for that reason.

(*b*) It is further claimed that the complaint does not sufficiently allege the fraud in procuring the defendant's release from the original contract and the substitution of the new. The contention is that the representations alleged to have been made were not as to existing facts, or of such matters as were material, or that the plaintiff had a right to rely upon, and the following cases are cited: *King* v. *Eagle Mills*, 10 Allen, 548; *Wilder* v. *De Cou*, 18 Minn. 470, (Gil. 421;) *Commissioners* v. *Younger*, 29 Cal. 176. We think counsel are right as to the rule of law contended for, (see *Lawrence* v. *Gayetty*, *ante*, 382, opinion filed January 15, 1889,) and that most of the allegations are within the rule; but there is one allegation showing a representation as to a material and existing fact, viz., that the defendant had, prior to the contract with plaintiff, contracted with another to convey him the same property, and that he was insisting upon a compliance with the contract. The plaintiff, believing this statement to be true, might reasonably have supposed that it would be better to accept other property than to take a deed for this, which was contracted to another, and might become the subject of litigation because of such prior contract. This representation was sufficient to authorize a rescission of the second contract if the complaint were sufficient in other respects. The other representations, to the effect that the defendant was afraid of being prosecuted and sent to state-prison, and the like, were not such representations as the plaintiff had a right to act upon, and were no cause for such rescission. Treating these as surplusage, the complaint is sufficient as against this objection, there being one material false representation alleged.

(*c*) The further objection to the complaint is that no damages are shown. The action is peculiar. The fraud alleged is not in procuring the plaintiff to enter into the original contract, as is usually the case, but in procuring the release of the defendant from the first contract, and inducing him to enter into a second contract in lieu of the first, by which he agrees to accept a conveyance for other and different property. The damage that would be the natural result of such misrepresentations, under the allegations of the complaint, arise from the substitution of other property for that originally contracted for, as the fraud mentioned is alleged to have been committed for the purpose of bringing about such substitution. Viewing the complaint in this light, it is subject to the objection urged against it. The value of the property alleged to have been substituted is not stated, nor are there any facts alleged from which it can be inferred that it was of any less value than that originally contracted for. Therefore no damage is shown that could have been the result of the fraud charged. It is true, the complaint alleges that the property first contracted for increased largely in value, and was worth more than that which plaintiff was to convey to defendant; but the same may have been true of the property embraced in the second agreement. If so, the plaintiff was not injured by the fraud alleged. The respondent attempts to meet this by saying that the action was not for the fraud, but for damages for the breach of the original contract. Then why plead the second contract, or the fraud? The making of the second contract would have come properly from the defendant as a defense. If it was obtained by fraud, this could have been shown by the plaintiff without any pleading under the loose rule obtaining in this state that a plaintiff may prove everything necessary to meet the answer without giving any notice thereof in any way. We think the complaint should be treated as one based upon the alleged fraud. If not, the complaint was greatly weakened by an unnecessary attempt to anticipate an expected defense. Treating it as an action for the fraud, the demurrer to it should have been sustained on the ground that no damages were shown. As the plaintiff has taken upon himself unnecessarily the burden of proving that the last contract was made, and that the same was obtained by fraud, and for that reason had been rescinded by him, it was incumbent upon him, in any view that may be taken of the complaint, to show sufficient ground for such rescission, which rendered it necessary for him to allege such facts as would show that he was injured by the fraud alleged. Therefore, treating the complaint as one for damages for a breach of the original contract, the objection made to it is of equal force, and the demurrer should, in that view of it, have been sustained for the same reason. *Purdy* v. *Bullard*, 41 Cal. 444. If the facts alleged were not sufficient to authorize a rescission of the second contract, damages could not be recovered for a breach of the first, from the performance of which the defendant was thereby released.

2. The court permitted the plaintiff to prove by one Scott that he had purchased from the defendant the property in controversy subsequent to the contract with the plaintiff. The evidence was objected to as irrelevant and immaterial, and on the further ground that the written contract was the best evidence. The evidence was not irrelevant or immaterial. The complaint alleges that the contract to a third party, which the defendant represented he had made before the contract with plaintiff was executed, was, in fact, made afterwards. The evidence was material as tending to prove this allegation. It was unnecessary that the written contract should have been introduced. We understand the rule to be that, where the question is not as to the contents of a writing, but as to whether one has been made or not, and the question comes collaterally in issue, it may be proved by parol. *Stanley* v. *Sutherland*, 54 Ind. 339, 353. The objection to the evidence was properly overruled.

3. The memorandum of agreement first entered into by the parties was offered in evidence, objected to by defendant on the ground that it contained no description of the property, and the objection overruled. This was error. The instrument was insufficient, standing alone, for want of a proper descrip-

tion of the property, and, as the complaint contained nothing which could aid it in this respect, it was immaterial, under the pleadings.

4. The plaintiff was permitted, over defendant's objection, to introduce in evidence certified copies of a certain deed and contract, without, in any way, accounting for the absence of the originals. This was error. *Brown* v. *Griffith*, 70 Cal. 14, 11 Pac. Rep. 500.

5. The defendant offered to prove the value of the property described in the second contract, and agreed to be conveyed in lieu of that mentioned in the first contract, with a view, we suppose, of showing that the former was of equal or greater value than the latter. The court excluded the evidence, and of this the appellant complains. As we have said, it was necessary for the plaintiff to allege and prove that the last property contracted for was of less value than the first, or other facts sufficient to show that he was damaged by the making of the last contract. The burden of proof being thus cast upon the plaintiff, and no evidence having been offered by him with reference to the matter, the evidence offered by defendant was wholly unnecessary, and was properly excluded as immaterial.

6. The appellant also complains of the refusal of the court to give his instruction, No. 2, by which the court was asked to instruct the jury that if the property described in the second contract was of equal value with that mentioned in the first, at the time the plaintiff agreed to take the former in lieu of the latter, the plaintiff was not damaged, and the jury should find for the defendant. The instruction contained a correct statement of the law, and under proper pleadings should have been given; but, as no issue as to the value of the property described in the last contract was presented by the pleadings, it was properly refused.

7. The defendant asked the court to instruct the jury that the knowledge of the defendant, if he had any, that a railroad was to be located near the Dennison subdivision lots, was immaterial, and that he was not bound, and it was not his duty, to communicate that fact to the plaintiff, and that the fact of such failure to do so should not be considered. The first clause of this instruction was not good law. The second clause, as to the duty of the defendant to disclose his knowledge of the proposed location of the railroad, was correct. The fact that defendant had come into possession of a fact showing that the property first contracted for was likely to increase largely in value was a circumstance tending to show the fraud, as furnishing a motive for the attempt to relieve himself from his contract; therefore, it was not immaterial, and should have been considered by the jury. The instruction, being wrong in this particular, was properly refused, although the other proposition laid down may have been correct.

8. The court, over the defendant's objection, instructed the jury as follows: "The court instructs you on the part of the plaintiff that if you find from the evidence that defendant agreed to exchange the six lots described in the complaint to the plaintiff, and before the paper of January 13, 1887, was made, the lots were pointed out to plaintiff on the ground, for the property of plaintiff described in the contract of January 13, 1887; and if you further believe from the evidence that defendant, by false statements and representations, deceived and induced the plaintiff to believe, and that the plaintiff did believe, either he had no title or had sold it to another, or that through false representations detailed in the evidence before you, and believed by plaintiff, and he was so induced thereby to consent to the abandonment of the terms of the contract of January 13, 1887, and that those representations so made by defendant were knowingly false, or made by him when he did not know them to be true,—plaintiff was not bound by the engagement of March 14 or 16, 1887; and, if you so find, your verdict should be for the plaintiff for the amount at least of the difference between the value of plaintiff's property on the 9th of July, 1887, and of the value of the six lots described in the complaint as

belonging to defendant, and designated in the alleged contract of January 13, 1887." This instruction was erroneous. It informed the jury, in effect, that the plaintiff might rescind the second contract, and recover for a breach of the first, on the sole ground that the former was induced by fraudulent representations. It leaves out the material element of damage or injury, which must be shown to authorize the rescission of a contract. For aught that appears by the complaint or the evidence, the plaintiff may have been benefited, rather than injured, by this second contract. If so, he has no cause of complaint or ground of action. The error in ruling upon the demurrer to the complaint is carried into this instruction.

9. For the reasons above stated the court erred in denying defendant's motion for a nonsuit. The plaintiff had no cause of action on paper, and none was shown by the evidence. For these reasons the nonsuit should have been granted. For the same reasons the motion for a new trial was improperly overruled.

Judgment and order refusing a new trial reversed, with instructions to the court below to allow the parties to amend their pleadings.

We concur: Beatty, C. J.; McFarland, J.; Paterson, J.; Thornton, J.; Sharpstein, J.

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78 Cal. 158

Foss *et al.* v. Hinkell. (No. 12,673.)

(*Supreme Court of California.* January 28, 1889.)

1. Public Lands—Railroad Grants—Validity.
   A patent to the S. P. R. Co., for land which at the time of its grants, under acts Cong. July 27, 1866, and March 3, 1871, was within the exterior limits of a Mexican or Spanish grant then *sub judice*, is void from the beginning.
2. Same—Mexican Grants—Evidence.
   Whether land was at a certain time within a grant does not depend on the last United States survey made. The boundaries must be ascertained by the *expediente* of the grant issued by the Mexican government, aided, if necessary, by parol evidence.
3. Same—Rights of Pre-emptor to Question Patent.
   A pre-emptor is so far in privity with the United States, under whose laws he has settled on the land, that he may attack a patent of said land.
4. Same—Defenses against Patent—Intruder.
   A pre-emptor cannot defend against one claiming under a patent to a railroad, on the ground that the land was, when the patent was issued, within the indemnity limits of another company, since as to the latter he would only be an intruder.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'Melveny, Judge.

Ejectment by Carrie L. Foss and Frank Foss against Joseph Hinkell. Judgment for plaintiffs. Defendant appeals.

Will D. Gould and *James H Blanchard*, for appellant. *Edwin Baxter* and *Chapman & Hendrick*, for appellees.

Thornton, J. Ejectment. Judgment for plaintiffs, and appeal by defendant from judgment and order denying the motion for a new trial. The plaintiffs claimed title under a patent from the United States of the land in suit to the Southern Pacific Railroad Company, dated the 4th of April, 1879, and a deed of the company of date of the 20th of June, 1887, conveying this land to them. The defendant is a duly-qualified pre-emptor, having entered into and held possession of the land in suit since the 22d of April, 1886, and ever since that day has been a *bona fide* pre-emption settler thereon. On the 10th day of June, 1887, he did tender and deposit his declaratory statement, in due form, for the land, in the proper United States land-office, and tendered therewith all legal fees for filing the same. The register and receiver refused to file this statement, and on the same day defendant appealed from this refusal to the commissioner of the general land-office at Washington, where the appeal is now pending. The defendant pleaded that the land in controversy was never granted to the plaintiffs' grantor, the Southern Pacific Railroad Company, because at the date of the location of the route of the Southern Pacific Railroad, or about April 3, 1871, this land was within the exterior limits of the Rancho San José, a valid Spanish or Mexican grant, and was thereby reserved from appropriation by the railroad company. By reason of the foregoing facts pleaded, defendant contends that the patent to the railroad company is void.

If the land in suit here was, when the grant to the railroad company, under the acts of congress of July 27, 1866, and March 3, 1871, took effect, within the limits of the Rancho San José, and the grant of this rancho was then *sub judice*, the patent under which plaintiffs herein claim was void from the beginning. This conclusion is sustained by the judgments of this court in *Carr* v. *Quigley*, 57 Cal. 395, and *McLaughlin* v. *Heid*, 63 Cal. 210. The case first cited was decided January, 1881, and the last cited case on February, 1883. The supreme court of the United States has recently (on the 21st of November, 1887,) decided the same way in *Doolan* v. *Carr*, 125 U. S. 618, 8 Sup. Ct. Rep. 1228. The case just cited contains an elaborate discussion of the point. As a summing up of the discussion on the case last cited, the court, speaking by MILLER, J., used this language: "Those Mexican claims were often described, or attempted to be described, by specific boundaries. They were often claims for a definite quantity of land within much larger out-boundaries, and they were frequently described by the name of a 'place' or 'ranche.' To the extent of the claim when the grant was for land with specific boundaries, or known by a particular name, and to the extent of the quantity claimed within out-boundaries containing a greater area, they are excluded from the grant to the railroad company. Indeed, this exclusion did not depend upon the validity of the claim asserted, or its final establishment, but upon the fact that there existed a claim of a right under a grant by the Mexican government which was yet undetermined, and to which, therefore, the phrase 'public lands' could not attach, and which the statute did not include, although it might be found within the limits prescribed on each side of the road when located."

As the record now stands, the finding on the issue whether the land sued for is within the exterior limits of the grant of the Rancho San José is insufficient. In fact, it cannot be regarded as a finding on the issue at all. The court finds on this point that on the 3d day of April, 1871, said land was within the claimed exterior limits of the Rancho San José, a valid Mexican grant, as shown by the Thompson survey, mentioned in the next finding. In the next finding it is declared that in August, 1868, Thompson, a deputy United States surveyor, duly made a survey of the rancho under the instruction of the United States surveyor general for the state of California, by which survey the land in controversy was included within the exterior limits of said rancho from 1868 until said survey was rejected, in 1875; that by a former survey, made by the United States deputy surveyor Hancock, said land was excluded from the exterior limits of said rancho, which survey, with slight modifications not affecting this point, was finally approved, and the rancho was afterwards patented on the 20th day of January, 1875. The fact required to be found is whether the land in controversy was included within the exterior limits of the Rancho San José, as originally granted by the Mexican government.

The court finds that this land was within the exterior limits of the rancho according to Thompson's survey, and not within such limits according to a prior survey of Hancock. We cannot see how this could be. The exterior limits of the rancho do not depend on any survey made of it. The land sued for may be within such exterior limits, though excluded from a survey. Though Hancock may have excluded this land from his survey, it still may be within the exterior boundaries of the rancho as granted by the Mexican government. What the exterior limits of such granted rancho were must be determined by the *expediente* of the grant issued by the Mexican government, including petition, *diseno*, and grant, the boundaries designated in which may be identified by parol evidence. See *Doolan* v. *Carr*, *supra*.

That the Mexican grant for the rancho above named was *sub judice* long after the definite location of the railroad was made, is clearly found. The grant being *sub judice*, as above found, on the 3d of April, 1871, if the land in suit was within the ouside boundaries of the grant appearing in the granting documents as made by the Mexican government, then it was not granted by the act of congress of the 27th of July, 1866, or of the 3d of March, 1871, to the Southern Pacific Railroad Company, and the patent to it was void, and nothing passed by the deed of the railroad company to the plaintiffs. See cases above cited.

It is argued that the defendant should not be allowed to attack the patent of the United States herein because he is not in privity with the United States. The settlement by the defendant as a pre-emptor on the land in suit was, when made, in compliance with the laws of the United States. And when this land, being a part of the Rancho San José as granted by the Mexican government, was excluded from it by a lawful survey, it became subject to settlement and pre-emption. Defendant was then lawfully in possession under the laws of the United States, and being then so in possession he was in privity with the United States, the grantor in the patent. He entered and remained in possession under the grantor by its permission and authority, and the United States had no power to turn him out of possession, unless by proceedings in condemnation of the land for public use, and compensation for defendant's property duly made to him.

The views just above stated are sustained by the cases decided by this court, above cited, and by the case cited, decided by the supreme court of the United States. The defendant argues, further, that the fact that the land in suit is within the indemnity limit grant of the Atlantic & Pacific Railroad Company can be availed of by him as a defense to this action. This fact is urged as a defense if the land in suit was not within the exterior limits of the Rancho San José when the line of the Southern Pacific Road was definitely located. It must be observed that, if the land was within the exterior limits of the rancho above mentioned when the line of the Atlantic & Pacific Railroad was definitely located, it was not granted to the Atlantic & Pacific Railroad Company. See third section of the act of July 27, 1866, pp. 294, 295. If it was without the limits of the Rancho San José, but within the indemnity limits above mentioned, then it does not appear that the defendant was in possession by authority of, or by contract with, the Atlantic & Pacific Railroad Company. He was then in possession as a mere trespasser or intruder, and could not set up such defense against the patent of the United States under which plaintiffs claim.

For the error above pointed out, the judgment and order are reversed, and the cause remanded, with directions to the court below to find, on the testimony already introduced, and such further testimony as may be introduced by either party, whether or not the land in suit was on the 3d day of April, 1871, within the exterior boundaries of the Rancho San José as granted by the Mexican government, and on such findings to enter judgment.

Ordered accordingly.

We concur: WORKS, J.; SHARPSTEIN, J.

PATERSON, J. I concur. The court found that "the plaintiffs' right of recovery of the land in controversy is based on a patent from the United

States to the Southern Pacific Railroad Company, dated April 4, 1879, and a deed of said land from said company to the plaintiffs, dated January 20, 1887." Neither the company nor plaintiffs were ever in possession of the lands. Defendant was in the actual possession more than a year prior to plaintiffs' purchase from the company, and has ever since been in exclusive possession, claiming the land under the pre-emption laws. Ten days prior to the date of plaintiffs' purchase from the company, defendant tendered a declaratory statement and the usual fees to the officers of the United States land-office, and upon their refusal to accept the same he immediately filed an appeal to the commissioner of the United States land-office. That appeal is still pending. These facts, under the decision of the supreme court of the United States in *Doolan* v. *Carr*, 8 Sup. Ct. Rep. 1228, entitled the defendant to question the validity of the patent from the United States, and they exclude plaintiffs from the benefit of the act of congress passed March 3, 1887, for the relief of *bona fide* purchasers. They are not *bona fide* purchasers. 14 Copp, Land-Owner, 214–217.

I concur in the judgment: **McFarland, J.**

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78 Cal 169

PEOPLE *v.* FONG CHING. (No. 20,448.)

(*Supreme Court of California.* January 28, 1889.)

1. BRIBERY—INSTRUCTIONS—PROVINCE OF JURY.
   On trial for bribing a witness to testify falsely, the defense being that money was paid to the witness to dissuade him from giving false testimony, a charge that it is not a recognized custom of the country to subsidize the personal integrity of citizens to prevent them from lapsing into falsehood is error, as usurping jury powers.
2. SAME—EVIDENCE—RELEVANCY.
   The accusation being that the bribe was offered for testimony on a murder trial that witness had seen some persons attack the one accused of murder, and that the latter had shot in among them, evidence that the alleged murderer tried to shoot the arresting officer; that he had several pistols in his possession; and that he wore a coat of mail,—is irrelevant on the trial for bribery, though the general nature of the crime charged would be relevant to show the materiality of the requested testimony.
3. SAME—CORROBORATORY EVIDENCE.
   The bribe having been offered to a policeman, who testified that he pretended to be about to accept the bribe, and asked a higher sum for the sake of getting evidence to convict of bribery, evidence that the policeman had made similar statements to others is inadmissible.
4. CRIMINAL LAW—EVIDENCE—CHARACTER.
   Testimony that a witness had learned since defendant's arrest that his reputation before arrest was bad is inadmissible
5. WITNESS—CROSS-EXAMINATION.
   Defendant, having testified on direct examination as to his birth, parentage, education, and business, was properly asked, on cross-examination, whether he had ever been arrested before.

In bank. Appeal from superior court, city and county of San Francisco; D. J. TOOHY, Judge.

Fong Ching, *alias* Pete, was convicted of offering a bribe to a witness, and appeals. Defendant having testified, on direct examination, as to his birth, parentage, etc., was asked, on cross-examination, whether up to the date of his arrest on this charge he had ever been arrested before, and, having answered "No," was asked, "From any cause whatever?" to which he gave the same reply.

W. H. Lowenthal, for appellant. *Geo. A. Johnson*, Atty. Gen., for respondent.

McFARLAND, J. The defendant was convicted of the crime of offering to give a bribe to a witness, under section 137 of the Penal Code. He appeals from the judgment, and from an order denying a new trial.

There are 39 assignments of error; and, as many of them are about rulings concerning the admissibility of evidence, we have been compelled to examine carefully the whole transcript, which consists of four large books of manuscript, and, when read, it is found to consist, to a great extent, of lengthy, wearisome, and apparently pointless examinations and cross-examinations of witnesses, and other immaterial and worthless matter, utterly useless in pointing the exceptions taken. Under our view of the case, however, there is no need to notice much of this unnecssary matter.

It appears that on July 28, 1886, J. B. Martin, who was a policeman of the city of San Francisco, arrested one Lee Chuck for the alleged murder of one Yen Yuen, who was on that day shot and killed on a public street of that city, and the charge against the defendant herein, Fong Ching, (or Pete,) upon which he was convicted, is that he offered said Policeman Martin a bribe of $400 to testify falsely, upon the examination of said Lee Chuck for said alleged murder, "that he [Martin] had seen some persons attack said Lee Chuck with pistols, and that he [Lee Chuck] had shot in amongst them." On the trial of the case at bar Martin testified (in substance) that, soon after the arrest of Lee Chuck, the defendant herein (Pete) met him, (Martin,) and asked him "to be light" on Lee Chuck, and that he (Martin) gave some evasive answer, saying, "I will see," or something like that; that during the next day or two he had several private interviews with the defendant, (another policeman, named Love, being present part of the time,) at which defendant offered to give various sums of money to Martin if the latter would agree to swear falsely, as above stated; that he (Martin) pretended to listen favorably to defendant's proposals, for the purpose of leading him on, so that he might have sufficient evidence of the crime; that he demanded higher sums of money than defendant would offer; that he never received or took any money at all from defendant; and that finally defendant offered him $400 for the proposed false testimony. On the other hand, defendant testified that Martin made the first proposal about money; that defendant never gave, or offered to give, any money to Martin to induce the latter to swear falsely; that Martin represented that he could be of great service to Lee Chuck; that defendant was a warm friend of Lee Chuck, and feared that a certain strong Chinese society, which was very hostile to Lee Chuck, would use money to induce Martin to testify falsely against him, and that at the solicitation of Martin he (defendant) gave Martin various sums of money, amounting in all to $400, for his friendship, and to induce him to testify merely to the truth, and not to testify falsely against Lee Chuck. It is evident that the decision of the case turned mainly upon the amount of credence which the jury should give to either one of these conflicting stories. (It appears incidentally in the transcript that two former juries failed to agree.) Bearing upon this stage of the testimony the court below, of its own motion, gave a certain charge to the jury; and it is contended that the latter part of said charge (given below in italics) was an unauthorized intrusion into the province of the jury. The charge is as follows: "The defendant has testified as a witness in his own behalf. On the witness stand he told you that at certain times between the 28th of July and the 1st of August, 1886, he gave and delivered $400 to Mr. Martin, and that the object of giving it was to enlist and secure the friendship of Martin, and to dissuade him from giving false testimony on the prosecution of Lee Chuck, then about to be tried for murder. If you believe the defendant's version, your verdict should be, 'Not guilty.' It is not a crime in this state to encourage a witness with pecuniary gifts to be truthful, but neither *is it among the recognized customs of this country to subsidize the personal integrity of our citizens in order to prevent them from lapsing into falsehood and perjury.*"

This language could have but one meaning and purpose. In addition to incorporating an unproved fact into the case, it was an argument against the truthfulness of defendant's testimony, and its direct tendency was to influence the jury not to believe it. It might have been a legitimate argument in the mouth of the attorney for the prosecution; and, in such event, the attorney for defendant could have answered it, as best he knew how, upon, at least, equal terms, counsel against counsel. But the weight of the opinion of the court had no place in either scale. The prosecuting officer in criminal cases is the district attorney, not the presiding judge of the court. The main duty of the latter is to see that the trial is orderly and legally conducted; to rule upon such questions of law as are presented to him, or to declare such law as is applicable to the case; and to sit impartially between the people and the defendant. But the moment he attempts to comment upon, or argue about, the weight of evidence, the credibility of witnesses, or the probability of their sworn statements, he usurps power, and violates section 19 of article 6 of the state constitution, which provides that "judges shall not charge juries with respect to matters of fact." "To weigh the evidence and find the facts is, in this state, the exclusive province of the jury; and with the performance of that duty the judge cannot interfere without a palpable violation of the organic law." *People* v. *Dick*, 34 Cal. 666. The same principle is declared in numerous other decisions of this court. See cases cited in Desty, Const. Cal., under section 19, art. 6. The language objected to in the above charge is therefore clearly erroneous, and that it was material and prejudicial to appellant is apparent to lawyer or layman. It threw the weight of the court against the defendant at the very pivotal point of the contest. For this reason the judgment must be reversed.

We shall not examine at length the many other assignments of error. It is proper, however, to notice two or three of them.

1. In order to show the materiality of the proposed false testimony which, as is alleged, defendant sought to have Martin give, it was allowable, no doubt, to put in evidence the general nature of the crime with which Lee Chuck was charged; but we think that the court allowed the prosecution to go too far in that direction. The accusation against the defendant in the case at bar is that he sought corruptly to induce Martin to swear falsely that on the day Yen Yuen was killed he (Martin) "had seen some persons attack the said Lee Chuck with pistols, and that said Lee Chuck shot in amongst them." Surely but little was necessary to point the materiality of such testimony; and yet the prosecution was allowed, against defendant's objections, to introduce in evidence all the details of the arrest of Lee Chuck, and his conduct at the time,—for instance, that he tried to shoot the arresting officer; that he had several pistols in his possession; that he had on his person a coat of mail, etc. How was all this relevant to a charge against the defendant, Pete, of an attempt to bribe Martin? Clearly it was an attempt, under the guise of another purpose, to wrongfully prejudice the jury against the defendant by inflaming their minds against a third person.

2. And in the same way the court went too far in allowing the testimony of the witness Martin to be corroborated or bolstered by showing that he had made statements similar to those of his testimony to third parties,—a thing which, as a general rule, is not allowable. This evidence was admitted under the rule that a detective officer who pretends to be an accomplice in order to ferret crime may prove that, in fact, he was not an accomplice, by showing that he disclosed what he was doing to his superior officer. The rule, within its legitimate bounds, is no doubt well established; but in the case at bar it

was allowed to be carried beyond its true limits. Courts should be careful not to permit a rule of evidence proper under certain circumstances, and for certain limited purposes, to be used as a means of opening the door to a mass of irrelevant matter never contemplated by the rule itself.

3. We think also that the court erred in allowing the witness Glennon to testify that he had learned since the arrest of defendant that his reputation before his arrest was bad.

4. The cross-examination of the defendant was certainly very broad, but, as he testified in chief about his birth, parentage, education, and business, we cannot say that he did not open the door wide enough to justify what followed in the cross-examination.

There are many other points made which we do not deem it necessary to notice.

Judgment and order reversed, and cause remanded for a new trial.

We concur: WORKS, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

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78 Cal. 166

MERRILL LODGE NO. 299, I. O. G. T., *v.* ELLSWORTH *et al.* (No. 12,610.)

(*Supreme Court of California.* January 28, 1889.)

BENEVOLENT SOCIETIES—RIGHTS OF SUBORDINATE LODGE.

The constitution of the grand lodge of a fraternal order provided that, in case of failure by a subordinate lodge to do certain things, it "shall be deemed an extinct lodge, and its charter shall be forfeited." *Held* that, where the subordinate lodge is incorporated under the state laws, its suspension by the grand lodge has no effect on its legal existence, and gives to the representatives of the grand lodge no right to the possession of property of which it is the owner, and in which the grand lodge has no right, title, or interest.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Julius Lyons and *Chapman & Hendrick*, for appellants. *Will D. Gould* and *James H. Blanchard*, for respondent.

HAYNE, C. Suit for an injunction to restrain the defendants from interfering with certain real and personal property. The court below gave judgment for the plaintiff, and the defendants appeal.

The case appears to have grown out of a dispute between the members of the lodge as to its management and control. The answer admits that the plaintiff is, and was at the time in question, a corporation duly organized under the laws of the state of California, and avers that on April 1, 1886, "Will D. Gould, James H. Blanchard, C. C. Dunn, M.W. Childs, and others, members of said Merrill Lodge, got control of said lodge, and elected the officers thereof, the said Gould, Blanchard, and Childs being elected trustees thereof, and undertook to destroy the said order, and to control the same for their own private ends." It further avers, in substance, that the plaintiff is a "subordinate" lodge of the order; that by the constitution of the grand lodge it is declared that any subordinate lodge which fails to do certain things, "shall be deemed an extinct lodge, and its charter shall be forfeited;" that the plaintiff by its conduct brought itself within this provision, and was "suspended" by the grand lodge; and that the defendant Ellsworth "was by the grand chief templar of the grand lodge of the state of California appointed the deputy of said grand chief templar, and directed by him to take possession of the books, papers, and the other property of said Merrill Lodge, and hold the same subject to and until the further order of said grand lodge," which the said Ellsworth proceeded to do.

These averments of the answer (except as to the wrongful intent of the persons who "got control" of the corporation) appear to be true. Upon the question of the ownership of the property the court finds that "said plaintiff, in furtherance of its objects, leased a certain hall; * * * that said plaintiff is now, and has been since December 3, 1874, in possession of, and entitled to the possession of, said hall;" that plaintiff, "for the purpose for which it was incorporated has expended for carpets, furniture, fixtures, books, and necessary property for the carrying on of its work, the sum of $2,000; that said hall is a necessary and proper place in which to keep all of said property, and for the promotion of its said benevolent purposes;" and that "the defendants, or either of them, have no right, title, or interest in or to, or any right of possession of, said hall, or the furniture, books," etc.

The appellants make no criticism upon the sufficiency of this finding as a finding of ownership. Their position seems to be that the suspension by the grand lodge, and the appointment of Ellsworth as the deputy of the grand chief templar, entitled him to the possession and control of the property. The relation between the grand lodge and the corporation plaintiff is not very clear from the record before us; but, as we view the case, no question as to the rights of the plaintiff or its members, as members of the order, is involved. The question presented is one of property merely; and in relation to this two controlling facts appear from the record, viz.: that the plaintiff is a corporation duly organized under the laws of the state of California, and that it is the owner of the property in question, in which the defendants have no right, title, or interest. It follows from these facts that the plaintiff is entitled to be protected against the acts of the defendants. The ownership of the property draws to itself the right of possession and control. And since the plaintiff is a corporation it can only be dissolved in the manner prescribed by the laws of California. The provision of the constitution of the grand lodge that in certain contingencies the subordinate lodge "shall be deemed an extinct lodge, and its charter shall be forfeited," and the "suspension" by the grand lodge, and the action taken by the grand chief templar, have not the slightest effect upon the legal existence of the corporation; and as long as it exists its affairs must be managed by its duly-elected officers, as provided by law. If they misconduct themselves, appropriate proceedings to remove them must be resorted to. But the propriety of their conduct will not be inquired into in a suit by the corporation to protect its property.

The showing seems to us to be sufficient to entitle the plaintiff to an injunction. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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78 Cal. 166

MERRILL LODGE NO. 299, I. O. G. T., *v.* ELLSWORTH. (No. 12,591.)

(*Supreme Court of California.* January 28, 1889.)

Commissioners' decision. In bank.

HAYNE, C. This was an action to recover certain personal property. We think that the description of the property was sufficient, and that the averments of the complaint were sufficient to give the court jurisdiction. The other points are similar to those made in No. 12,610, *ante*, 399, (just decided,) and upon the authority of that case we think the judgment should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

81 Cal. 378

KOHL *et al. v.* LILENTHAL *et al.* (No. 11,719.)

(*Supreme Court of California.* February 18, 1889.)

CORPORATIONS—CONSOLIDATION—DIVISION OF STOCK.

Vexatious litigation having sprung up between two rival mining corporations, an agreement was entered into between the stockholders of both companies to form a new company, to which should be conveyed all the property of both the old companies in consideration of stock in the new company, which was to be divided *pro rata* among the old stockholders. Each of the old companies was to be equally represented in the directory of the new. Before the stock was divided all creditors of the old companies were fully paid. *Held*, that a division of the stock among the stockholders under such circumstances was not prohibited by Civil Code Cal. § 309, providing that the directors of a corporation must not "divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock. * * * There may, however, be a division and distribution of the capital stock of any corporation, which remains after the payment of all its debts, upon its dissolution," etc.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F SULLIVAN, Judge.

Mesick & Maxwell, *Garber, Thornton & Bishop*, and *F. A. Berlin*, for appellants. *Stewart & Herrin* and *Wm. M. Pierson*, for respondents.

FOOTE, C. The plaintiffs claim to be the owners and holders of 63,138 shares of the stock of the Head Center Consolidated Mining Company, and bring this action to compel the defendants to transfer, deliver, and issue to them 39,115 shares of stock of the Head Center & Tranquillity Mining Company, and to restrain the defendants from representing, voting, or dealing in any way with these latter shares of stock, of which plaintiffs claim to be the owners. The plaintiffs claim to derive their title to the last-mentioned by reason of their ownership of the first-mentioned shares of stock. The plaintiffs had judgment, and from that and an order denying a new trial, the defendants have appealed. The grounds of the appeal, concisely stated, are that the judgment is unsupported by the findings and any admissions in the pleadings, and that the findings are unsupported by the evidence.

According to the evidence in the record, some time in the summer of the year 1882, two mining companies were in possession of adjoining mining claims in the Tombstone district of the territory of Arizona. One of them, called the "Tranquillity Mining Company," was incorporated under the laws of New Jersey; the other, the Head Center Consolidated Mining Company, was a California corporation. Litigation of a vexatious character had sprung up between these two companies. For the purpose of discontinuing this strife, and furthering their mutual interests, an arrangement was proposed to be effected upon the part of the stockholders of both companies, by common consent, by which the formation of a new corporation was to be had, to which should be deeded all the property of both the old companies, in consideration of the stock of the new company. After various negotiations, looking to this end, the Head Center & Tranquillity Mining Company was organized on the 1st day of December, A. D., 1882, its capital stock being fixed at $2,000,000, and the number of shares at 200,000. This step was taken upon legal advice that it was the most feasible method by which the two companies could be consolidated,—one being a New Jersey corporation, and not subject to the provisions of the Civil Code of California with reference to the consolidation of such corporations. The subscribers to the stock of the new company, and who constituted the board of directors thereof, were F A. Benjamin, T. E. Jewell, A. W. Foster, William Kohl, P. N. Lilenthal, J. M. Gitchell, and J. W. Pew, who each nominally subscribed for five shares of stock. It seems to have been agreed upon all sides by the stockholders of the two original companies that an equal voice in the management of the new company should be accorded to each set of stockholders. At the first two elections of directors, three of them were selected to represent the stockholders of each of the old companies respectively, and a seventh person was elected as being impartial. On the 18th of December, 1882, the board of directors of the new company unanimously adopted a resolution to the effect that the proposition of Messrs. Jewell and Benjamin to sell, convey, or cause to be conveyed to that company the mining claims and grounds known as the "Head Center" and "Yellow Jacket" claims in the Tombstone mining district of Cochise county, Ariz., in full payment and satisfaction of the sum of $5 and 100,000 shares of the capital stock of that corporation, and the Tranquillity mining claim of the same district, county, and territory, with its appurtenances, for the like sum of money and the like number of shares of the capital stock aforesaid, should be accepted, the president and secretary of that corporation being thereby directed to transfer, on the basis proposed, the 200,000 shares of its consolidated stock to Benjamin and Jewell, or their order, on the books of the corporation, on the reception by the company of the conveyance of the property of the two old corporations. Afterwards, on the 4th of January, 1883, the directors of the Head Center Consolidated Company passed certain resolutions, with a view to carry out the arrangement above mentioned. These resolutions recognize the existing *status* of affairs as heretofore mentioned, and, for the purpose of carrying out the compromise and consolidation which had been agreed upon, direct the president and secretary of the corporation to execute a conveyance of its mining ground, and to receive in consideration therefor $5 in money and 100,000 shares of the capital stock of the new corporation. On the 25th of the same month, at an annual meeting of the stockholders of the Head Center Consolidated Company, at which 160,165 shares of the 164,211 outstanding shares of the stock of the company were represented, the action of the directors in the matter of the consolidation was ratified, and on the 27th of February following the deed was executed by the officers of that corporation. On that day, also, Mr. Benjamin, to whom the secretary of the new company had been directed to issue the 100,000 shares of stock in the new corporation for the Head Center property, directed Mr. Pew, who was that secretary, to issue 99,980 shares of the stock to himself (Pew) as trustee, and the remaining portion of it in pieces of five shares each to several of the directors; and Jewell, to whom it had been ordered that the 100,000 shares of the stock for the Tranquillity property was to be issued, directed that 99,975 shares of it be issued to William Kohl, as trustee, and the rest to the remainder of the directors, which was done. The stock thus issued was deposited in the Anglo-Californian Bank, to be held subject to the joint order of Kohl and Foster, under a stock-pooling arrangement, to which the stockholders of both the original companies were parties.

There does not seem to have been any question as to the right of distribution among the stockholders of the old Tranquillity Company of their *pro rata* share of the new stock; but when Mr. Pew, the trustee for the Head Center stockholders, demanded that their stock be distributed to them in like manner, the request was refused on the ground that the law did not authorize such a distribution, as it vested the title and right to the stock in the old corporation, as its capital stock, by reason of the fact that the stock was a mere substitution for the mining ground which had belonged to that company, and it was not legal that the capital stock of the corporation should be divided out among the stockholders. And here, in passing, it may be remarked that no objection seems to have been made in any quarter to such a dividing out *pro rata* to the stockholders of the Tranquillity Company of the shares of stock which fell under the new arrangement to the Tranquillity in lieu of its mining ground, etc. And it also appears that no difference existed under the arrangement for consolidation, in the agreement and understanding, as it affected the Tranquillity or the Head Center Consolidated Company and their several stockholders. If this arrangement was, without any objection, carried out as to the one, that would seem to be a strong circumstance going to show that the same understanding must have existed on the part of the stockholders and all parties concerned, with reference to what was to be done with the stock of the other old company. Upon the other hand, the defendants claim that the oral testimony establishes no such common understanding, and that it and the documentary proof indicates very clearly that the real transaction was merely a sale of its property by the Head Center Consolidated Mining Company, in consideration of 100,000 shares of the capital stock of the Head Center & Tranquillity Company (the new company;) that the transaction as carried out was a corporate transaction, rather than one on the part of the body of the stockholders of the Head Center Company. But the evidence indicates that when the stock was issued it was not to the corporations, but to Kohl and Pew, trustees, and was to remain in a pool for a certain purpose, for a certain specified time, when it was to be divided out among the stockholders in pursuance of the original plan and agreement. This is abundantly shown, to quote from the opinion of the judge below, who heard the witnesses testify, and saw them face to face, by "the positive testimony of the plaintiffs, the negative corroboration of that testimony by defendants, borne out by the recorded acts of all parties." All of which makes it plain "that the arrangement, as planned and executed, was a consolidation of the interests of the two sets of old stockholders in the new Head Center & Tranquillity Company." This conclusion is consistent with all the testimony, oral and written, and is in perfect harmony with the conduct of all parties, which is convincing evidence of its correctness, especially in view of the further circumstances that what is claimed to have been agreed on is just what would have been the best thing for all interests to have been done, if the old corporations had both been domestic or state corporations.

If, then, as we conclude it to have been, the arrangement was "the act of the body of the Head Center stockholders," and the stock was issued to Pew as their trustee merely, is the transaction one forbidden by section 309 of the Civil Code,[1] or by the general principles of equity which govern such transactions? If the consummation of the agreement would result in fraud of complaining creditors' rights, or was opposed to the interests of the stockholders, it is plain that under the decision of the appellate court in *Martin* v. *Zellerbach*, 38 Cal. 300, in giving construction to a similar statute, such a division of stock among stockholders would be unlawful. But, as appears to us, this arrangement was for the benefit and interest of all parties, both the creditors to whom not a large sum was due, which was paid before this application to divide the stock was made, and to the stockholders themselves, who thereby, as it seems to us, would have occupied relatively the same position in the new company which they held in the old. The prohibition, as we take it, contained in the section, Civil Code, *supra*, " is directed against the trustees, and seems designed to protect creditors as such, and also to protect the stockholders against their mismanagement in distributing capital stock in the form of dividends, with a view to holding out the idea that the corporation is more prosperous than it is, for the purpose of promoting some unlawful object. If all parties in interest are secured from injury, and the purpose is a lawful one, the object of the provision would seem to be accomplished, and there would be no one entitled to complain. Such a transaction was regarded as lawful in *Treadwell* v. *Manufacturing Co.*, 7 Gray, 393." *Martin* v. *Zellerbach*, *supra*. Here the debts are all paid before the stock is asked to be delivered. The parties asking it are those who had the stock in one of the original companies, whose property is now owned by the new company, and they do not ask for anything more than was agreed upon all hands that they should have, and which, as it seems to us, they ought to have. What was considered a fair thing, which no one seems to doubt, for the Tranquillity stockholders, should not be unfair to the Head Center stockholders, who have contributed their all in the way of property to the new corporation. Section 309, *supra*, in our judgment, does not inhibit a body of stockholders from "doing for a lawful purpose, and without injury to creditors," that which appears in this instance to have been for the best interests of all concerned.

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[1] Sec. 309. The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock; nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. * * * There may, however, be a division and distribution of the capital stock of any corporation, which remains after the payment of all its debts, upon its dissolution, or the expiration of its term of existence

As throwing some light upon this proposition the appellate court in the case of *Chater* v. *Refinery Co.*, 19 Cal. 220, may be referred to as having asserted that stockholders have a right to preserve their just rights of property in consonance with contracts which they may have made, notwithstanding the intervention of corporate agencies, which claim the property for themselves. In *Shorb* v. *Beaudry*, 56 Cal. 450, after quoting from the case *supra*, the court says: "The truth is, the corporation, under our system, following such an agreement," (as the one here shown) "would be the mere agency of the associates, created for the mere sake of convenience in carrying out the agreement as between those who made the bargain, the different characters or forms in which or by which the bargain was made, and the order in which the several parts of it were executed, making no substantial difference in the obligation." The appellate court further said: "Substantial justice can be administered in this case by treating the parties in the light of their agreements between themselves, independently of their incorporation, and in no other way that we can discover can this be done." So in the present instance the court below seems to have done substantial justice as between all the parties to the transactions which resulted in the incorporation of the new mining company; and, perceiving no prejudicial error in the record, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

78 Cal. 221

WENZEL *v.* SCHULTZ *et al.* (No. 12,651.)

(*Supreme Court of California.* February 2, 1889.)

NEGOTIABLE INSTRUMENTS—ACTION ON NOTE—FRAUD.

On settlement of their mining partnership, defendants, S. and his wife, gave plaintiff their note at six months for the sum found due; having objected to giving a note due one day after date, as plaintiff wished. Two days later plaintiff came back saying that he had found a mistake in the balance, and presented them another note to sign for a slightly smaller amount. Defendant could not read, and requested plaintiff to indorse the difference on the old note. His wife was busy, and asked plaintiff to leave the note till she could look over it. At last, moved by his importunities and assurances that it was just the same as the other except in amount, they signed it. It was payable one day after date. *Held*, that defendants had a good defense, although they had no confidential relation with plaintiff, and had an opportunity to learn the contents of the note.[1]

In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Action against H. C. Schultz and Mary Schultz on their promissory note dated January 28, 1886, and due one day after date. Judgment for defendants. Plaintiff appeals.

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[1] On the subject of signing an instrument without reading it, and the liabilities created thereby, see Barnes v. Insurance Co., (Iowa,) 39 N. W. Rep. 122, and note; Railway Co. v. Cox, (Iowa,) 41 N. W. Rep. —.

F. D. & G. W. Nichol, for appellant. *I. M. Kalloch* and *F. W. Street*, (*P. Reddy* and *W. H. Metson*, of counsel,) for respondents.

PATERSON, J. On January 26, 1888, plaintiff and defendant H. C. Schultz, who had prior and up to that time been engaged jointly in certain mining enterprises, met and adjusted their accounts. Plaintiff asserted that the sum of $3,920.67 was due to him, and wanted a note payable one day after date. Defendants were unwilling to give a note payable in so short a time, but, relying on his statement, executed and delivered to him their promissory note for the sum claimed, payable in six months after date. Immediately thereafter the plaintiff took his note to an attorney to see what could be done to secure the payment thereof, and was informed that nothing could be done to secure its payment, as it was not payable until six months after date. Two days later plaintiff went to the residence of defendants, and stated to them that he had made a mistake in computing the amount due from them; that the note called for $50 more than he was entitled to, and he presented to them a new note, which he said was for $3,870.67, but he said that in all other respects it was the same as the note delivered on the 26th instant. Defendant H. C. suggested that a payment of $50 be indorsed on the original note, but plaintiff insisted upon a new note. The defendant Mary,—wife of H. C.,—who was busy with her household affairs, requested the plaintiff to leave the note with her for a few hours, that she might read it before signing it. The court finds "that neither of the defendants knew whether a mistake had been made in the note of January 26th or not; that the defendant H. C. Schultz was not able to read the said new note, and that the defendant Mary Schultz had bread baking, and told the plaintiff that she had not a moment's time, and asked him to leave the note with her for a couple of hours, until she had time to read and sign it; that the plaintiff insisted upon an immediate execution of the note, and repeatedly declared to the defendants that it was just the same as the other note, excepting the difference of $50 in its principal sum, and showed defendant, Mary Schultz, the difference in the principal sum; that the defendants thereupon, by reason of their confidence in plaintiff, and their belief of the truthfulness of his assertions, signed the said new note, and delivered it to plaintiff; that, contrary to plaintiff's declaration, the said new note had been by him made payable one day after its date; * * * that the plaintiff's statements and representations to defendant were false and fraudulent, and were knowingly and purposely made by plaintiff for the purpose of misleading and deceiving defendants into the execution and delivery of the note sued upon in this action, and that said misrepresentations and statements misled the defendants into the execution and delivery thereof to plaintiff; that the defendants * * * demanded from plaintiff the surrender to them of said note, and tendered to plaintiff in lieu thereof their promissory note for the sum of $3,870.67, bearing date January 26, 1888, and made payable six months after date; * * * that the plaintiff refuses, and has ever since continued to refuse, to surrender the note executed by defendants on January 28th, and has ever since continued to reject the defendants' tender." Upon these facts judgment was entered for defendants.

The facts found by the court are supported by the evidence, and we think the judgment is right. Plaintiff had been for ten years a partner of H. C., had lived in defendant's family five years, and had gained their friendship and confidence. Defendant H. C., who was suffering from cataract of the eye, could not read the note written by plaintiff; his wife was busy; both signed the note relying on the positive and repeated assurance of plaintiff that the note was in all respects the same as the original, except as to the amount named therein.

Appellant whistles these facts down the wind, saying that "it does not appear therefrom that any relation of especial trust or confidence existed between the parties, or that defendants did not have full and equal opportunity with plaintiff to acquire knowledge of the contents of the note," etc. But the court finds, upon ample evidence, that the plaintiff intended to deceive defendants, and that they were in fact deceived by his statements as to the contents of the note. Where a party is induced to sign an instrument by false statements as to its contents, made with intent to mislead him, and to prevent him from making an examination of its provisions, it is no answer to say that a higher degree of care and diligence would have enabled him to escape its effect. *Gibbs* v. *Linabury*, 22 Mich. 478; *Anderson* v. *Walter*, 34 Mich. 113; *Anderson* v. *Field*, 6 Bradw. 307; 2 Pom. Eq. Jur. § 895; *Burroughs* v. *Guano Co.*, 81 Ala. 255, 1 South. Rep. 212; *Cole* v. *Williams*, 12 Neb. 440, 11 N. W. Rep. 875; *Association* v. *Esche*, 17 Pac. Rep. 677, note 1; Civil Code, §§ 1571, 1572.

Defendants, in their answer and at the trial, tendered to plaintiff a note which in form was the same as the note plaintiff represented to them they were signing on January 28, 1888. This was more than the law required of them. 1 Daniel, Neg. Inst. §§ 193, 848.

The answer of defendants contains a full and complete defense. *Capuro* v. *Insurance Co.*, 39 Cal. 125. At the trial no objection was made that the testimony offered by defendants was not within the issues.

Judgment and order affirmed.

We concur: BEATTY, C. J.; THORNTON, J.; WORKS, J.; MCFARLAND, J.; SHARPSTEIN, J.

78 Cal. 175

SIMPSON *et al.* *v.* MCCARTHY. (No. 12,854.)

(*Supreme Court of California.* January 29, 1889.)

1. ATTACHMENT—AFFIDAVIT—SUFFICIENCY.

Under Code Civil Proc. Cal. § 538, providing that an affidavit for an attachment shall show an indebtedness upon a contract, express or implied, an affidavit stating that the defendant is indebted "on an account stated, a contract for the direct payment of money," etc., is sufficient as showing that the elements of an implied contract, at least, exist, and it is not necessary to state whether the contract is express or implied. MCFARLAND, J., dissenting.

2. SAME—KNOWLEDGE OF AFFIANT.

Such affidavit is not defective because the affiant does not state whether his averments are based on knowledge or on information and belief.

3. SAME—AFFIDAVIT BY AGENT.

And where the affidavit is made by an agent of the creditor, such agency need not be shown, nor need it be expressly averred that he makes the affidavit on behalf of the creditor.

In bank. Appeal from superior court, San Joaquin county; J. S. SWINNERTON, Judge.

Carter & Smith and *J. H. Budd*, for appellant. *C. H. Clement*, for respondents.

BEATTY, C. J. This is an appeal from an order overruling a motion to dissolve, vacate, and set aside a writ of attachment. The grounds of the motion were: (1) That the affidavit did not conform to section 538 of the Code of Civil Procedure, in that it did not state whether the debt was upon an implied or an express contract; (2) that it did not appear that the affidavit was made upon knowledge or upon information and belief; (3) that it did not appear that the affidavit was made by or on behalf of the plaintiffs; (4) that the attachment was improperly issued, because the affidavit neither stated whether the contract sued on was express or implied, or stated facts from which it could be ascertained whether the contract was express or implied; (5) that it did not appear whether the undertaking was made and entered into before or after suit brought; (6) that the undertaking was in the alternative.

The portion of the affidavit called in question was in the following language: "[Title of court and cause.] *State of California, County of San Joaquin—ss.* J. M. White, being duly sworn, says: That he is the agent and salesman of the plaintiffs in the above action; that the defendant in the said action is indebted to them in the sum of $1,295.75, gold coin of the United States, over and above all legal set-offs and counter-claims, upon an account stated, a contract for the direct payment of money," etc. That portion of the undertaking to which objection is made reads thus: "[Title of court and cause.] Whereas, the above-named plaintiffs have commenced, or are about to commence an action," etc., dated this 7th day of February, 1888. The objections to the undertaking have not been urged here. As to the affidavit, we think there is no force in the second or third of the objections as specified grounds of the motion. The statute does not require the affiant to state whether his averments are based upon direct knowledge, or upon information and belief; and when, as here, the facts are stated positively, without qualification, it will be implied that they were within the knowledge of the affiant. Neither is it required that the person who makes affidavit in behalf of the creditor should show that he is the agent of the creditor for the collection of the debt, or by express averment that he makes it in his behalf, or that the facts are peculiarly within his knowledge, or that there is any particular reason or excuse for the omission of the creditor to make the affidavit himself; and there is nothing in the policy of the law requiring the interpolation of such provisions by construction.

The serious question involved in the appeal arises upon the first and fourth objections. It was held by this court in an early case (*Hawley* v. *Delmas*, 4 Cal. 196) that an affidavit, alleging in the bald language of the statute that the indebtedness arose upon an express or implied contract, was insufficient to sustain an attachment, and in several subsequent and some recent cases that decision has been cited with approval. Doubtless it states the law correctly, and unless this case can be distinguished, the order appealed from must be reversed. It seems to us, however, that the cases are distinguishable. The real vice of the affidavit in *Hawley* v. *Delmas*, as pointed out in the opinion of MYRICK, J., in *Wilke* v. *Cohn*, 54 Cal. 213, was that it stated nothing with certainty. It did not allege an express contract; it did not allege an implied contract; and, consequently, did not establish the essential fact that any sum of money was due from defendant to plaintiff upon a contract for the direct payment of money. Obviously this is the one essential fact, for, as regards the right to attach, it makes not a particle of difference whether the contract is express or implied, and all that was decided in the cases referred to was that so loose an allegation in the alternative could not be treated as an allegation of either alternative. Here, however, is no allegation that if one thing is not true, then another is; it is positively and directly charged that the defendant is indebted to plaintiff "upon an account stated, a contract for the direct payment of money." It may be true, as contended by counsel for appellant, that account stated can be either an express or implied contract; but, on the other hand, it is undeniable that in either case it is a contract for the direct payment of money. The allegation that there is an account stated makes it certain that at least the elements of the implied contract exist, and the mere fact that there is nothing to negative the existence of the additional element necessary to constitute it an express contract, does not, in our opinion, deprive the allegation of the requisite decree of certainty.

For these reasons I think the order appealed from should be affirmed, and it is so ordered.

We concur: THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.

WORKS, J., (*concurring.*) It is held in *Hawley* v. *Delmas*, 4 Cal. 196, and cases following it, that an affidavit alleging, in the language of the statute, that the indebtedness is "upon a contract, express or implied," is insufficient, because, being in the alternative, it fails to show that it is upon either an express or an implied contract. An account stated may be "a contract, express or implied." Therefore an affidavit alleging that it is an account stated is identical with the one held to be bad, because it in effect avers that the indebtedness is upon either an express or an implied contract, and is directly within the cases referred to. But in my judgment the affidavit in *Hawley* v. *Delmas* was sufficient under the statute. It is totally immaterial whether the contract is express or implied, as the right of the attaching creditor is precisely the same in either case. The fact of the indebtedness upon contract is the material thing to be alleged; therefore to say that the defendant was indebted upon contract, express or implied, should, in my judgment, have been held sufficient. In the case of *Klenk* v. *Schwalm*, 19 Wis. 111, such an affidavit was held to be sufficient under a statute precisely like our own. For the reason that I do not concur in the rule laid down in the earlier cases referred to, I am of opinion that the affidavit here is sufficient; but if those cases are to be adhered to, I am unable to see how we can do otherwise than to hold the affidavit to be insufficient.

MCFARLAND, J., (*dissenting.*) I dissent and agree with the following opinion, written by Commissioner HAYNE:

"I think *Hawley* v. *Delmas* is in point, and that under that decision the affidavit must show whether the contract is express or implied. If the only thing necessary to be shown was that there was a contract, the alternative words in the affidavit could have been, and presumably would have been, rejected as surplusage. The statement that the indebtedness was on an account stated does not show whether the contract was express or implied, because an account stated may be an implied contract. *Hendy* v. *March*, 17 Pac. Rep. 702. Unless *Hawley* v. *Delmas* is to be overlooked, I think the order appealed from should be reversed."

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78 Cal. 181

COWAN *v.* PHŒNIX INS. CO. (No. 12,608.)

(*Supreme Court of California.* January 29, 1889.)

1. INSURANCE—ACTION ON POLICY—PLEADING—COMPLAINT—PROOF OF LOSS—WAIVER.
A fire insurance policy stipulated that a loss should be paid within 60 days after receipt of proofs thereof at the company's office, and that notice in writing of the nature and cause of the loss, etc., sworn to, shall be furnished within 30 days after its occurrence. Another clause provided for arbitration as to the amount of the loss in case of disagreement, which should be conclusive. A complaint for a loss thereunder alleged that after the fire, and before the commencement of the action, plaintiff furnished defendant with proofs of the loss; that she performed all the conditions required by the policy on her part, and offered to arbitrate as provided in the policy, which defendant refused to do, or to pay the loss. *Held*, that the complaint was bad for want of an allegation that proofs of loss were furnished 60 days before the institution of the action, and that the provisions concerning arbitration did not waive the necessity of furnishing the proofs within that time.

2. SAME—APPLICATION.
Where the policy contains a provision that the application shall be deemed a part thereof, and a warranty of the facts stated therein, and that misrepresentation or omission of facts material to the risk in said application shall avoid the policy, it is unnecessary to set out the application in a complaint thereon, or aver the performance of anything relating thereto, or the truth of the representations therein made.

In bank. Appeal from superior court, Butte county; LEON D. FREER, Judge.

Action by Mary Cowan against the Phœnix Insurance Company, to recover on an insurance policy. Verdict and judgment for plaintiff, and defendant appeals.

Jarboe, Harrison & Goodfellow, for appellant. *Gray & Sexton*, for respondent.

THORNTON, J. Action on policy of fire insurance, on which plaintiff recovered judgment. Defendant appeals.

The complaint was demurred to on the general ground. The counsel of defendant state in their brief very clearly the particulars in which they contend that the complaint is insufficient. We copy these from the brief. They are as follows:

"The plaintiff alleges that, for a sufficient consideration, the defendant made its policy of insurance to her, a copy of which is annexed to and made a part of the complaint. That policy contains the following agreements and conditions: 'By this policy of insurance the Phœnix Fire Insurance Company of Brooklyn, in consideration of $35.75, and subject to and under the conditions hereinafter mentioned, do insure Mary McMullan against loss or damage by fire to the amount of $1,500, as per slip hereto attached.' [Here are specified the several objects which are insured, and the amounts on each;] as per application and diagram of assured on file with this company, which is hereby made a part of this policy, and a warranty by the assured. If an application, survey, plan, or description of the property herein described is taken, whether said application, survey, plan, or description be taken or signed subsequent or prior to the issue of this policy, such application, survey, plan, or description shall be considered a part of this contract, and a warranty by the assured; and any false representation by the assured of the condition, situation, or occupancy of the property, or any omission to make known every fact material to the risk, or any overvaluation, or any misrepresentation whatever, either in a written application or otherwise, or if the assured shall have, or shall hereafter make, any other insurance, whether valid or not, on the property herein described, or any part thereof, without the consent of this company written hereon, or the risk be increased by the erection or occupation of neighboring buildings, or by any means whatever, without the consent of this company indorsed hereon, then, and in every such case, this policy is void.' By the terms of the policy it is provided that the amount of loss or damage shall be estimated according to the actual cash value of the property at the time of the loss, and 'be paid sixty days after the proofs of the same required by the company shall have been made by the assured, and received at the office in Chicago.' The only allegation upon this subject is 'that afterwards, (that is, after the fire,) and before the commencement of this suit, plaintiff furnished the defendant with proof of her said loss, and of her interest in said property.'"

These statements are correct as to the allegations of the complaint.

It is argued that the complaint is defective in that it does not set forth the application of the assured, which is declared to form a part of the policy. It appears clearly from the complaint that there was an application, which was made a part of the policy. The contents of it are not stated in the complaint. But it is stated in the complaint, by appending the policy to and making it part of it, that there was an application, and that that application should be considered a warranty by the assured. This stipulation of the contract is a solemn engagement by the assured that the representations made, in the application at the time they were made, and when the policy became a contract, were true and correct. There are two classes of conditions usually inserted in policies,—the first pointing to the time of the contract; the second, to things which may occur, or which may have to be performed, at a time subsequent. In the former case the stipulation is called an "affirmative warranty," and in the latter a "promissory warranty." 1 Marsh. Ins. 578; Ann. Ins. § 145; *Insurance Co.* v. *Cotheal*, 7 Wend. 72. Affirmative warranties are sometimes called "warranties *in præsenti*." 1 Wood, Ins. 444. A breach of an affirmative warranty consists in the falsehood of the affirmation, when made, of a promissory warranty, which is in its nature executory, of the non-performance of the stipulation. *De Hahn* v. *Hartley*, 1 Term R. 343. A stipulation that "a watchman shall be kept on the premises nights" is a promissory warranty. 1 Wood, Ins. §§ 179, 186. So, also, that, during the risk the premises shall be used as an hotel is a promissory warranty that it shall be so used. An engagement that so many buckets of water shall be kept by the assured on any floor of a building is also a promissory warranty. 1 Wood, Ins. § 187.

Instances of promissory or executory warranties may be found in *Murdock* v. *Insurance Co.*, 2 N. Y. 210, and *Bobbitt* v. *Insurance Co.*, 66 N. C. 70.

In pleading performance of conditions precedent in a contract, it is not necessary, under the law of this state, to state the facts showing performance, but it may be stated generally that the party duly performed all the conditions on his part. Code Civil Proc. § 457.

In counting on a policy of insurance, we cannot see that there is any necessity of averring performance by the insured of anything warranted to be true when the policy is issued, for the reason that there is nothing to be performed. When the assured has warranted a thing to exist, or a representation to be true, at a time when a policy becomes consummated as a contract, he has done all that he can do. The warranty is agreed to by him, and there is an end of all he can do or perform. Under the section of the Code of Civil Procedure above referred to, he is only required to aver performance of the conditions on his part to be performed, and, where there is nothing in the representation or statement to be performed by the plaintiff, there is no necessity of setting forth such representation or statement. Clearly, when nothing is required to be performed by him, such an averment by him would be useless and without meaning; whereas in the case of a promissory warranty, the assured has warranted that he will do something during the existence of the risk, and therefore an averment of such stipulation and of its performance is required. As is said in 2 Wood, Ins. 1136: "It can readily be determined of what matters performance should be averred by ascertaining what, under the policy, the assured has stipulated to do, and what he must do in order to recover, and he must aver performance of all such conditions; as where he stipulates to erect a chimney, to keep a watchman, to put in a force-pump, to keep water in certain quantities and in certain places, or any other matter or thing which the insurer has contracted to do." In same connection this author, on same page, says: "But, as to all other matters which are in the nature of exceptions, or which are merely prohibitory, and provide that the assured shall not do certain things, the plaintiff need not make any special averments, as they are merely matters of defense, which, if relied upon by the insurer, must be pleaded and proved by him; and, if nothing is said in the declaration as to whether such conditions have been broken or not, the declaration will not be defective." These statements of Mr. Wood are sustained by cases cited by him, and are on principle correct.

In *Bobbitt* v. *Insurance Co.*, *supra*, the warranty was held by the court to be a stipulation or warranty by which the assured bound himself that the cash value of the tobacco insured during the period of the risk would continue to be about $30,000. This was substantially an agreement that the insured would keep on hand tobacco during the period of the risk of the value of about the sum above named. The assured had agreed to do something, and therefore it was necessary for him to set forth in his complaint what he had agreed to do, and that he had performed it. It may be remarked of the case cited that there was as to the tobacco insured an affirmative warranty as well as a promissory warranty. The language in the application, which was a part of the policy construed by the court, was this: "The present cash value of the tobacco on hand is $30,000, and it will be increased to $50,000; the average value on hand, say $30,000." The statement that the present cash value of the property on hand is $30,000 is an affirmative warranty, speaking of the time when the policy became operative. The remaining words are substantially a promise that a quantity of tobacco shall be kept on hand of the average value of $30,000. The court in its opinion speaks of it as a description of the property insured. It was not only such a description, but it was a promise that such a description should continue to be true during the period for which the insurance was made. It was in effect a promise such as is stated above. It was in reference to this promise that the court said that it was part of the contract, should be set out in the complaint, and proved by the plaintiff.

An application is generally nothing more than a representation made by a party when he applies for insurance of his property. These statements or representations relate to the descriptive character and value of the property of which insurance is sought, and how such property is used. When the application is made a part of the policy given out and a warranty, the warranties in it are of the kind styled "affirmative" or "*in præsenti.*" They constitute a contract that the representations made in the application are true. Of such engagements or contracts there is nothing to be done or performed by the insured, and therefore the statements need not be set forth in a complaint on the policy or any averment of the performance of them. A plaintiff is not called on to aver or prove the truth of such representations in his complaint. It was so held in the case of *Herron* v. *Insurance Co.*, 28 Ill. 238, upon a demurrer to a complaint, where the same objection was made to it as in the case before us, and the ruling of the court below sustaining the demurrer was reversed.

It is said that something material, or which may be material, to plaintiff's right to recover, has been left out of the complaint. In reply to this, we say it does not appear that anything material in the application, or which may be material to plaintiff's case, has been left out. The application is not before us, and we cannot say what is in it. Therefore we cannot say that anything material is omitted from the complaint. As to the contention that there may be something material in the application which is omitted from the complaint, in addition to what is said above, we will further say that a demurrer to a complaint should not be sustained because there may be possibly something in an application affecting plaintiff's right to recover which is not averred in the complaint. Certainly we should not reverse a ruling of the court below overruling a demurrer on a perhaps. Error should clearly appear to justify such a course.

In ruling against the defendant on the point above discussed, we desire to say, further, that we cannot see how it can receive any detriment from the lack of the suggested allegation. The policy states that the application is filed with the defendant, and in his answer defendant can set it out and aver non-performance of anything required by it to be performed.

The second objection to the complaint is that it does not appear that the proof of loss was furnished to the defendant 60 days before the commencement of this action. This question was presented to this court in *Doyle* v. *Insurance Co.*, 44 Cal. 264, and it was there held that a complaint with a similar allegation was fatally defective. The court said in the case cited: "By the terms of the policy it is provided as follows: 'The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after due notice and proof of the same made by the assured,' etc. It is objected that it does not appear from the allegations of the complaint that when the action was commenced this period of sixty days had elapsed. In answer to this point, the respondent relies upon the following averments in the complaint: 'That the plaintiff duly performed all the conditions on her part in the said policy of insurance to be performed; that she gave to defendant due notice and proof of the fire and loss aforesaid, and demanded payment of the said sum of $600; that no part of the same has been paid, and that the whole of said sum is now due, for which she demands judgment,' etc. The allegation that the sum 'is now due' may be laid out of the case, inasmuch as that is a conclusion of law merely. Nor does the averment that the plaintiff duly performed all the conditions on her part in the said policy of insurance to be performed, and that she had given due notice and proof of the loss, aid the complaint in this respect. Under the terms of the policy, the doing of these things would not give her an immediate right of action against the defendant for the payment of the sum demanded, for the defendant was not bound to pay until the lapse of sixty days thereafter. In a complaint filed on the very next day after the notice and proof had been given, it might have been alleged, with truth, that all these things had been done; and yet it will not be pretended that she would at that time have had a cause of action against the defendant, or that the latter was then in default because payment had not been made. The delay of the sixty days after notice, to which, under the terms of the policy, the defendant is entitled, is a substantial right secured by the stipulation of the contract, not merely to enable it to prepare to pay, but also to investigate the circumstances under which the loss occurred, with a view of determining whether or not the loss had been of such a character as involved an obligation upon its part to pay at all."

But it is said in reply to this by plaintiff that the following averments in the complaint render it sufficient, in the absence of allegations showing that the proofs of loss were furnished 60 days before the commencement of this action: "That afterwards, and before the commencement of this suit, plaintiff furnished the defendant with proof of her said loss and her interest in the said property, and offered in writing to arbitrate the value of the said property so lost by the said fire, and named in said writing the person selected by her to be one of said arbitrators, and otherwise performed all the conditions of said policy on her part to be performed. But the said defendant, with the intent and purpose to cheat and defraud this plaintiff out of her said insurance, refused to arbitrate the value of the property so lost by the said fire, or to name or to appoint any person arbitrator, or to pay to plaintiff said insurance money, or to communicate with plaintiff in reference thereto, but absolutely and unqualifiedly refused to pay to plaintiff said insurance money, or any part thereof, or to treat with plaintiff in regard thereto."

The provisions of the policy in regard to proof of loss are as follows: "The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid sixty days after the proofs of the same required by the company shall have been made by the assured, and received at the office in Chicago, and the loss shall have been ascertained and proved in accordance with the terms and provisions of this policy, unless the property be replaced, or the company shall have given notice of their intention to rebuild or repair the damaged premises. Persons sustaining loss or damage by fire shall forthwith give notice in writing of said loss to the company, and within thirty days thereafter render a particular and specific account of such loss, signed and sworn to by them, stating whether any and what other insurance has been made on the same property, giving copies of the written portions of all policies thereon; also the actual cash value of the property, and their interest therein; for what purpose and by whom the building insured, or containing the property insured, and the several parts thereof, were used at the time of the loss; when and how the fire originated; and shall produce a certificate under the hand and seal of a magistrate or notary public nearest to the place of the fire, not concerned in the loss as a creditor or otherwise, nor related to the assured, stating that he has examined the circumstances attending the loss, knows the character and circumstances of the assured, and verily believes that the assured has, without fraud, sustained loss on the property described to the amount which such magistrate or notary public shall certify."

This last paragraph quoted is from subdivision 9 of policy. There are other provisions in this subdivision which need not be quoted, bearing on the subject of the proofs of loss.

The respondent's counsel, referring to the language of the first paragraph just above quoted as to proofs of loss, asks: "Now, how is the loss to be ascertained and found in accordance with the terms and provisions of this policy?" He then proceeds to say that the mode prescribed by the policy for ascertainment is the arbitration clause of the policy, which is in these words. "The amount of said value and of damage to the property, whether real or personal, covered by this policy, or any part thereof, may be determined by mutual agreement between the company and the assured; or, failing to agree, the same shall then, at the written request of either party, be submitted to competent and impartial arbitrators, one to be selected by each party, the two so chosen, in case of disagreement, to select a third; and the award of any two of them in writing, under oath, shall be binding and conclusive as to the amount of such loss or damage, but shall not determine the validity of the contract, nor the liability of this company, nor any other question, except only the amount of such loss or damage."

We cannot discern that the proofs of loss or damage are dispensed with or waived by the provision. The stipulation in the policy that the amount of loss or damage may be determined by arbitration only takes effect when the parties have failed to agree, and there is no allegation in the complaint that they have failed to agree. If an arbitration is required by the policy to ascertain and determine the amount of loss or damage, still it is clear from the clause first quoted, in regard to proofs of loss, that the loss is not payable until 60 days after the proofs have been made and received at the office in Chicago.

If arbitration is resorted to for the ascertainment and proof of the amount of loss, and the award is not made until the period of 60 days above stated has elapsed, still the amount of loss is not payable until such award is made. The resort to arbitration may prolong the day of payment beyond 60 days, but cannot shorten that period. This is clear from the words used in the clause first above quoted, which provides that the loss shall not be paid until 60 days after the proofs shall have been received at the office in Chicago, and shall have been ascertained and found in accordance with the terms and provisions of the policy, *i. e.*, by arbitration, when resort is had to it, if the contention of the plaintiff is to be sustained. We think it clear that the resort to arbitration, as said above, may prolong the day of payment beyond the 60-day period, but cannot bring it within the 60 days.

We are of opinion that the objection to the complaint just above discussed is well taken, and that the demurrer to it should have been sustained.

We deem it unnecessary to pass on the other point made by the defendant, in regard to the verdict, as there is no probability of its arising on a new trial.

For the reasons above given the judgment is reversed, and the cause remanded for a new trial, with direction to the court below to sustain the demurrer to the complaint, with leave to the plaintiff to amend.

Ordered accordingly.

We concur: WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

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GOLDTREE *et al.* *v.* THOMPSON *et al.* (No. 11,749.)

(*Supreme Court of California.* January 29, 1889.)

WILLS—CONSTRUCTION—DECREE OF DISTRIBUTION—SUBSTITUTION.

A complaint by testamentary trustees for a construction of certain trusts in the will, alleging that plaintiffs, who were executors also, had administered on the estate, until by an order or decree of the probate court the funds in their hands as executors were distributed to them as trustees, without stating what disposition, if any, was directed to be made of the trust fund, does not state sufficient facts to enable the court to grant the relief sought, as the will would be superseded by the decree, which is final, a construction of which is all the trustees are entitled to, and an amendment setting out the decree in full should be made. THORNTON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

On rehearing. For former opinion see 15 Pac. Rep. 359.

Graves, Turner & Graves, for appellants. *J. M. Wilcoxon* and *W. H. Spencer,* for respondents. *Wm. Shipsey,* guardian *ad litem,* for minors.

FOOTE, C. This action was brought by the trustees, under the will of Jonathan Thompson, deceased, against his heirs at law and the legatees under the will, for the purpose of having the terms of that instrument construed, so that the trustees would be freed from doubt as to what their duties were with reference to the trusts confided to them. The court below made its decree determining the method in which the trustees should act in obedience to the trusts contained in the will from which this appeal is prosecuted.

We think the cause should be considered upon appeal. notwithstanding the effort made to dismiss it. The complaint, which seeks to have the trusts contained in the will construed by the court, shows by the averments that, after after the trustees had qualified as executors of the will, they entered upon the discharge of their duties as such, "and managed the property of the said deceased in the state of California, paid all the debts of said deceased, and, after due proceedings had in the said estate, all the property thereof was by an order of said probate court, duly made and given on March 13, 1877, distributed to said Patchett, Thompson, and Grierson, as trustees under the said will," etc. It does not appear from the complaint, however, what the terms of that decree were with reference to the disposition of the trust-estate, except that it was distributed to the trustees. What the purport of the order of the court was as to carrying out the trusts contained in the will is not stated. The order or decree of final distribution, having been "duly made and given," was binding upon the parties in interest here, subject only to be reversed, set aside, or modified on appeal. Section 1666, Code Civil Proc.; *Estate of Garraud*, 36 Cal. 279; *Estate of Hudson*, 63 Cal. 457; *In re Rowland*, 74 Cal. 525, 16 Pac. Rep. 315. No appeal in the matter appears to have been taken. This being so, it is manifest that the rights of the parties must be governed by the decree. In other words, the will is superseded by the decree. It is therefore immaterial to consider what is the proper construction of the will. The only thing upon which the trustees have a right to the opinion of the court is as to their duties under the decree; and the suit is in effect to obtain a construction of the decree. But the record does not show what the decree was, and therefore the court is practically asked to construe a document which is not before it. It cannot undertake to do that; and it results that the complaint does not state facts sufficient to constitute a cause of action. If the fact be that the will was made a part of the decree, that fact should be made to appear, and the whole of the decree should be given. We therefore advise that the judgment be reversed, and the cause remanded, with permission to file an amended complaint.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with permission to file an amended complaint.

THORNTON, J., (*dissenting.*) I desire in brief to explain my dissent. The trustees under the will of the testator in this case, (plaintiffs herein,) under a well-known head of equity jurisdiction, ask the advice of a court of equity as to the construction of trusts in the will. The property had been distributed by the proper court, under the will, to the plaintiffs as trustees; and it is held in the prevailing opinion that the will is superseded by the decree. How this supersedure is brought about I cannot conceive. The court distributing the property had nothing to do with the construction of the trusts under the will. The question was not before it at all. That court had only to determine in whom the law vested the property under the will. As to what was the meaning or signification of the language declaring the trusts under the will, that court had nothing to say or do. There was no merger in a decree or judgment. Such merger cannot go beyond the matter in issue. If the point or question is not a matter in issue,—that is, to be determined in the action by the court in which the suit is pending, and declared by its judgment,—the judgment of the court on such point or matter determines nothing which can bind or estop either court or party. And here it clearly appears that the court did determine nothing as to the extent or limits of the trusts. It only distributed the property, as it should have done, to the plaintiffs as trustees. The plaintiffs are held to be trustees by the decree and to be trustees by the will. They are appointed by that instrument. They could not be appointed by the decree. The plaintiffs speak of themselves in the complaint as trustees under the will; and they are so. Because they are recognized in the decree as trustees under the will, they do not cease to be trustees under the will. The will still is the foundation and rule of their duties. They must look to the will as the source of their duties and obligations, and for the extent of such duties and obligations. For these reasons I cannot concur in the judgment of the court dismissing the plaintiffs from the forum, who, as trustees, come into court and ask for that which they have a right to ask,—the judgment of the court as to the complicated duties which they have to perform.

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78 Cal. 217

BEST *et al.* v. JOHNSON *et al.* (No. 11,534.)

(*Supreme Court of California.* January 30, 1889.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ASSIGNEE'S BOND—LIABILITY OF SURETIES.

Under insolvent act Cal. 1880, § 15, providing that any creditor aggrieved may sue on the bond of the assignee of an insolvent debtor, the creditors and debtors alone have a right of action, and the sureties on such a bond, given for the faithful discharge of the assignee's duties, are not liable for the wrongful seizure by him without legal process of property not belonging to the estate of the insolvent.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; J. K. ALEXANDER, Judge.

Geil & Morehouse, for appellants. *Dorn & Parker*, for respondents.

BELCHER, C. C. This is an action against the principal and sureties on a bond, made to insure the faithful performance by the principal of the duties devolving upon him as assignee of the estate of an insolvent debtor. The complaint alleges the appointment of the defendant Johnson as assignee of the estate, the execution, approval, and filing of the bond, the plaintiffs' ownership of certain described personal property, and that Johnson, while acting as such assignee, wrongfully and unlawfully and against the will of plaintiffs took the property from them, and converted it to the use and benefit of the estate, and afterwards on demand, many times made, refused to deliver to them the possession thereof. The prayer is for a judgment for the value of the property, with damages and costs. A general demurrer was interposed to the complaint, and sustained as to the sureties Dorn and Hoffman, with leave to plaintiffs to amend. Plaintiffs declined to amend, and thereupon judgment was entered that they take nothing as against the sureties.

The statute requires the assignee of an insolvent's estate to give a bond, with sureties, conditioned for the faithful performance of the duties devolving upon him; and it provides that "the bond shall not be void upon the first recovery, but may be sued upon from time to time by any creditor aggrieved, in his own name, until the whole penalty is exhausted." Insolvent Act 1880, § 15. The duties of an assignee, as declared by the act, are to take into his possession all the estate of the insolvent debtor, except property exempt by law from execution; if need be, to sue in his own name, and recover all the estate, debts, and things in action belonging or due to such debtor; to sell the property, and convert the same into money as speedily as possible on the order of the court; and to keep correct accounts of all moneys received by him, and to pay them out on the order of the court. Sections 18, 21, 25, 29, 34.

It is argued for appellants that Johnson, as assignee, had a right to take into his possession only such property as belonged to the insolvent; that he had no right to take the plaintiffs' property; and that, when he did so, and converted it to the use of the estate, he violated the conditions of his bond, and he and his sureties became liable thereon. And in support of this theory counsel cite numerous cases, and, among others, *People* v. *Schuyler*, 4 N. Y. 173; *Van Pelt* v. *Littler*, 14 Cal. 194; *Lammon* v. *Feusier*, 111 U. S. 17, 4 Sup. Ct. Rep. 286. All the cases cited are to the effect that if a sheriff or constable, having in his hands for service a writ of attachment or execution, seizes thereunder the property of a stranger to the writ, he becomes a trespasser, and is guilty of such official misconduct as makes him and his sureties liable on his official bond. In *People* v. *Schuyler*, the court, after stating that the defendant was a sheriff, and that the writ was delivered to and received by him as a public officer, said: "His sureties undertook 'that he should faithfully execute' the process. If he had 'in all things' performed his duty, he would have seized the goods of Fay, or returned the writ, instead of which he levied upon the goods of Bachellor, as the property of the defendant in the attachment. Upon principle and upon grounds of public policy, it seems to me that the responsibility of his sureties should be different from those they would incur if the sheriff had entered upon the premises of the relator, and removed his goods without any process whatever In the last case supposed the sheriff would act in his own right, and might be resisted as any other wrong-doer. In the one before us he was put in motion by legal authority, invoked in behalf of others, and could command the power of the county to aid him in its execution." And in *Van Pelt* v. *Littler* the court said: "The weight of authority, and, as we think, a fair construction of the statute, and the condition of the bond, are in favor of the maintenance of the action. The legislature intended that the officer and his sureties should be responsible for every abuse of his official powers, and we think there could not well be a more flagrant abuse of such powers than the seizing and selling of the property of one person under and by virtue of an execution against another. He does not act, in such a case, in a private and individual capacity, but as an officer clothed with official authority, and protected by the judgment of a court and the process which he pretends to execute. No resistance can lawfully be made by any person whose property is thus taken. The property itself may be detained, whether legally taken or not, and a summary mode is provided for the protection of the officer, to determine disputes in regard to the title. To hold that such an act is not official, at least so far as to charge the sureties, it appears to us, would be in contravention of the spirit and intention of the statute."

There is a broad and obvious distinction between the cases cited and the case in hand. In those cases the officer, when he took the property, claimed to be executing process issued from a competent court, and was apparently acting under lawful authority No one could rightfully have interfered with or resisted his seizure of the property; and, if needed, he could have called to his assistance the *posse comitatus*. Not so with the assignee. He had no writ or process to serve. He was not put in motion by legal authority, but was acting at his own instance, and upon his own authority. He could not have invoked the aid of a *posse* to assist him, but might have been resisted like any other wrong-doer. The duties of the assignee of an insolvent's estate are wholly private. He is to take charge of and manage the estate for the benefit of the creditors, and they are the only persons named in the act who can sue on the bond. Section 15. The creditors and debtor are alone interested in the amount and sufficiency of the bond. *Luhrs* v. *Kelly*, 67 Cal. 291, 7 Pac. Rep. 696. It follows that the liability of the sureties on the assignee's bond is different from the liability of the sureties on a sheriff's bond. But if it be assumed that this is not so, and that the same rule is to be applied in each case, there would nevertheless be no liability upon the sureties here; for it is clear that the liability of the assignee's sureties can be no greater than the liability of a sheriff's sureties. And the rule is that a sheriff's sureties are not liable for the wrongful seizure or detention of property or money when not made by him under process. *State* v. *Mann*, 21 Wis. 684; *Turner* v. *Collier*, 4 Heisk. 89; *Governor* v. *Perrine*, 23 Ala. 807; *Schloss* v. *White*, 16 Cal. 66 and see *Com.* v. *Cole*, 46 Amer. Dec. 506, and notes. It results, therefore, that the demurrer was properly sustained, and that the judgment should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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77 Cal. 646

LATHAM *v.* BLAKE *et al.*[1] (No. 9,912.)

(*Supreme Court of California.* December 29, 1888.)

EXECUTION—PROPERTY SUBJECT TO—JUDGMENTS.

Under Code Civil Proc. Cal. § 542, subd. 5, providing that debts and property incapable of manual delivery may be attached by leaving with the person owing the debt a copy of the writ, and a notice that the property is attached, and section 688, providing that such property may be taken on execution the same as upon writs of attachment, a judgment, being the mere evidence of debt, and not the debt itself, cannot be levied on as such, and sold under execution. PATERSON, J., dissenting.

W. H. Fifield and *Garber & Bishop*, for appellant. *Lewis & Dibble* and *Haynes & Mitchell*, for respondent.

PER CURIAM. Upon rehearing, the order appealed from in this case is affirmed, for the reasons given in the opinion filed in department 1, May 14, 1888, (18 Pac. Rep. 150,) which opinion will stand as the opinion of the court in bank.

PATERSON, J. I dissent. The facts of this case are fully stated in the opinion of the department. 18 Pac. Rep. 150. It was there held, upon the

[1] Affirming, on rehearing, 18 Pac. Rep. 150.

authority of *Dore* v. *Dougherty*, 72 Cal. 232, 13 Pac. Rep. 621, that the sale of the judgment against Blake to Osborne, under the execution against Latham, did not "operate as an assignment so as to vest in Osborne such right or title to the judgment as to entitle him to enforce it," and, such being the fact, the order of the court below should be affirmed. In the consideration of the case other questions raised by the appellant were overlooked, it being assumed that the invalidity of the sale to Osborne was a sufficient fact upon which to affirm the order of the court below. It is now urged by appellant upon rehearing that, conceding the point made in department against the validity of the sale to Osborne,—and I have no doubt of the correctness of the decision upon that question,—the order of sale under which appellant claims was an appealable order, and, not having been appealed from, became a final and conclusive adjudication as to appellant's right to the Latham-Blake decree. I am of opinion that this contention is sound. The order of sale was a "special order, made after final judgment," and was therefore an appealable order, and no exception to it was necessary. Sections 647, 963, subd. 2, Code Civil Proc. The order is not void on its face. The evidence upon which the court made the order is not in the record of the case in which it was issued. I think the court had the right to determine in that action who was the owner of the decree, and give him the benefit of the execution thereof, without Osborne becoming a party plaintiff. Section 385, Code Civil Proc.; *Mastick* v. *Thorp*, 29 Cal. 448. If the court had no such authority, then the order made herein, and issued to respondent, is void, and ought to be reversed. Upon the face of the order it is adjudicated that "Osborne has succeeded to the ownership of the judgment." There may have been evidence of Osborne's ownership other and better than the return on the execution sale and the sheriff's certificate. It does not appear that no other evidence of his ownership was given.

Of course, there could be no adjudication as to the ownership of the judgment against Latham, unless Latham had notice of the proceeding taken by Osborne, resulting in the order issued to him. On behalf of appellant it is claimed that, as the record is silent upon the question of notice, it will be presumed (if it be necessary to show that notice was given,—which he denies,—this being a collateral attack) that notice was given; but counsel for respondent claim that no presumption attends this order, because it is an order taken after final judgment, and Osborne was a stranger to the record. Whatever may be the rule applicable to direct attacks on judgments and orders, the general rule as to presumption of jurisdiction, applicable to proceedings in courts of general jurisdiction, involving collateral attacks, is so well known that it is unnecessary to repeat it here. See cases cited in *Ex parte Sternes*, 19 Pac. Rep. 277; Freem. Judgm. §§ 116, 124; *Brodribb* v. *Tibbits*, 63 Cal. 80; *Luco* v. *Bank*, 70 Cal. 339, 11 Pac. Rep. 650.

There is no direct attack here upon the order of sale. The notice of motion is "for an order directing the issuance of an order of sale in favor of Thomas B. Rowe, the assignee decreed therein, and to set aside the sale and sheriff's return therein, made upon application of G. W. Osborne." The grounds of the motion were that no one interested in the decree directed the issuance of the order of sale; that it was issued and executed against the objection of the judgment creditor, and that Osborne had no interest in the decree. The order herein appealed from does not disturb the former order of sale, but directs that an order of sale issue in favor of Rowe. The court and counsel for respondent seems to have treated the order as void on its face. If void on its face, perhaps the court might order a new sale, without any direct proceeding to set aside the void order; but I think the presumption of jurisdiction, which is applicable generally to the orders of superior courts, should be applied to the order before us herein. I see no distinction between orders made before judgment and those made after judgment, when the order does not show on its face whether the parties were in court. *Hughes* v. *Cummings*, 7 Colo. 138, 2 Pac. Rep. 289. It is true, after judgment actual notice must be given by a stranger to the record, but on a collateral attack the presumption is that actual notice was given; the presumption applies to all orders of a court of general jurisdiction. Not to presume notice here must result in a presumption that the superior court acted without jurisdiction, although there is nothing to show whether it had or had not jurisdiction, and this on a collateral attack.

Another answer to the contention of respondent on this question is his statement in the notice of motion herein that the order of sale issued to Osborne was issued and executed against the objection of the judgment creditor. This seems to be an admission that Latham was present, objecting, when the order of sale was issued to Osborne. It further appears that Latham was present at the sheriff's sale, "and claimed to be still the owner of such judgment;" that he knew of the sheriff's deed to Osborne, and Osborne's improvements under the said order of sale. These facts are not disputed. Aside from the statement in the notice of motion, above referred to, and the presumption of notice, which I think should be indulged, the record being silent, all the facts in the case point to actual notice by Latham of the order of sale, issued to Osborne,—if not notice of the application for the order, at least notice of the order itself a short time after the order was made; and, whether the remedy by appeal from such orders be exclusive or concurrent with the right to move to set the order aside, I think that the circumstances of this case are such that it would be an abuse of discretion to grant the motion. The respondent's delay to move for over two years after the sheriff's deed had been with his knowledge delivered to Osborne, and the latter's money placed to his credit in satisfaction of the judgment against him in *Page* v. *Latham*, coupled with his knowledge of Osborne's possession and improvement of the property, ought, in equity and in conscience, to operate as a waiver of the right to move.

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78 Cal. 193

GIANT-POWDER CO. *v.* SAN DIEGO FLUME CO. *et al.* (No. 12,721.)

(*Supreme Court of California.* January 29, 1889.)

1. MECHANICS' LIENS—ABANDONMENT OF CONTRACT—CLAIM OF MATERIAL-MAN.
Code Civil Proc. Cal. § 1187, as amended by Laws 1887, provides that the claim of a material-man shall be filed within 30 days after the completion of the building, etc., but that any trivial imperfection in the construction of any building shall not be deemed such a lack of completion as to prevent the filing of any lien; and in case of contracts the occupation or use of the building, etc., by the owner, shall be deemed conclusive evidence of completion. *Held*, that a contract made by J. to do certain work for defendant, which was not recorded before the commencement of the work, and was therefore void as between the parties by the terms of Code Civil Proc. § 1183, as amended by the Laws of 1887, declaring that no recovery shall be had on such a contract by either party thereto, was not void as between the defendant or J. and a material-man; and that a complaint by a material-man, averring that J. had suspended work on or about a certain date before the filing of plaintiff's lien, and surrendered the contract to the defendant, who had accepted such surrender and the work, and gone into occupation and use of the structure for which a lien was claimed, sufficiently showed a completion of the work at the date of the filing of the lien.

2. SAME—PERSONAL LIABILITY—MISJOINDER OF CAUSES.
Under the California practice, in an action to foreclose a material-man's lien against the owner of the structure in which the material was used, there is no misjoinder of causes because a personal liability is also sought to be enforced against the contractor to whom the material was furnished.

3. SAME—MISJOINDER OF DEFENDANTS.
Neither, in such case, is there a misjoinder of parties defendant.

McFARLAND, J., dissenting.

In bank. Appeal from superior court, San Diego county; EDWIN PARKER, Judge.

J. F. Cowdery, for appellant. *Welborn & Works*, for respondents.

THORNTON, J. This is an action to enforce the lien of a material-man. The complaint was demurred to by the San Diego Flume Company on various grounds. The demurrer was sustained, and, plaintiff declining to amend, judgment was entered against it. From this judgment the plaintiff appeals.

It is argued here on behalf of the demurrant that, as alleged in the complaint, the claim of lien was prematurely filed, and therefore that the complaint does not state facts sufficient to constitute a cause of action against the San Diego Flume Company. It is alleged in the complaint that one Joseph Johndrew contracted with that defendant company to do certain work; the plaintiff furnished materials to defendant to be used in the work; that Johndrew commenced work under the contract on the 9th day of April, 1887, and continued doing such work until the 10th day of August following; that on or about said last-named day Johndrew stopped all work, and surrendered the contract and his right thereunder to the flume company, and the flume company accepted the surrender of this contract, and accepted the structure and works for which a lien is here claimed, and took possession thereof, and has ever since continued in the occupation and use of the structure and works so accepted. The contract above mentioned was not recorded until June 6, 1887. The claim of lien is averred to have been filed for record on the 5th day of September, 1887. The statute (see St. 1887, pp. 154, 155; section 1187, Code Civil Proc., as there amended) requires that the claim of a material-man shall be filed for record within 30 days after the completion of the building, improvement, or structure, but provides further on this point that "any trivial imperfection in the said work, or in the construction of any building, improvement, or structure, or of the alteration, addition to, or repair thereof, shall not be deemed such a lack of completion as to prevent the filing of any lien; and in case of contracts the occupation or use of the building, improvement, or structure by the owner or his representative, or the acceptance by said owner or his agent of said building, improvement, or structure, shall be deemed conclusive evidence of completion."

We are of opinion that the allegations of the complaint bring the case within the words of the statute above quoted. It is distinctly averred that the structure made by Johndrew was accepted by the flume company. How near the structure approached completion on the 10th day of August, 1887, is not averred. It may have been so nearly completed that it might have been occupied and used by the flume company; or, if not near completion, it may have been in a condition that the maker might have accepted and conveniently used and occupied it. The above is consistent with the allegations of the complaint. Whatever might have been the actual condition of the structure on the 10th of August, 1887, we think the averments that the defendant company accepted the structure, and from the time of its acceptance continued in the use and occupation of it, bring the case within the rule prescribed by the section of the statute above quoted, unless the fact that the contract between Johndrew and the flume company was not recorded when the work was commenced by Johndrew under it excludes it therefrom. And the counsel for respondent (the flume company) contends that such is the effect of a failure to record the contract above mentioned before the work under it was commenced.

It will be observed that the statute in stating the rule relied on by the plaintiff (section 1187, *supra*) uses the words "and in case of contracts," and it is here urged by the learned counsel for the flume company that "it is true there was an effort to make a contract, but this effort was ineffectual, because of the failure of the parties to have the instrument which purported to be a contract filed for record before the work was commenced. This failure made the contract wholly void." The section of the statute which declares such contract wholly void declares how far it is void. Section 1183, Code Civil Proc., amended in 1887, St. 1887, p. 153. In our judgment "wholly void" has the same meaning as "void." When an instrument is void it is void from one end to the other, and in all its parts; in other words, it is wholly void. The language used is, "they shall be wholly void, and no recovery shall be had thereon by either party thereto." The statute only declares the contract void as between the parties to it. The inability to maintain an action on the contract is confined to the parties. In this case the parties to the contract are Johndrew and the flume company,—the one, in the purview of the act of which the section referred to formed a part, the contractor; the other, the owner. As between the contractor or owner and the material-man the contract is not void. If the contractor has purchased materials, the contract between the contractor and the material-man is still good. And by the express terms of section 1183, *supra*, (St. 1887, pp. 152, 153,) though the contract between the owner and contractor is void, the material-man is still entitled to his lien for the value of the materials furnished. Such we understand to be the ruling of this court in *Lumber Co.* v. *Schmitt*, 74 Cal. 625, 16 Pac. Rep. 516, (see last paragraph in opinion.) The contract, though not recorded, yet remains to mark the extent of the recovery of the lienholders, and to show the relations of the owner and contractor to the work, and also remains unaffected for the purposes of the rule prescribed in section 1187 as to what shall be deemed evidence of the completion of the work referred to in it.

The recording of the contract, as far as regards the person furnishing labor or materials to the work, is immaterial. No doubt the requisition was made for the benefit of such person, but it is a benefit that he may waive. The failure to record may affect the rights of the owner and contractor, but it does not affect those of the furnisher of labor or materials. Nor do we see any reason why it should be otherwise. Such person has no control over the contract; it is not in his possession, nor is he entitled to its possession. It may be out of his power to have it recorded before the work commenced under it. The work may have commenced long before such person has been brought into any relation with the work,—days or months before he has been applied to for labor or materials. The statute imposes the duty of recording the contract on the parties to it. If any are to suffer from failure to record, the parties to the contract should and do suffer. It is just to make the parties who neglected their duty suffer, but it would be unjust to make others suffer on whom no such duty was ever imposed, who have neglected no duty, and are entirely innocent. The law-makers have not been guilty of the injustice of causing detriment to innocent persons. We think that the notice or claim of lien is alleged to have been filed within a proper time, and that the complaint is in that respect good and sufficient.

The complaint was demurred to on the further grounds that Johndrew was improperly joined as a defendant, and that two causes of action are improperly united in this,—a personal liability against Johndrew, and a cause of action for the foreclosure of a material-man's lien against the flume company. It has been the constant and uniform practice ever since we had a lien law in this state for the benefit of material-men and others, in actions for the foreclosure of such liens, to make the owner and contractor parties defendant, and to unite a personal action against the contractor for the money, with the action to establish the lien, and for its foreclosure against the owner. The practice is much to be commended, in that it prevents a multiplicity of suits, and thus saves labor and expense. If each material-man or person performing labor on a building had to bring separate actions against the contractor for the recovery of his money, it is manifest the expense of the litigation would be greatly increased. This constant and uniform procedure, continued for so long a time, is strongly persuasive that the practice is correct. *Cursus curiæ est lex curiæ.*

In *Quale* v. *Moon*, 48 Cal. 479, the action was by a subcontractor to enforce a lien under the lien statute then existing. The plaintiff made Moon, the owner, and Clark, the contractor, parties defendant. There were several other defendants, who, it was alleged, had furnished materials, etc., who appeared separately, and set up the facts out of which their respective liens grew, and asked to have them enforced. Among them was one Higgins, who, in his answer, set up a claim for materials furnished for the building, and for work on the same as a mechanic under a contract with Clark, (contractor,) and also a separate claim for materials furnished for the building, and work on same at the request of Moon, (owner.) Moon demurred to Higgins' answer because it united two causes of action,—one for work and material as a subcontractor at the request of Clark, and one for work and material at the request of Moon. This court held that there was no misjoinder of causes of action in the pleading, styling it "the amended cross-complaint of defendant Higgins." There seems to have been no objection to the pleading in the case cited, because it united a cause of action against the contractor with the action for the foreclosure of the lien against the owner. The case was a stronger one. The causes of action were for work and materials furnished at request of each. Still, the court held the joinder proper. Following the rule prescribed in *Quale* v. *Moon*, we conclude that there is no misjoinder of causes of action in the case before us. The cause of action for the enforcement of the lien herein grows out of the contract between the flume company (owner) and Joseph Johndrew (contractor) and the work done by the latter under the contract, in virtue of a sale of material by the plaintiff to the contractor. As regards the plaintiff, all the foregoing are parts of a transaction which give it its right of action. They may be all set forth, then, in the same complaint, under numerous decisions of this court. The cases bearing on this point will be found cited in *Pfister* v. *Dascey*, 65 Cal. 405, 4 Pac. Rep. 395.

We feel clear that there is no misjoinder of causes of action here. This conclusion is sustained by section 1194, Code Civil Proc. This section, after classifying the various liens allowed by the statute, and establishing the order of priority between them, and requiring that the proceeds of the sale of the property shall be applied to each lien or class of liens in the order of its rank, provides that "whenever, in the sale of the property subject to the lien, there is a deficiency of proceeds, judgment may be docketed for the deficiency in like manner and with like effect as in actions for the foreclosure of mortgages." This deficiency judgment must be docketed in actions for the foreclosure of mortgages "against the defendant or defendants personally liable for the debt." Section 726, Code Civil Proc. The person personally liable for the debt in the case of material-men would usually be the contractor, though sometimes the owner might be, as the purchaser himself of the materials. When the contractor is personally liable for the debt, section 1194, Code Civil Proc., just referred to, authorizes his being made a defendant along with the owner, and a determination in such action of the amount for which he is liable to each lienholder, and, in case of deficiency above pointed out, a docketing of the judgment against him for such deficiency as he may be personally liable for. As this could not be done without his being made a defendant, the law must authorize his being made a defendant. We have no doubt, from the provisions of sections 1193, 1194, and 1195, that it was the intent of the law-makers that in an action to enforce a lien under this statute, all the persons claiming liens under the statute, including the contractor and owner, should be made parties, so that there might be a complete determination of all matters in controversy between the material-men and other lienholders, the owner, and the contractor; and in this point of view the contractor is a necessary party, and, if he was not made a party, the court should order him to be made a defendant, that there might be a full and complete determination of the matters in controversy.

The above disposes of the objections urged to the complaint herein by the flume company. It follows from the foregoing that there was error in sustaining the demurrer of the defendant company to the complaint herein, and the judgment is therefore reversed, and the cause remanded, with a direction to the court below to overrule the demurrer, and permit the above-named defendant to answer.

Ordered accordingly.

We concur: BEATTY, C. J.; PATERSON, J.: SHARPSTEIN, J.

Mr. Justice WORKS did not participate in the decision of this cause.

MCFARLAND, J. I dissent. The complaint is based upon the contract between the owners of the property and the original contractor, Johndrew. But as that contract was not recorded, it was, under section 1183, Code Civil Proc., as amended in 1887, "wholly void." In such a case labor and materials shall be deemed to have been done and furnished "at the personal instance of the owner," and a lien can be had "for the value thereof." St. 1887, p. 153. But the complaint was not drawn upon that theory; and therefore I think that the demurrer to it was properly sustained, and that the judgment should be affirmed. Moreover, in my opinion, a material-man cannot have a lien for exploded powder after, like the "unsubstantial pageant" in the Tempest, it has "melted into air, into thin air." It is true that this point is not much argued in the briefs, but it seems to be necessarily involved in the demurrer.

78 Cal. 232

McCormick *v.* Sutton. (No. 12,632.)

(*Supreme Court of California.* February 11, 1889.)

Judgment—Res Adjudicata—Subject-Matter.

Defendant located a mining claim on land claimed by plaintiff, and R. afterwards made a location on the same land. Pending an action for the land by defendant against R., in which defendant obtained judgment, plaintiff made a conveyance to R. by deed, which was lost, which plaintiff alleged gave only a right to mine the land in controversy; but plaintiff's son testified that he was acting as her agent, and had all her papers, and knew of the pendency of the suit, and that R. reconveyed to plaintiff the same land that she had conveyed to him. The reconveyance was of the ground theretofore located by R., "the deed of which was made by" plaintiff to R. Plaintiff did not testify. In ejectment, *held*, that a finding that plaintiff conveyed all her interest in the land to R. was justified, and that the former judgment was a bar.

In bank. Appeal from superior court, Tuolumne county; C. V. Gottschalk, Judge.

Ejectment by M. McCormick against F. Sutton. Defendant pleaded a judgment in favor of himself and one A. Gerlach, in an action brought by them against E. J. Richards and James Pereira for the restitution and recovery of the lands in question in this action. The patent to Hughes and the conveyance to Daniel McCormick were made in 1874, and the decree of distribution to plaintiff was made in 1879. Plaintiff appeals. For opinion on defendant's appeal, see *post*, 543.

F. D. & G. W. Nicol and *E. A. Rodgers*, for appellant. *F. W. Street*, for respondent.

PATERSON, J. The court below decided that the right of possession of the land in controversy was determined against plaintiff, and in favor of defendant, by a judgment entered November 19, 1884. Said judgment was entered in an action commenced in the superior court of Tuolumne county, February 2, 1884, in which Sutton and Gerlach were plaintiffs, and Richards and Pereira were defendants. If this decision is based upon facts supported by the evidence, it is unnecessary to consider any other question discussed in the briefs.

Without stopping to discuss the question whether the patent of the United States to Hughes, president of the board of trustees of the city of Sonora, the deed of said board to Daniel McCormick, and the decree of the probate court distributing the land in controversy to Mrs. McCormick, were sufficient to vest in her the legal title to the same, we shall assume that the legal title did pass to her by those conveyances and the decree. On January 1, 1883, defendant Sutton and one Gerlach located a mining claim which included the land in controversy. Richards and Pereira made a location on 800 feet of the vein included in the Sutton and Gerlach claim, January 1, 1884. On February 2, 1884, Sutton and Gerlach commenced the action referred to above against Richards and Pereira, to recover possession of the lands included in the location of the latter, and which resulted in the judgment of November 19, 1884. While that action was pending, to-wit, August 20, 1884, Margaret McCormick, plaintiff herein, conveyed all her right, title, and interest in and to the land to Richards and Pereira. The trial in said action was had on August 28, 1884. The judgment therein remains in full force and effect. Gerlach conveyed his interest to Sutton on January 10, 1885. Richards and Pereira reconveyed to plaintiff January 1, 1886. This action was commenced March 21, 1887.

Appellant contends that plaintiff never conveyed to Richards and Pereira any part of the lands in controversy,—any part of the surface thereof,—but simply the right to mine beneath the surface; that she had no notice of the pendency of the suit of *Sutton et al.* vs. *Richards et al.;* that plaintiff is not the successor in interest of Richards and Pereira as to the right of possession; and having had no notice, actual or constructive, of the pendency of said action, she is not concluded by the judgment therein to any extent, because the deed from Richards and Pereira, reconveying to her, conveyed only what she had granted to them, viz., the right to mine beneath the surface. The court found against appellant on all of these contentions, and we cannot say that the findings are against the evidence. The deed from plaintiff to Richards and Pereira was lost, and could not be produced at the trial, although it had been returned to plaintiff. James McCormick, a son of plaintiff, stated that he was acting as his mother's agent; that Richards and Pereira deeded back the land his mother had conveyed to them; that he had all of his mother's papers in his possession, and had been attending to her general business since his father's death; that he knew of the pendency of the suit above referred to, and was present at the trial, but did not know whether he had ever spoken to his mother about it. It is true some of the statements were afterwards qualified. The deed reconveying to plaintiff described the property as "all that portion of the San Guiseppe mine, * * * and being the same ground which was heretofore located by the said parties of the first part on the 1st day of January, 1885, the deed of which was made by the said second party [M. McCormick] to said parties of the first part [Richards and Pereira] in 1885." The deed from plaintiff to Richards and Pereira was lost. Its contents could be made known only by the testimony of witnesses. In one part of his testimony—

afterwards qualified—James McCormick says the same land conveyed by his mother was reconveyed. The deed of reconveyance does not describe the property as the right to mine beneath the surface, but refers to it as "the ground heretofore located," etc., and "the deed of which was made by * * * M. McCormick to * * * Richards and Pereira, in 1885."

From the evidence above detailed, and other circumstances in the case, to which we need not refer, the court below was justified in believing that James McCormick had acted as the agent of plaintiff, and that he was cognizant of the suit of *Sutton et al.* v. *Richards et al.;* that not only had she conveyed all her right, title, and interest in and to the land in controversy to Richards and Pereira during the pendency of the suit referred to, but that she had done so to aid the defendants therein; and that when they (Richards and Pereira) failed in their defense in that action, and the land was awarded to plaintiff therein, they (Richards and Pereira) attempted to reconvey to her just what they had received from her. In these conclusions the learned judge who presided at the trial is supported by the significant fact that the plaintiff in whose mind rested the best evidence of the material facts—at least as to notice—remained silent throughout the trial.

Judgment and order denying a new trial affirmed.

We concur: McFARLAND, J.; WORKS, J.; THORNTON, J.; SHARPSTEIN, J.

78 Cal. 245

McCORMICK *v.* SUTTON. (No. 12,648.)

(*Supreme Court of California.* February 19, 1889.)

APPEAL—REVIEW—HARMLESS ERROR.

In ejectment, the court found that a patent, under which plaintiff claimed, conveyed an absolute title, but also found that the matters in issue were formerly finally adjudicated in defendant's favor, and rendered judgment for defendant. *Held*, that the finding as to the effect of the patent did not injure defendant.

In bank. Appeal from superior court, Tuolumne county: C. V. GOTTSCHALK, Judge.

Ejectment by M. McCormick against F. Sutton. Defendant appeals.

F. W. Street, for appellant. *F. D. & G. W. Nicol* and *E. A. Rodgers*, for respondent.

PATERSON, J. Ejectment. Judgment was entered in the court below in favor of defendant on September 26, 1887. Plaintiff's motion for a new trial was denied on December 24, 1887, and thereafter, to-wit, on January 3, 1888, he appealed to this court from the judgment and order. *McCormick* v. *Sutton, ante*, 541, (filed February 11, 1889.) On March 26, 1888, the defendant, fancying that he was aggrieved by one of the court's conclusions of law, viz.: "That the patent of the United States to M. E. Hughes, in trust for the inhabitants of the city of Sonora, conveyed the absolute title in fee to the whole of said lot, including all the minerals thereon," appealed to this court "from that portion of the judgment entered in said superior court on the 26th day of September, 1887, in favor of plaintiff in said action, wherein said superior court adjudged that the patent of the United States, issued to M. E. Hughes, in trust for the inhabitants of the city of Sonora, conveyed the absolute title in fee to the whole of the lot in the complaint described, including all the mineral therein." In the judgment it is simply "ordered and adjudged that the plaintiff is not entitled to recover the possession of the lands in the complaint described, and that judgment be and the same is hereby entered in favor of the defendant, F. Sutton, and against the plaintiff M. McCormick, for his costs in this action, taxed and allowed at $69.45." Conceding that the conclusion of the court as to the effect of the patent was erroneous, the defendant was in no way injured by it. It is no part of the judgment, and there are other conclusions of law given, and facts in support thereof, which sustain the judgment in his favor. The court found that the matters here in issue were finally adjudicated in favor of defendant and against plaintiff in a former action, and "that defendant is entitled to a judgment in his favor, and against plaintiff for his costs incurred in this action." Judgment affirmed.

We concur: SHARPSTEIN, J.; WORKS, J.; THORNTON, J.; MCFARLAND, J.

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77 Cal. 423

REDMOND *v.* WEISSMAN. (No. 9,788.)

(*Supreme Court of California.* December 6, 1888.)

TRIAL—VERDICT—SUFFICIENCY.

In an action for a certain amount for labor and materials, counsel agreed that the only issue was whether plaintiff contracted with defendant, and the court charged, without objection, that the only question for the jury was whether plaintiff and defendant entered into a contract, and that in that case, the verdict should be for plaintiff for the amount claimed. *Held*, that the amount claimed was not in issue, and a verdict "for the plaintiff," without stating any amount, was sufficient to warrant judgment for the amount claimed, though Code Civil Proc. Cal. § 626, directs that the jury shall "find the amount of the recovery."

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by Michael F. Redmond against Henry Weissman. Verdict and judgment for plaintiff, defendant's motion for new trial denied, and he appeals.

A. N. Drown, for appellant. *Edward P. Cole*, for respondent.

THORNTON, J. This action was brought to recover $948.60 for work and labor and materials furnished to defendant in the construction of the foundation of the Garfield monument in Golden Gate park. The first point regards the verdict of the jury herein, which is in these words: "We, the jury in the above-entitled action, find for the plaintiff." It is urged that the amount of the recovery of plaintiff is not found by the verdict; that issue was joined on the amount due; and in failing to find it the verdict does not respond to all the issues in the case, is therefore insufficient, and judgment should not be entered on it.

On examining the complaint and answer, we are not prepared to say in view of the decisions of this court in *Wells* v. *McPike*, 21 Cal. 219, and *Lightner* v. *Menzel*, 35 Cal. 460, that the position above stated in regard to the pleadings is correct.

But be that as it may, it appears that at the commencement of the trial a discussion took place between the counsel of the respective parties as to the issues to be tried in the cause, and that they concurred in the opinion that the only issue to be tried was whether plaintiff contracted with defendant or some one else. No reference was made in this discussion to any issue as to the amount claimed or due. The only issue spoken of as awaiting trial, referred to in the discussion, was the one above stated. To this issue the testimony was directed, and, when the court came to instruct the jury, its directions were in accordance with this view of the issue they were to pass on. We quote here that portion of the charge of the court which relates to this subject. It is as follows: "The only question for you to pass upon is this: Did the plaintiff and the defendant in this case make an agreement for the building of the second foundation? That is the question for you to pass upon, —whether the plaintiff and the defendant made that agreement, as testified to by the plaintiff, and that the plaintiff entered upon this contract under the agreement between the plaintiff and defendant. The only question of fact for you to pass upon is, did the plaintiff and defendant enter into a certain contract for the completion of the second foundation? If you find from the evidence that the defendant agreed with the plaintiff, for the plaintiff to build the second foundation, and that the plaintiff did build the same, then your verdict must be for the plaintiff for the amount claimed in the complaint; for the defendant does not deny that the work done was of the value claimed. If, on the other hand, you believe the evidence of the defendant, that he did not make any contract with the plaintiff, then your verdict must be for the defendant. Now, gentlemen, you cannot consider the difference between the price of the first foundation and the second; you must not consider that at all. If the plaintiff is entitled to anything, he is entitled to the whole amount claimed. There is no question about the value of the work at all."

There was no exception by counsel for defendant reserved to the charge, but it was accepted by him as correctly presenting the law of the case to the jury. Under the state of the case here presented, the counsel for defendant having agreed that the only issue to be tried was that which was tried, that the court charged the jury that the only issue to be determined by them was that which they did determine, and that the counsel for defendant did not in any manner object to or except to the charge, we are of opinion that the cause should be regarded as one where the amount of money claimed was not in issue, that the only matter counsel intended to contest was the responsibility of his client, the defendant, and that, being found against him, the verdict should be for the amount claimed. There being no controversy as to the amount claimed by plaintiff, the verdict did embrace all there was in dispute in the cause, did cover all the issues, and was sufficient.

Considering the peculiar features of this case, we see no good reason for sending it back for a new trial, because the jury under the charge of the court did not follow the direction of the statute, (Code Civil Proc. § 626,) and by their verdict "find the amount of the recovery." We have considered the other points made on behalf of appellant, and find nothing which would authorize a reversal.

Judgment and order affirmed.

We concur: SEARLS, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

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78 Cal. 247

DAVIS *v.* BUTTON. (No. 12,564.)

(*Supreme Court of California.* February 19, 1889.)

1. MASTER AND SERVANT—INJURY TO SERVANT.
   In an action against a railroad company for the death of plaintiff's intestate, the answer admitting that defendant owns the road, an instruction that a *prima facie* case is made against defendant by showing ownership, without showing affirmatively that the persons in charge were defendant's servants, is not prejudicial error.
2. SAME—CONTRIBUTORY NEGLIGENCE.
   An instruction that plaintiff could recover, "if any injury sustained by deceased was not the result of contributory negligence," is not reversible error, as authorizing a recovery, unless the contributory negligence wholly caused the death, where the jury were also instructed that no damages could be recovered in case of contributory negligence, even though defendant's negligence might also be a cause of the death.
3. CARRIERS—OF PASSENGERS—RELATION.
   An instruction that, if defendant was engaged in the business of transporting passengers for hire on a railroad operated by him, the law denominates him a "common carrier," is correct.

On rehearing. For statement of facts and former opinion, see 18 Pac. Rep. 133.

H. C. Rolfe, (*Chas. R. Reddick*, of counsel,) for appellant. *Frank F. Oster*, *Harris & Gregg*, and *Byron Waters*, for respondent.

McFARLAND, J. The opinion of this court on the first decision of the case touched all the points made by appellant except one; and, upon re-examination, we are satisfied with that opinion upon all matters therein discussed. But, with respect to the point that the court below erred in giving certain instructions to the jury, it is said in that opinion as follows: "We cannot consider the argument in support of this point. It does not appear that exceptions were taken to any portions of the instructions of the court." The petition for rehearing, however, called our attention to the fact that there was a proper exception taken to the giving of instructions numbered 1, 2, and 4, asked by plaintiff. For that reason a rehearing was granted, and it only remains for us to inquire whether the judgment should be reversed on account of those instructions.

1. There are one or two things in the first instruction excepted to which, as abstract statements of legal principles, may, perhaps, be questionable; but it is evident that the instruction could have affected the jury to the prejudice of defendant, or at all, only in this: That therein the jury were told that where a plaintiff sues for injury caused by the negligent management of a railroad, or negligent construction thereof, it makes a sufficient *prima facie* case against the defendant to show that he was the owner of the railroad, without proving affirmatively that the persons in charge were his servants or employes. And we do not think that defendant was injured by that statement. Surely, in such a case, it is not necessary for the plaintiff to show that the owner of the railroad had not leased it, or had not, in some other way, given the entire control, management, and operation of it to another person. A railroad in operation differs in some respects from ordinary property, and we cannot see that its admitted owner can be injured by the inference, in the absence of proof to the contrary, that he is operating it. In *Ferguson* v. *Railroad Co.*, 63 Wis. 145, 23 N. W. Rep. 123, the court says: "Where a company owns a railroad in operation, bearing the name of the company, and which presumably the company constructed, the presumption is that the company operates it, and, in order to release itself from liability for injuries to persons upon such road caused by the negligence of the employes operating the same, the burden of proof is upon it to show that it does not operate the same." In the case at bar the answer admits that the defendant was the owner of the road.

2. The only part of the second instruction necessary to be noticed is the latter clause, which is as follows: "Provided you further believe from the testimony that any injury sustained by deceased was not the result of contributory negligence on the part of said deceased." The criticism on this language is that it told the jury that defendant could not escape a verdict against him on account of any negligence of plaintiff unless such negligence caused—that is, wholly caused—the injury; whereas, the true rule is that plaintiff, in such a case, cannot recover if his negligence contributes proximately to the injury. But we think that the instruction is not justly subject to that criticism, particularly when considered with other charges given. It is probable that the language, considered by itself, is not such as would be adopted as a perfectly accurate statement by a moot court, or by a law writer in the repose of his study, or upon any other sort of dress parade. But the judge of a trial court, engaged in actual service, with a real case before him, and with due regard to the dispatch of business, cannot be expected to see that every isolated sentence spoken or written by himself, or presented to him in the language of another, shall contain, in itself, every necessary qualification of a rule. It is sufficient if all the instructions taken together, and not being inconsistent with each other, or confusing, shall give to the jury a fair and just notion of

the law upon the point discussed. Instruction No. 6, given at the request of defendant, shows plainly enough that the negligence of plaintiff, if any, need not have been the sole cause of the injury; (and it may be remarked that the attorney for defendant, in drawing the first part of this instruction, subjects himself to the same criticism with which he attacks the said second instruction asked by plaintiff.) Said instruction is as follows: "If a person's own want of ordinary care is the proximate cause of his injury or death, this is contributory negligence on his part, and no damages can be recovered from another person for such injury or death, even though the negligence of such other person may also be a cause of the injury or death." We think, therefore, that the jury were fairly given to understand that if the negligence of plaintiff contributed proximately to the injury the verdict should be for defendant, and not that such a verdict depended upon the fact that the injury was the result of plaintiff's negligence solely.

3. We see no error in the fourth instruction excepted to, which is as follows: "If the jury believe from the evidence that the defendant was engaged in the business of transporting passengers for hire, upon a railroad operated by him, then the law denominates the defendant a 'common carrier.'" No doubt the evidence was conflicting, and somewhat evenly balanced, as to several material matters of fact, but we think that the case was fairly put to the jury. Upon that point we are satisfied with the opinion of this court delivered at the first hearing by Justice McKINSTRY.

Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.; THORNTON, J.

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78 Cal. 225

SEARS *et al.* *v.* STARBIRD. (No. 12,379.)

(*Supreme Court of California.* February 11, 1889.)

1. PARTNERSHIP—CONTRIBUTION AFTER DISSOLUTION—EVIDENCE.
In an action by two members of a former partnership against the third, for contribution from him of his part of a debt of the firm paid by them, the judgment roll in a former suit, brought by defendant against plaintiffs for a dissolution of the partnership, which shows an adjudication of the amounts invested in the partnership enterprise by each partner, and that the debt in question is a firm liability, is competent to establish those facts.

2. SAME—PLEADING—PROMISE TO CONTRIBUTE.
A complaint by partners against a copartner, for contribution to the payment of a partnership debt paid by plaintiffs after dissolution, need not allege an express promise by defendant to pay his proportionate part.

3. TRIAL—RECEPTION OF EVIDENCE—EFFECT.
Where a judgment roll is offered as evidence, with no statement limiting its purpose, and upon objection the object of its introduction is stated, whereupon the objection is made that it is incompetent for any purpose, which is overruled, the record becomes evidence for all legitimate purposes, and is not limited to that mentioned by the party introducing it.

4. WRITS—DEFECTIVE SUMMONS—OBJECTIONS WAIVED.
A defect in a summons is waived if, after an unsuccessful motion to vacate it, defendant pleads to the merits.

In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Action by J. F. Sears and Sidney Smith against R. J. Starbird, to recover a proportionate part of a joint debt of the three paid by plaintiffs. After summons was served on defendant, he moved to vacate and set aside the service, because of its insufficiency, which motion was overruled. Subsequently he demurred to and answered the complaint. Judgment for plaintiffs, and defendant appeals.

F. D. & G. W. Nicol, for appellant. *F. W. Street*, for respondents.

PATERSON, J. In the month of April, 1878, the plaintiffs and defendant entered into an agreement to construct and maintain a toll road and bridge, known as the "Ward's Ferry, Road, and Bridge," in the county of Tuolumne. The parties agreed that in the construction of the road and bridge each was to pay in such sums as he might be able to pay, and that neither of them was to have, as against the other, any claim for any sum invested by him over the amount invested by the other; that after the completion of the road and bridge they should settle their accounts, and ascertain how much each one had invested; each was to be interested in the road and bridge in proportion to the amount he invested therein. After the road and bridge were completed, they endeavored to settle their accounts, but, failing to do so, the plaintiff Sears was appointed by all the parties to take charge of the road and bridge, and to act in liquidation of the affairs of the company. In the construction of the bridge and road one Mason had been employed, and there was due him at the time the work was completed the sum of $992.22. Mason requested Starbird to sign a note or due-bill for the amount due him on his account. Starbird refused to sign it. Thereupon Mason went to the other partners, the plaintiffs herein, and they executed and delivered to him a promissory note, dated April 9, 1881, and signed, "WARD'S FERRY, ROAD, AND BRIDGE CO. By J. F. SEARS. SIDNEY SMITH."

This note remained in Mason's possession until April 7, 1885, at which time plaintiffs executed and delivered to him a new note for the principal sum of the original note and interest due thereon, $1,468.38. Plaintiffs did not know that Starbird had refused to sign any note or due-bill, nor did the defendant, Starbird, at the time they were made and delivered, know that plaintiffs had executed or delivered either of the notes. On February 14, 1887, the defendant, Starbird, commenced an action against Sears and Smith, plaintiffs herein, for dissolution of the partnership existing between himself and these plaintiffs, an accounting, for an order and decree of sale of the partnership property, and for a decree showing the amounts paid out by the several partners on behalf of said partnership, and fixing the indebtedness of the partnership, and the members thereof. He claimed in his complaint that Sears, Smith, and himself were equal partners in the partnership, entitled to equal shares in the profits of the concern, and liable in the same proportion for the losses sustained. This allegation was denied by the defendants therein, who claimed that each copartner was to own and be interested in said road and bridge in proportion to the amount of money, labor, or material which each, respectively, invested or paid out in the construction of said road or bridge. They further alleged that the firm was indebted to Mason in the sum of $1,468.38, with interest thereon from April 7, 1885. The amounts invested by each partner were set forth. Defendants prayed for an accounting to determine the profits or losses resulting from the partnership, and that the partnership property might be sold to pay the debts, etc.

The court in that action found that the terms and conditions of the partnership agreement were as stated by the defendants in their answer; that plaintiff, Starbird, had invested, on behalf of the partnership, $4,007.47; that defendant Sears had invested $4,427.86; and defendant Smith, $1,487.40,—making a total of $9,922.73. The court further found that the liabilities of the copartnership consisted of a promissory note given by the partnership to Mason, dated April 7, 1885, for $1,468.38, with interest thereon; that this note had been given by the defendants, as partners, to Mason for work done and goods furnished the partnership. A decree followed in that action dissolving the partnership, and ordering a sale of the partnership property, and that the proceeds of the sale be applied in payment of the indebtedness of the copartnership, and the balance, if any, be paid to the partners in due proportion. The evidence further shows that the debt for which the original note was given was a partnership debt, acknowledged to be such by all the parties, and the payment thereof assumed by them in the progress of the partnership affairs. The evidence shows that after the work was completed the firm was indebted to one Hall, said Mason, and others. The partners met together, and agreed that the indebtedness should be paid out of the proceeds of the road. All the indebtedness was paid in that manner, except that which was owing to Mason. This agreement was made in the commencement of the year 1879. Starbird and Sears managed the road, and paid part of the debts from the proceeds thereof, under this agreement. Mason was employed, he testified, principally by Starbird. Furthermore, it was adjudicated in the case of *Starbird* v. *Sears et al.* that the note given to Mason was a copartnership liability.

There is no question here as to the authority of a partner to bind his copartners after dissolution of the partnership. Of course, after the dissolution of the partnership, one partner cannot revive a debt barred by the statute, but during the pendency of the partnership each partner is an agent for all in making an acknowledgment under the statute of limitations. Wood, Lim. 433; Pars. Partn. 188; Civil Code, § 2428.

It is claimed by appellant that there is no evidence to show the amounts invested by the partners, or to show that Starbird ever invested anything. The judgment roll in *Starbird* v. *Sears et al.*, from which we have quoted the facts above stated, was competent and relevant evidence upon this topic. The amount invested was put in issue therein by the plaintiff, and was determined by the court. There is nothing to show that the judgment therein is not final; nothing to show that it has ever been set aside, or appealed from. It is claimed, however, that the judgment roll could not be used for the purpose of showing the amounts invested by the partner. The judgment roll was offered in evidence by counsel for respondent without specifying in the offer the object of the evidence. An objection was made on the ground that an appeal had been taken from the judgment, and on the ground that the questions involved therein were not the issues involved herein. Counsel then offered it "for the purpose of showing that on the 8th day of February, 1888, a decree was entered in said action * * * dissolving the partnership, * * * and ordering a sale of the partnership property." Defendants objected, on the ground that it was incompetent for any purpose. The court admitted it, reserving a decision, and thereafter overruled the objection, and admitted it in evidence.

The court was not bound to limit the evidence to any specific purpose, under this offer and objection. In *Sill* v. *Reese*, 47 Cal. 344, it was held that counsel is not bound by the declaration of a limited purpose, so as to preclude him from drawing other deductions than that suggested by the terms of the offer, from the evidence offered, unless injustice would follow to the opposite party by permitting such new inferences. In the absence of an express understanding between counsel and the court that evidence is to be limited to a particular matter, the court will be authorized to consider it for any purpose for which it is competent and relevant to the issues.

In the case referred to (*Starbird* v. *Sears et al.*) it was determined that the Mason note was a partnership debt, and that the partnership property should be sold, and the proceeds thereof applied in payment. It was the only debt and liability remaining unpaid after dissolution of the partnership. It was a joint obligation of all the partners, and all the partners were liable. The note was made April 7, 1885, and the suit for a dissolution of the partnership was not commenced until 1887.

It is claimed that "no action lies by one partner against another, unless there has been a settlement of accounts, and a promise to pay the balance." This is true as to matters occurring before a dissolution of the partnership, but where a partnership has been dissolved, and the partnership accounts fully settled, an express promise to pay the balance is not necessary, "because the promise is implied in closing the accounts and stating the balance." Pars.

Partn. c. 8, pp. 278, 287. Where one partner pays a partnership debt existing after dissolution of the partnership, he may maintain *assumpsit* against his copartner for contribution, and this is true although he gives his individual note for a debt due from the firm. *Clouch* v. *Moyer*, 23 Kan. 405; *Brown* v. *Agnew*, 6 Watts & S. 235; *Whetstone* v. *Shaw*, 70 Mo. 575; section 2412, Civil Code.

Conceding that the summons was defective, which is by no means clear, the defendant, by pleading to the merits, waived his objection to all defects therein. *Desmond* v. *Superior Court*, 59 Cal. 274. We think that the complaint states a cause of action, although a demurrer for ambiguity would have been sustained. The complaint shows that there had been a dissolution of the copartnership by a decree of the superior court, and that an order of sale had been made for payment of the debts, and, as we have seen, it was unnecessary for the plaintiff to allege an express promise by the defendant to pay his proportion of the partnership indebtedness.

Judgment and order affirmed.

We concur: McFARLAND, J.; WORKS, J.; THORNTON, J.; SHARPSTEIN, J.

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78 Cal. 235

GALE *v.* BEST *et al.* (No. 12,326.)

(*Supreme Court of California.* February 18, 1889.)

PUBLIC LANDS—RAILROAD GRANT—CHARACTER OF LANDS—RES ADJUDICATA.

Where land is patented to a railroad company as public land, under a grant providing for its disposal as agricultural land, without any reservation in the grant except a general one of mineral lands, and no reservation in the patent, the patent is a conclusive determination by the government that the land is agricultural; and in an action at law to recover possession, by one claiming title under the company, against persons claiming under a location of a mining claim upon the public domain, the character of the land cannot be brought in question.

In bank. Appeal from superior court, Butte county; LEON D. FREER, Judge.

Action by John Gale against S. M. Best, J. W. Reams, J. H. Bassford, Calvin Reams, and L. B. Abernathie, to recover possession of the S. W. $\frac{1}{4}$ of section 27, township 24 N., of range 3 E., Mount Diablo base and meridian, situate in Butte county, Cal. Judgment for plaintiff, and defendants appeal.

Gray & Sexton and *W. S. Riley*, for appellants. *Hundley & Gale*, for respondent.

McFARLAND, J. This is an action to recover possession of certain land, and to restrain defendants from doing certain acts thereon in the nature of waste. Judgment went for plaintiff, and defendants appeal from the judgment, and from an order denying a motion for a new trial.

The land in contest is within the limits of the grant of lands by congress to the California & Oregon Railroad Company, a corporation; and on March 17, 1875, the government of the United States executed and delivered its patent, in due form of law, to the Central Pacific Railroad Company, a corporation, successor to said first-named corporation, by which it conveyed said land to said last-named corporation without any reservation whatever. Plaintiff holds, and was in possession, under said Central Pacific Railroad Company. In December, 1885, and while plaintiff was in possession of said land, defendants entered thereon, and did the usual acts which constitute the location of a mining claim upon the public domain, and in December, 1886, they took possession of said land and dispossessed plaintiff; and since then, until restrained by order of court, were engaged in digging, excavating, and removing large quantities of the soil, etc., from said land. They claim a right to the possession of the land upon the ground that it is mineral land, and that all mineral land was reserved in the grant by congress to said railroad company. That part of their answer which sets up this defense was, on plaintiff's motion, stricken out, and at the trial an objection to their offer to prove that the land was mineral was sustained. Upon these two rulings of the court below the main point in the case arises.

The rule is well settled by numerous decisions of the supreme court of the United States that when a law of congress provides for the disposal and patenting of certain public lands upon the ascertainment of certain facts, the proper officers of the land department of the general government have jurisdiction to inquire into and determine those facts; that the issuance of a patent is an official declaration that such facts have been found in favor of the patentee; and that in such a case the patent is conclusive in a court of law, and cannot be attacked collaterally. Of course, if the patent be void upon its face, or if, looking beyond the patent for a law upon which it is based, it is found that there is no law which authorizes such a patent under any state of facts; or that the particular tract named in the patent has been absolutely reserved from disposal,—then the patent would be worthless, and assailable from any quarter. For instance, if a certain section or a certain township described by legal subdivisions should be expressly and unconditionally reserved by congress from disposal under any statute, a patent for any part of such tract would be void. But if a large body of public lands be subjected to sale or other disposition under a law which has merely a general reservation of such parts of those lands as may be found to be of a particular character, such as swamp or mineral, then the land department has jurisdiction to determine the character of any part thereof, and a patent is conclusive evidence that such jurisdiction has been exercised. In such a case the patent could be attacked only by a direct proceeding, and by a person who connects himself directly with the title of the government.

There are many decisions of the supreme court of the United States establishing these views, and it is sufficient to refer to the cases of *Smelting Co.* v. *Kemp*, 104 U. S. 636, and *Steel* v. *Smelting Co.*, 106 U. S. 447, 1 Sup. Ct. Rep. 389, where Mr. Justice FIELD, in elaborate opinions, discusses the whole subject, and cites the other cases bearing upon the question. It may, however, be well, perhaps, to allude briefly to the case of *French* v. *Fyan*, 93 U. S. 169, because that case seems, in principle, to be exactly like the one at bar. In that case a patent had been issued to the state of Missouri for certain swamp and overflowed land, under a certain act of congress. A party claiming the land under a grant to a railroad company, which would have carried the title if the land were not swamp, brought an action of ejectment, and sought to introduce parol evidence to prove that as a matter of fact the land was not of that character, and thus impeach the validity of the patent. There, as in the case at bar, the question was as to the character of the land. The court below rejected the offered evidence, and held that the patent concluded the question. The supreme court sustained the ruling of the court below, and Mr. Justice MILLER, in delivering its opinion, said: "We are of opinion that, in this action of law, it would be a departure from sound principle, and contrary to well-considered judgments in this court, and in others of high authority, to permit the validity of the patent to the state to be subjected to the test of the verdict of a jury on such oral testimony as might be brought before it. It would be substituting the jury, or the court sitting as a jury, for the tribunal which congress had provided to determine the question, and would be making a patent of the United States a cheap and unstable reliance as a title for lands which it purported to convey."

In *Steel* v. *Smelting Co., supra*, Justice FIELD, whose exhaustive opinion we cannot here undertake to reproduce, among other things, says as follows: "We have so often had occasion to speak of the land department, the object of its creation, and the powers it possesses in the alienation by patent of portions of the public lands, that it creates an unpleasant surprise to find that counsel, in discussing the effect to be given to the action of that department, overlook our decisions on that subject. That department, as we have repeatedly said, was established to supervise various proceedings whereby a conveyance of the title from the United States to portions of the public domain is obtained, and to see that the requirements of different acts of congress are fully complied with. Necessarily, therefore, it must consider and pass upon the qualifications of the applicant, the acts he has performed to secure the title, the nature of the land, and whether it is of the class which is open to sale. Its judgment upon these matters is that of a special tribunal, and is unassailable except by direct proceedings for its annulment or limitation. Such has been the uniform language of this court in repeated decisions." And again, speaking of the lands held by the possessor of a patent, he says: "If intruders upon them could compel him, in every suit for possession, to establish the validity of the action of the land department, and the correctness of its ruling upon matters submitted to it, the patent, instead of being a means of peace and security, would subject his rights to constant and ruinous litigation. He would recover one portion of his land if the jury were satisfied that the evidence produced justified the action of that department, and lose another portion, the title whereto rests upon the same facts, because another jury came to a different conclusion. So his rights in different suits upon the same patent would be determined, not by its efficiency as a conveyance of the government, but according to the fluctuating prejudices of different jurymen, or their varying capacities to weigh evidence." 104 U. S. 641. And the pith of the whole matter is aptly expressed by the same learned justice in *Smelting Co.* v. *Kemp*, *supra*, where, speaking of the land department, he says: "Indeed, the doctrine as to the regularity and validity of its acts, where it has jurisdiction, goes so far that if in any circumstances under existing law a patent would be held valid, it will be presumed that such circumstances existed." 104 U. S. 646.

It is contended by appellants that former decisions of this court, in *McLaughlin* v. *Powell*, 50 Cal. 64; *Carr* v. *Quigley*, 57 Cal. 394; and *Mining Co.* v. *Oliver*, 16 Pac. Rep. 780,—are in conflict with the doctrine above stated. Whether or not there be any expressions in the opinion in either of those cases inconsistent with the views of the highest federal court on the subject, (which views, in the end, on a question like this must prevail,) it is not necessary here to consider. In order to affirm the judgment in the case at bar there is no necessity to upset either of those cases. In *McLaughlin* v. *Powell* the patent itself expressly excepted "all mineral lands, should any be found to exist, in the tracts" embraced by the patent. And the decision is expressly put upon the ground that there was that exception, and that it was "part of the description" of the lands conveyed. And it may be strongly argued that, in such case, although it was the duty of the land department to determine the character of the land before the issuance of the patent, yet, as the patent shows upon its face that such duty was not performed, the patentee must be held to have taken it, knowing its uncertain and unsubstantial character. On the other hand, Judge SAWYER has held, in an opinion of great force and ability, that the issuance of a patent in such a case was a conclusive declaration that the land was of the character to be properly patented under the law,—that is, agricultural land; that there is no authority to make in such a patent a general reservation of mineral lands, any more than there is in case of a pre-emption patent; and that such a reservation is void. *Cowell* v. *Lammers*, 10 Sawy. 246, 21 Fed. Rep. 200. At all events, as in the case at bar, the patent contained no reservation whatever. The case of *McLaughlin* v. *Powell* is not authority here. And the same may be said of *Mining Co.* v. *Oliver*. In that case the patent also excepted "all mineral lands, should any be found to exist," etc. *Carr* v. *Quigley* is not in point at all. In that case there was no question about the character of the land patented. It was claimed to be within a "government reservation," and that the body of land itself involved in that case, without reference to its character, was expressly reserved from the operation of the law under which the attempt was made to patent it. Our opinion is that where a patent issues for public land under a law which provides for its disposal as agricultural land, either to a railroad company, or to pre-emption or homestead claimants, and there is no reservation in the law, except a general one of mineral lands, and no reservation at all in the patent, then the patent must be considered as a conclusive determination by the government that the land is agricultural; and afterwards, in an action in a court of law, it is not competent to reopen the question of the character of the land. The opposite view would render the titles to a large region of California, now rapidly filling up with agricultural settlers, unstable, insecure, and almost worthless. It would affect, also, those holding through patents under the pre-emption and homestead laws, for mineral lands are exempted from the provisions of those laws. The theory of that view is that if the land previously patented as agricultural can at any time be shown to be in fact mineral, then the title to it never passed from the United States, but had always remained a part of the public domain; and, as no statute of limitations runs against the government, the insecurity of the title under the patent would be perpetual, and an attack upon it could be made as successfully 100 years hence as now. Such, in our opinion, is not the law.

The view taken of the question presented by the court below was correct, and we see no error in the record.

Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

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3 Cal. Unrep. 52

HUMBOLDT SAV. & L. SOC. *v.* WENNERHOLD *et al.* (No. 11,674.)*

(*Supreme Court of California.* February 18, 1889.)

1. BOND—BREACH—LIABILITIES OF SURETIES.
A secretary of a building association executed a bond to well and truly perform and discharge all his official duties, and do all things required by the by-laws, and to perform faithfully all duties required of him, and obey all orders given him by the board of directors. The secretary was confided with the general superintendence of the association's funds, received, cared for, and paid them out, and the performance of these duties by this officer had become the established usage of the association. *Held*, that his sureties on the bond were liable for moneys of depositors which he had received and entered in their pass-books, but not in the company's books, and converted to his own use; also for moneys taken by him, which had been deposited in the safe for persons who had borrowed the same; and also for moneys taken from the association and converted, he forging a receipt for the same in the name of a third person.

2. SAME—DURATION OF LIABILITY.
The fact that no term of office was ever fixed or put an end to by any by-law, order, or resolution, does not affect the liability of the sureties, the bond being conditioned that he should perform his duties "so long as he shall continue and be continued in said office." No want of consideration being shown, the sureties could bind themselves for an unlimited period.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; W. A. EDMONDS, Judge.

Manuel Eyre, for appellants. *A. H. Loughborough*, for respondent.

FOOTE, C. Plaintiff brought this action against Wennerhold, Joseph Frank, and John Wieland. During its pendency two of the defendants, Joseph

*Reversed in banc. See 22 Pac. 920, 81 Cal. 528.

Frank and John Wieland, died, and the executors of Frank and the administratrix of Wieland were substituted as defendants. Judgment passed for the plaintiff, from which, and an order denying a new trial, defendants appealed.

The cause of action set out in the complaint was the breach of the conditions of a bond given to the plaintiff by one Hartmann, its secretary, upon which Wennerhold, Frank, and Wieland were the sureties. The alleged breach consisted in the embezzlement by Hartmann, while acting in the capacity above mentioned, of large sums of money belonging to, or for which the plaintiff was responsible.

The facts attending the affair seem to be that Hartmann embezzled the money which he is charged to have taken, by receiving some of it "from depositors coming to deposit money in plaintiff's bank, and entered such sums in the pass-books of said depositors, but neglected to cause such sums to be entered in the books of the bank. He converted the same to his own use." "The following depositors deposited money, filling out deposit tags; and Hartmann, receiving said money, signed or indorsed said tags with his name as secretary, and returned them to said depositors as their vouchers, but failed to enter such amounts in the books of the bank, but converted the same to his own use." "Said Hartmann took from bags deposited in the vault and safe of plaintiff's bank money set apart for persons who had borrowed the same from the bank, and converted the same to his own use." "And on the following dates said Hartmann took from the money of the bank the following sums, filling a check or receipt, to which he forged the name of V. Chapman, so that it appeared that said sums had been paid by him to said Chapman, whereas he had paid her nothing, but appropriated the money to his own use." "All of which was done by Hartmann while acting as hereinafter testified to in the employ of the plaintiff." "To the testimony adduced, and to each question asked in eliciting such testimony, the defendant objected on the grounds,—*First*, that the complaint did not state facts sufficient to constitute a cause of action; *second*, that it was incompetent, irrelevant, and immaterial." The defendant further contends that the decision is contrary to the evidence, and that certain of the findings are not supported by the evidence.

The bond seems to have been given under the idea that Hartmann, as secretary of the plaintiff, might thereafter from time to time be re-elected, rechosen, and reappointed, or continued in office, or suffered to hold the same. And in point of fact he seems to have been continued in the office of secretary, to which he was first elected, and to have been suffered to hold the same, and exercise its functions, up to the time of about three days before his death by suicide.

The condition of the bond was that if Hartmann, during his term, or during all the time he should hold the office of secretary, should well and truly serve the plaintiff as such secretary so long as he shall continue and be continued in said office, and "well, truly, and honestly perform and discharge all his duties as such officer, and do all things required of him by the by-laws of said corporation, which may now be in force, or which may be hereafter enacted by said corporation, and shall well and truly and faithfully perform all the duties which shall be required of him, and obey all orders and directions given him by the board of directors of said corporation, then this obligation to be void; otherwise to remain in full force and effect."

The averment in the complaint, after setting out the bond in full as having been given, is "that the said bond was conditioned that said Hartmann should well and truly serve this corporation as such secretary, and well, truly, and honestly perform and discharge all his duties as such officer, and all things required of him by the by-laws of the plaintiff, which might then be in force, or which might thereafter be enacted by this plaintiff, as by reference thereto will more fully appear."

The question really is, not what the office Hartmann was to fill was called, but what its duties were, as prescribed by the by-laws or the orders and directions of the board of directors, or which had devolved upon the secretary by the established usage and custom of the bank, with the consent of the directors before and after the giving of the bond of which the sureties must be held to have had notice, and whether or not he had well, truly, and faithfully performed them. "When a certain class of corporations,—for instance, banks, have established, recognized, and well-known usages, all persons dealing with their agents will be affected with notice of these usages, and the contracts of such corporations will be construed with reference to them." Tayl. Corp. § 195, and cases cited.

The interpretation of the terms of the bond is to be governed by the same rules as other contracts. Civil Code, § 2837. In order to give a proper construction to an instrument of the kind here involved, "the circumstances under which it was made, including the situation of the subject of the instrument and of the parties to it, may also be shown, so that the judge be placed in the position of those whose language he is to interpret." Code Civil Proc. § 1860. The appellate court, in speaking to such a matter, after alluding to the rule laid down as to official bonds in *Hubert* v. *Mendheim*, 64 Cal. 213, said: "But, as was said in that case with reference to bonds given to individuals and private corporations, 'such matters are the subject of private contract, by which the parties may bind themselves in any manner, or to any extent not violative of public policy or positive statute.' These private contracts are to be interpreted like other private contracts with reference to their language and the circumstances under which they were entered into." *Enterprise Co.* v. *Allen*, 67 Cal. 508, 8 Pac. Rep. 59.

The record here shows that the banking corporation of which Hartmann was made the secretary started out on a small scale, and that it was the intention of those controlling and directing it that the secretary should be the chief agent in receiving, caring for, and paying out the moneys which were paid in, paid out, and of which it had charge, or belonged to it. To this secretary, in other words, it was the intention of all those concerned to confide the general supervision of its funds, as cashier, teller, book-keeper, etc. This is shown by the acts of the parties, and all the surrounding circumstances, both before and after the giving of the bond. It was contemplated in the beginning that there would be a time of small affairs, and that a secretary could do all that is ordinarily confided to a receiving and paying teller, cashier, book-keeper, etc. These duties all seem to have been expected of Hartmann, to have been assumed by him, and to have become the established usage of the bank, if not directly ordered by its trustees, both before and after the making of the bond. It is perfectly apparent to us that this was the expectation of the sureties when they signed the bond, and that they must have known what Hartmann for years had been doing as secretary, and what the nature of his duties was. He had been secretary for about 10 years prior to the making of this bond, and had always performed the same duties before and after the bond was executed.

The complaint, in effect, gives the conditions of the bond, and the breach of it by Hartmann, and states a sufficient cause of action. He was elected secretary, and was continued or suffered to stay in the same office for years, up to the time of his defalcation, without further election or order, and this was in consonance with the terms of the bond, which seem to contemplate just such a continuance or sufferance in office. No term of office was intended to be fixed by the bond; that was to be left to the action of the directors for the time being, whoever they might be. Their term of office did not affect his. Brandt, Sur. § 146; Tayl. Corp. § 235. It is not shown that his term of office was ever fixed, or put an end to, by any by-law, order, resolution, or custom. And the sureties could bind themselves for such an unlimited period, as no want of consideration is shown. *Association* v. *Esche*, 17 Pac. Rep. 677. The responsibility of the sureties, as fixed by the court, is in accordance with the words of the bond. Upon the whole case we perceive no prejudicial error, and advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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78 Cal. 254

WEINREICH *et al. v.* JOHNSON. (No. 12,624.)

(*Supreme Court of California.* February 20, 1889.)

1. PARTNERSHIP—SUIT BY PARTNERS—NOTE TO INDIVIDUAL MEMBER.
   In an action by W. and R. as partners on a note alleged to have been executed to them, where the note appears to have been executed to W. individually, it is error to render judgment thereon in favor of W. individually.
2. PLEADING—VARIANCE—WAIVER OF OBJECTIONS.
   The case presents neither a variance of proof nor a misjoinder of parties, and it cannot be urged that the objection was waived by failure to raise it by demurrer or answer as required by Code Civil Proc. Cal. § 434, which provides that all objections, except to the jurisdiction and sufficiency of the complaint, shall be deemed waived unless taken by demurrer or answer.
3. PARTIES—MISJOINDER—PLEADING.
   Section 578, providing that judgment may be given for or against one or more of several plaintiffs, and for or against one of more of several defendants, has no application to such a case, as the effect would be to render a judgment for a party in whose favor no cause of action is stated in the complaint.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Action by H. Weinreich and F. Raschen, partners as Weinreich & Co., against Thomas Johnson, on a promissory note and an account. Judgment for the firm on the account, and H. Weinreich individually on the note, and from the latter judgment defendant appeals.

Code Civil Proc. § 434, provides: "If no objection be taken, either by demurrer or answer, the defendant must be deemed to have waived the same, excepting only the objection to the jurisdiction of the court and the objection that the complaint does not state facts sufficient to constitute a cause of action." "Sec. 578. Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants."

J. C. Tubbs and *Matt. F. Johnson*, for appellant. *Albert M. Johnson*, for respondents.

WORKS, J. The respondents, H. Weinreich and F. Raschen, as partners, doing business under the firm name of Weinreich & Co., sued the appellant in the court below on a promissory note and upon an account. The complaint contains the necessary averments showing the partnership and a compliance with the statute with reference to the filing of a certificate thereof with the county clerk, and alleges in the first count that the defendant executed to the plaintiffs the promissory note sued on, and in the second count the purchase of goods and merchandise and the amount due therefor. The defendant denied all of the material allegations of the first count, except the formal allegations as to the partnership, and admitted the allegations of the second count. It was proved by the evidence, and found by the court, that the respondent Weinreich was, prior to the formation of the partnership alleged in the complaint, doing business individually under the firm name of H. Weinreich & Co.; that the note sued on was executed to and was due to him, and not to the firm composed of the plaintiffs Weinreich and Raschen; and that the amount of the account was due to said firm. Upon these findings the court rendered judgment in favor of Weinreich individually for the amount of the note, and in favor of the firm for the amount found to be due on the account. The defendant moved for a new trial, which was denied, and he appeals.

We think the judgment cannot be supported by reason or authority. As to the judgment in favor of Weinreich individually there is no pleading to support it. Weinreich was not a party to the suit in his individual capacity. The allegation of the complaint was that the note was given to someone else, and there was no allegation of the execution of any note to him, and nothing to show an indebtedness to him from the defendant, or any averments upon which a judgment could rest.

But the respondent contends that the question of variance in the proof or a misjoinder of parties is not raised by demurrer or answer, and is therefore waived under section 434 of the Code of Civil Procedure. There was no misjoinder of parties. The plaintiffs alleged an indebtedness to the parties suing, and the defendant in his answer denied it. Not only was it not waived, but his defense was made, proved, and found in his favor by the court. Counsel are right in their contention that this was not a case of variance. It was a clear case of failure of proof, which is quite another thing.

It is further claimed by the respondent that where a joint action is brought, a several judgment may be rendered in favor of a part of the plaintiffs under section 578 of the Code of Civil Procedure, and that the very object of the section was to "dispense with such frivolous and technical objections as are now urged by the defendant in this case." Let us stop to inquire to what this would lead us. A. and B., as partners, sue C. on a promissory note. C. denies the execution of the note. He has a good defense on this ground. The proof sustains his answer, but it appears that, if he did not give a note to A. and B., he did execute one to A. alone. If A. had sued alone on his note, the defense interposed here could not have been made, but a counter-claim or other valid defense might have been pleaded and proved. By taking the course pursued in this action any such defense could be effectually avoided.

It seems to us that the objection made here is not frivolous, but goes to the heart of the case, and affects the most substantial right of the defendant. In our judgment section 578 of the Code has no application to a case of this kind. To apply it here would be to authorize the rendition of a judgment for a party in whose favor no cause of action is stated in the complaint, and against a party who has had no notice of any such cause of action or any opportunity to meet it. *McCord* v. *Seale*, 56 Cal. 262; *Cotes* v. *Campbell*, 3 Cal. 191; *Curry* v. *Roundtree*, 51 Cal. 184. This would be in violation of the well-established elementary rule that the proof must correspond with the allegations of the complaint. A system of pleading and practice that would permit such a course as was pursued in this case would be a snare and a delusion. We had as well abolish all pleading at once. To allow such a practice would be equally violative of the Code provision that every action must be prosecuted in the name of the real party in interest.

Counsel for respondent earnestly contends that his view is supported by Mr. Pomeroy in his work on Remedies, and asks us to read carefully what is said on this subject by the learned author. We have complied with this request, and find nothing to support counsel's position.

The judgment and order appealed from are reversed and cause remanded.

We concur: McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

with the words of the bond. Upon the whole case we perceive no prejudicial error, and advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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But the respondent contends that the question of variance in the proof or a misjoinder of parties is not raised by demurrer or answer, and is therefore waived under section 434 of the Code of Civil Procedure. There was no misjoinder of parties. The plaintiffs alleged an indebtedness to the parties suing, and the defendant in his answer denied it. Not only was it not waived, but his defense was made, proved, and found in his favor by the court. Counsel are right in their contention that this was not a case of variance. It was a clear case of failure of proof, which is quite another thing.

It is further claimed by the respondent that where a joint action is brought, a several judgment may be rendered in favor of a part of the plaintiffs under section 578 of the Code of Civil Procedure, and that the very object of the section was to "dispense with such frivolous and technical objections as are now urged by the defendant in this case." Let us stop to inquire to what this would lead us. A. and B., as partners, sue C. on a promissory note. C. denies the execution of the note. He has a good defense on this ground. The proof sustains his answer, but it appears that, if he did not give a note to A. and B., he did execute one to A. alone. If A. had sued alone on his note, the defense interposed here could not have been made, but a counter-claim or other valid defense might have been pleaded and proved. By taking the course pursued in this action any such defense could be effectually avoided.

It seems to us that the objection made here is not frivolous, but goes to the heart of the case, and affects the most substantial right of the defendant. In our judgment section 578 of the Code has no application to a case of this kind. To apply it here would be to authorize the rendition of a judgment for a party in whose favor no cause of action is stated in the complaint, and against a party who has had no notice of any such cause of action or any opportunity to meet it. *McCord* v. *Seale*, 56 Cal. 262; *Cotes* v. *Campbell*, 3 Cal. 191; *Curry* v. *Roundtree*, 51 Cal. 184. This would be in violation of the well-established elementary rule that the proof must correspond with the allegations of the complaint. A system of pleading and practice that would permit such a course as was pursued in this case would be a snare and a delusion. We had as well abolish all pleading at once. To allow such a practice would be equally violative of the Code provision that every action must be prosecuted in the name of the real party in interest.

Counsel for respondent earnestly contends that his view is supported by Mr. Pomeroy in his work on Remedies, and asks us to read carefully what is said on this subject by the learned author. We have complied with this request, and find nothing to support counsel's position.

The judgment and order appealed from are reversed and cause remanded.

We concur: McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

78 Cal. 242

In re MOORE'S ESTATE. (No. 13,002.)

(*Supreme Court of California.* February 18, 1889.)

EXCEPTIONS, BILL OF—CONTENTS—RECORDS NOT IN EVIDENCE.

Records and documents neither offered nor read in evidence should not be incorporated in a bill of exceptions, though they refer to the same matter as that in controversy, and were commented on in the argument at the trial.

In bank. Application for writ of mandate against P. W. Keyser, judge of the superior court of Sutter county, to require the settlement of a bill of exceptions.

Warren Olney, for applicant. *Chas. B. Younger*, for respondent.

WORKS, J. Application to this court to settle a bill of exceptions, on the ground that the court below has refused to insert certain records, papers, and documents therein. The petitioner was the administrator of the estate of Moore, and was, by order of the court below, removed from his trust. One of the grounds of the petition for his removal was that he had failed to file his final account as required by law. In his answer he admits that he has not filed his final account, but alleges as an excuse for not doing so that the estate had been in litigation for nearly 10 years with the widow of the decedent, and that said litigation is not yet ended. The matter sought to be inserted in the bill of exceptions, by this proceeding, consists of the pleadings, papers, and proceedings in the different branches of the litigation between the estate and the widow referred to in the answer. The judge of the court below, for answer to the petition, alleges that the papers and records aforesaid "were not, nor was any part thereof, read, offered, or used in evidence on the trial of said proceeding for the removal of the administrator of said estate, nor was any exception, in any wise relating thereto, taken by said petitioner at said trial." This is conceded by the petitioner, and is a complete answer to the petition. The office of a bill of exceptions is to present to this court the proceedings of the court below. Only such evidence can be inserted therein as was heard by the court, or offered and excluded. To permit an appellant to insert in his bill of exceptions any matter of evidence not actually heard by the lower court would work great injustice both to the court and to the opposite party. It would present to this court a case which might be entirely different from the one presented to and decided by the court below.

It is argued on behalf of the petitioner that the papers and records referred to were a part of the proceedings in the settlement of this same estate, and that for that reason it was the duty of the court to examine and consider them in determining the question whether the administrator should be removed or not, and that this court should presume that they were so examined and considered. We cannot accede to this view. Such a rule would leave the lower court no guide in making up a bill of exceptions, and lead to utter confusion. A party who desires that any item of documentary evidence shall be considered by the court must call the attention of the court to it, and offer it in evidence. In no other way can it be regarded as a part of the evidence, independent of some stipulation of the parties. It need not be read in evidence, but must necessarily be offered, and thereby brought to the attention and consideration of the court. By no other means can the practice in this particular be made certain and uniform. Nor can we say as matter of law that the court was bound, in passing upon this question, to examine and consider all of the papers in the estate.

Again, it is claimed that some, if not all, of these papers were commented upon at the argument below, and that they were thereby called to the attention of the court, and should, for that reason, be inserted in the bill of exceptions. But this will not do. Such a practice would lead to just what has taken place here, a controversy between opposing counsel as to what, if anything, was so referred to.

For the reasons given the application is denied.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

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78 Cal. 258

GRENNAN v. MCGREGOR *et al.* (No. 12,420.)

(*Supreme Court of California.* February 23, 1889.)

1. DEED—CONSTRUCTION.

A deed of a half section of land from a railroad company contained the following reservation: "Excepting and reserving, however, for railroad purposes, a strip of land 400 feet wide, lying equally on each side of the track of the railroad of said company, or any branch railroad now or hereafter constructed on said lands." The consideration for the conveyance was $450. The only track on the land conveyed, besides the main line, constructed and in use at the date of the deed, was a track 1,500 feet long, used for switching purposes, in connection which the main track, and which cost $2,500. *Held*, that it was a "branch railroad" within the meaning of the parties.

2. SAME—PAROL EVIDENCE TO EXPLAIN.

The phrase "branch railroad" is of such ambiguous import that its meaning cannot be determined without reference to the circumstances surrounding the parties when they used it.

In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Ejectment by John Grennan against Ruth McGregor and S. F. Woodworth. Plaintiff appeals from a judgment in his favor as to a portion of the land sued for, but in favor of defendants as to the residue.

Wallace & Prewett, for appellant. *Hale & Craig*, for respondents.

BEATTY, C. J. This is an action to recover a small parcel of a certain half section of land in Placer county, which was conveyed to the plaintiff January 14, 1884, by the then owner, the Central Pacific Railroad Company. The deed of conveyance contained the following reservation: "Excepting and reserving, however, for railroad purposes, a strip of land four hundred feet wide, lying equally on each side of the track of the railroad of said company, or any branch railroad now or hereafter constructed on said lands."

The defendants are lessees of the successor of the Central Pacific Railroad Company,—plaintiff's grantor,—and the whole controversy turns upon the question whether the demanded premises are within the reservation of the deeds to plaintiff. The superior court, holding that they were included in the reservation, gave judgment for defendants, from which, and from an order denying his motion for a new trial, plaintiff appeals.

It is agreed that the following facts were established by the evidence taken at the trial: "That the said railroad company was, on January 14, 1884, and for many years prior thereto, and ever since, up to the date of the lease hereinafter mentioned, has been, the owner and operator of a railroad running from San Francisco, Cal., to Ogden, Utah; and said railroad traverses the east half of said section; and that on said half section was and is situated the station known as 'Clipper Gap Station.' That along the side of the main track of said railroad at said station the said company had and have constructed a switch, lying on the easterly side of the main track, of the length of about 1,500 feet; that said switch is appurtenant to, and used wholly for and with, said station. That along the opposite side or westerly of said main track, there extends and runs a track called by the plaintiff a 'spur' or 'side track,' and by the defendant a 'branch railroad.' That said last-mentioned track commences at a point below said station's office, distant about six hundred feet, and at or near the point at which the said switch commences, and runs up along-side the main track, but not quite parallel thereto, and extends a distance of about one thousand three hundred feet, and abruptly terminates. That at its furthest point from the main track, it is over three hundred feet therefrom. That it is used by said railroad company for conducting its business as a common carrier, and is necessary for such use. The cost of constructing the said last-described track was not less than $2,500. That there is no station on the same. That all the freight that is ever handled thereon is such as is consigned to said Clipper Gap station, and that is only when it is so consigned in car-load lots that it is run out on the said track to be unloaded. That all freight so run out and unloaded is formally received and receipted for at said Clipper Gap station. That freight received at said station is unloaded from the main track when in less than car-load lots, and from said 1,300-foot track when in car-load lots; and shipments from said Clipper Gap station are usually made in the same way. That passenger trains never run on or over the same. That there are no stations or offices thereon. That there is not, and never has been, any schedule of fares and freights for said track. That freight and passengers, or either, are never received on said track for consignment or shipment to any point thereon. That at the time of the construction of said track and the execution of said deed, on January 14, 1884, there was not on the line of said track any warehouse or place of business, or any place or house to which freight was carried. That since the execution of said deed a box factory has been built thereon, and that freight is now sometimes carried to the same, but that it is always consigned to said station. That all other freight, when carried out on said track for unloading, is unloaded direct from the cars to wagons. That no cars or engines belong to said track, and that trains are never run on said track from one objective point to another, and only move about thereon to facilitate unloading or loading. That occasionally empty freight cars are run out thereon, and are left there to be loaded with freight, and, when so loaded, are run down on the main track and into trains and carried away. That there is a large and deep cut just above said station, commencing about one hundred feet above the station office, and extending a long distance up the track. That by reason of the existence of said deep cut it is impracticable for a switch to be run on the westerly side of said main track, at said station, and again connect with said main track at any point above said point 100 feet above said station, without the same should be extended across a deep ravine at great expense, or without said deep cut should be made very much wider. That by reason of these facts it is impracticable to make a switch, or to extend a track out on the said westerly side of said main track at said station, unless the same is made to run about on the site of said track that is in this action claimed by plaintiff to be only a spur. That in all particulars said last-mentioned track is used only in connection with said station and main road, and never separately and independently therefrom. It is admitted that the leases pleaded in the answer were in fact executed as therein set out, and that, if said Central Pacific retained, or has any right to, the premises in controversy, the same has passed to and belongs to defendant McGregor. The price and consideration paid by plaintiff for the land conveyed to him by the Central Pacific Railroad Company by means of the deed hereinbefore referred to was the sum of $450, and no more."

The premises in controversy are not within 200 feet of the main line of the railroad, but are within 200 feet of the track on the west side of the main line, which is "called by the plaintiff a 'spur' or 'side track,' and by the defendant a 'branch railroad.'"

It is not contended that the following words in the above-quoted reservation, viz., "the track of the railroad of said company," included anything except the main line of the road exclusive of side tracks, switches, etc., and therefore the specific point to be determined is the proper meaning of the phrase "branch railroad," as employed by the parties to the deed. If these words in this collocation had any certain, precise, and generally accepted meaning, the case would present no difficulty, for we take judicial notice of the true signification of all English words and phrases, and may resort for aid to any appropriate books of reference. Code Civil Proc. § 1875. But we cannot find this phrase anywhere accurately defined, and although each of the words composing it has a sufficiently exact meaning, the question debated by counsel still remains, whether the idea expressed by the combination embraces something more or something less than the word "railroad" standing by itself; whether, in other words, a branch railroad must be not only a branch of a main line, but must also have all the elements of a separate road, as *termini*, and a freight and passenger traffic between its *termini*, or whether, being a branch of another road, it need have no distinct *termini* or traffic of its own. We find ourselves unable to say, as a general proposition, applicable to all cases, which of these ideas is the correct one, and must therefore hold that the parties to this deed have used a phrase of such ambiguous import that its meaning cannot be determined without reference to the circumstances surrounding them at the date of the transaction. Civil Code, § 1647. Looking, then, to the surrounding circumstances, and especially to the fact that this branch or spur on the west side of the main track, at Clipper Gap station, constructed and in use at the date of the deed, was the only piece of road within the tract conveyed that could satisfy these words of the reservation: "Branch railroad now constructed," and considering that while the whole price of the tract conveyed was only $450, the cost of this section of railroad was at least $2,500, we are forced to the conclusion that by the words "branch railroad now or hereafter constructed" the parties to this deed intended to and did include the branch or spur referred to, and that the superior court did not err in its decision.

Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

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78 Cal. 263

WILHOIT *et al.* *v.* BRYANT *et al.* (No. 12,692.)

(*Supreme Court of California.* February 25, 1889.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—SCHEDULE—INTEREST OF ASSIGNEE.

A debtor excepted from an assignment for the benefit of creditors all property "exempt by law from attachment and execution." In a schedule, made a part of the assignment, mention was made of a quarter section of land "incumbered by a homestead filing," and described as "the exempt real property" of the debtor, "the same being the homestead property of the within assignor, valued at $5,000." *Held* that whether the value placed upon such quarter section was correct or not, the purpose of the assignor was to except from the assignment the whole of such land, and no interest in it passed to the assignees.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; A. VAN R. PETERSON, Judge.

R. E. Wilhoit *et al.*, assignees of M. E. Bryant, insolvent, sued Bryant *et al.* to subject certain real estate claimed by Bryant as a homestead to the assignment. Defendants' demurrer was sustained, and plaintiffs appeal.

J. C. Campbell, for appellants. *J. C. Byers* and *P. S. Wilkes*, for respondents.

BELCHER, C. C. The defendant M. E. Bryant, being insolvent, made an assignment for the benefit of his creditors, under the provisions of the Civil Code, §§ 3449-3473, and the plaintiffs were his assignees. The assignment was of "all his real estate, personal property, chattels, book-accounts, choses in action, and property of every name, nature, and description, wheresoever the same may be situate, save and except such property, land, tenements, and hereditaments, and all as are exempt by law from attachment and execution, as is fully described and set forth in the schedule hereto annexed, and made a part of these assignments, marked 'Schedule A.'" The schedule describes the several parcels of real property owned by the assignor, and, among others, "the S. E. quarter of section 17, all in township 4 N., R. 8 E., M. D. M.," and adds: "Said lands are incumbered as follows: By three mortgages, * * * and the S. E. quarter of sec. 17 is incumbered by a homestead filing of the within assignor." Then, after giving a list of the personal property, it says: "The following is a list of the exempt real property of the within assignor: The S. E. quarter of section 17 in Tp. 4 N., R. 8 E., M. D. M., the same being the homestead property of the within assignor, valued at $5,000."

The plaintiffs, after setting out in their complaint a copy of the assignment and schedule, and all the facts necessary to make the assignment valid under the provisions of the Code, proceed to allege that defendant Bryant conveyed to them the south-east quarter of said section 17, "subject to a certain homestead theretofore filed upon the same" by him, "to the extent and value of five thousand dollars, and no more;" "that said real property did on said 16th day of February, 1886, [the date of the assignment,] and does now, greatly exceed the sum of five thousand dollars in value, and is of the value of eleven thousand dollars, or thereabouts;" "that all of the property of said Bryant that has come into the hands of these assignees, or of which they have any knowledge, including the property herein described, will not be sufficient to pay the creditors of said Bryant in full." Wherefore they pray that the court appoint three disinterested freeholders "to appraise and set aside to said Bryant, from said land herein described, his land as a homestead herein, of the value of five thousand dollars; and that plaintiffs be authorized and permitted to sell the remaining portion of said land under the provisions of their said deed aforesaid;" and further, that the court order and decree that "defendants have no right, title, or interest in or to any of the land or premises herein, save and except the portion thereof that may be set aside to said Bryant as his said homestead." A general demurrer was interposed and sustained to the complaint, and from the judgment thereupon entered against them the plaintiffs have appealed.

It is argued here for appellants that under the assignment made to them they took as trustees, and now hold the title to six-elevenths of the quarter section in question; and that their action is in the nature of an action for partition. In this connection it may be observed that the averment in the complaint is that the property at the time of the assignment greatly exceeded in value the sum of $5,000, and is (about two years afterwards) of the value of $11,000, or thereabouts. There is nothing in this to show what the aggregate value of the property was when the assignment was made, or what interest, if any, the assignees then took in it. We cannot, therefore, know or assume that the value then was what it is now stated to be.

But, however this may be, it is contended for respondents that plaintiffs took no interest in the quarter section under their deed; and this contention, we think, must be sustained. The assignment was voluntary. The assignor could in this way turn over for the use of his creditors as much or little of his property as he pleased. It is true, the Code required him to make a full and true inventory of all his property, whether exempt or not exempt from execution, (section 3461,) and, if he failed to do so, the right of his creditors to proceed against him was in no way impaired. But neither the assignees nor creditors could claim any property under the assignment which was not in fact deeded to them. Now, the deed in this case excepts from its operation all property "exempt by law from attachment and execution," and the schedule, which is made a part of the deed, mentions the quarter section in question as "incumbered by a homestead filing" of the assignor, and describes it as "the exempt real property" of the assignor, "the same being the homestead property of the within assignor, valued at $5,000." The value named, whether correct or not, was intended, as we construe the language, to be of the whole quarter section, and not of some fractional interest therein, and the purpose of the grantor was to have the whole quarter section excepted from the operation of the deed. This being so, no interest in the quarter section passed to the assignees, and the demurrer was therefore properly sustained.

This disposes of the whole case and it is unnecessary, therefore, to consider the other question discussed by counsel.

The judgment should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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80 Cal. 397

DE NECOCHEA *v.* CURTIS. (No. 12,724.)

(*Supreme Court of California.* February 23, 1889.)

1. IRRIGATION—APPROPRIATION OF WATER—SUBSEQUENT PATENTEE.
   The act of July 16, 1866, (14 U. S. St. at Large, 253,) provided that when rights to the use of water for mining, agricultural, and other purposes have vested, and are acknowledged by local custom and laws, the possessors of such rights shall be protected, and the right of way, for construction of ditches, confirmed; and the amendatory act of July 9, 1870, (16 U. S. St. at Large, 218,) provided that patents granted or pre-emptions and homesteads allowed shall be subject to vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights. *Held*, that the right acquired by plaintiff by appropriation after the passage of the act of 1866 is valid, and will be protected as against defendant, who afterwards obtained title to the land from the United States.
2. SAME—POSTING NOTICE.
   The fact that plaintiff did not post or record the notice of appropriation required by Civil Code Cal. § 1415, did not invalidate his right under section 1418, which provides that "by a compliance with the above rules the claimant's right to the use of the water relates back to the time of posting," and section 1419, providing that "a failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant." As plaintiff actually diverted the water to his land, and applied it to useful purposes, he acquired the right to its use as against defendant, who showed no compliance on her part with the provisions of the Code.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; R. E. ARICK, Judge.

Action by Jose Maria De Necochea against Minerva Curtis, to restrain the diversion of water flowing on plaintiff's land. Judgment for defendant. Plaintiff appeals.

Hunsaker, Britt & Lamme, for appellant. *Leach & Parker*, for respondent.

BELCHER, C. C. This action was brought to restrain the defendant from diverting the water flowing to and upon the plaintiff's land. The court below gave judgment for the defendant, and the plaintiff appealed.

The facts, as found by the court, are in substance as follows: The plaintiff is the owner of a tract of land in San Diego county, containing 160 acres, and extending across his land is a canyon or ravine, in which a natural stream of water flows at all times, when not prevented by artificial means. This stream has its source in a large spring issuing from the earth about half a mile distant from plaintiff's land. Some time about the year 1880, plaintiff, in order to prevent the waste and loss of water, consequent upon its flow in its natural channel down the canyon, constructed a ditch from the spring to his land, and diverted the water of the spring into his ditch, and thereby conducted it to and upon his land. From that time until the defendant diverted the water from his ditch, plaintiff used it for domestic purposes and the watering of stock, and, at seasons of the year when irrigation of crops was necessary and proper, for irrigating his land. On a part of his land he has fruit trees and vines growing, which will suffer injury, and the productiveness and value of the land will be reduced, if he is deprived of the use of this water.

The tract of land, containing 80 acres, on which the spring in question is located, was public land in 1885. During that year defendant settled upon this tract, and has since acquired title to it under the pre-emption laws of the United States. Shortly after her settlement, and in the same year, defendant constructed a ditch, and therein diverted the waters of the spring upon her tract of land, to be there used for the purposes of irrigation. Plaintiff objected to this appropriation by defendant, and by his agents entered upon defendant's land, and restored the flow of water from the spring to his own ditch. From that time a controversy as to the right to the use of the water was kept up between the parties till the summer of 1887, when defendant turned the same upon her own land, and entirely diverted it from the plaintiff's land. Defendant has a number of fruit trees, vegetables, etc., upon her tract of land, which have been grown by means of irrigation with the waters of the spring, and such trees and other crops will suffer injury if defendant is deprived of the use thereof.

The question arising from these facts is: Did the defendant, when she obtained the title to her land, thereby acquire a right to the exclusive use of the water of the spring, unaffected by the prior appropriation thereof by plaintiff? From the time of the organization of the government of this state, it has been customary for persons to go upon the public lands, and to construct ditches, and appropriate waters flowing thereon for mining, manufacturing, agricultural, and other useful purposes; and the right to the water so appropriated, as against any subsequent appropriator, not having rights derived from the government, has been recognized and upheld by the courts. *Irwin* v. *Phillips*, 5 Cal. 140; *Hill* v. *King*, 8 Cal. 336; *Ortman* v. *Dixon*, 13 Cal. 33; *Lobdell* v. *Simpson*, 2 Nev. 274; *Barnes* v. *Sabron*, 10 Nev. 217. And in order to make a valid appropriation, before the adoption of the Codes, no notice of the claim was required to be posted or recorded. It was sufficient that the water was actually appropriated, and used for the intended purpose, before any one else intervened, and claimed a right to it.

On the 16th of July, 1866, an act was passed by congress, the ninth section of which provided "that whenever, by priority of possession, rights to the use of water for mining, agricultural, manufacturing, or other purposes have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same, and the right of way for the construction of ditches and canals for the purposes aforesaid is hereby acknowledged and confirmed." 14 U. S. St. at Large, 253.

On the 9th of July, 1870, the act of July 16, 1866, was amended, and it was, among other things, provided that "all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights, as may have been acquired under or recognized by the ninth section of the act of which this act is amendatory." 16 U. S. St. Large, 218.

In *Jennison* v. *Kirk*, 98 U. S. 456, the court, speaking by Mr. Justice FIELD of the section above quoted, said: "The object of the section was to give the sanction of the United States, the proprietor of the lands, to possessory rights which had previously rested solely upon the local customs, laws, and decisions of the courts, and to prevent such rights from being lost on a sale of the lands."

In *Broder* v. *Water Co.*, 101 U. S. 276, the court, speaking by Mr. Justice MILLER of the same section, said: "It is the established doctrine of this court that rights of miners, who had taken possession of mines, and worked and developed them, and the rights of persons who had constructed canals and ditches to be used in mining operations and for purposes of agricultural irrigation, in the region where such artificial use of the water was an absolute necessity, are rights which the government had, by its conduct, recognized and encouraged, and was bound to protect, before the passage of the act of 1866. We are of opinion that the section of the act which we have quoted was rather a voluntary recognition of a pre-existing right of possession, constituting a valid claim to its continued use, than the establishment of a new one." And in that case it was held that rights acquired by appropriation before the passage of the act were protected as against one who obtained title to the land from the government after its passage.

It has also been held that where rights to water were acquired by appropriation after the passage of the act of 1866, they were valid, and must be protected as against one who subsequently obtained title to the land from the government. *Osgood* v. *Mining Co.*, 56 Cal. 571; *Farley* v. *Land Co.*, 58 Cal. 142; *Himes* v. *Johnson*, 61 Cal. 259; *Judkins* v. *Elliott*, 12 Pac. Rep. 116; *Ware* v. *Walker*, 70 Cal. 591, 12 Pac. Rep. 475.

It is, however, contended for respondent that plaintiff never acquired any valid right to the water flowing from the spring, because he never posted or recorded a notice of his attempted appropriation, as required by section 1415 of the Civil Code. We do not think this contention can be sustained. It is not alleged in the pleadings, or found by the court, that either of the parties ever complied with the provisions of the section referred to; and, in the absence of such an allegation and finding, we may assume that they did not. But the only effects resulting from a compliance, and from a failure to comply, with the provisions of the Code are declared in sections 1418, 1419 as follows:

"Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted.

"Sec. 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith."

It must be held, therefore, that, notwithstanding the plaintiff failed to post and record the requisite notice, he still acquired a right to the use of the water when he actually diverted it to his land, and applied it to useful purposes. And this right was good, and must be sustained as against the defendant and all the world until a superior right is shown. But no superior right was shown by the defendant, or could be, without a compliance on her part with the provisions of the Code.

It results that the judgment should be reversed, and the cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial.

MCFARLAND, J., (*concurring.*) I concur in the judgment because defendant, in her answer, claims the water in contest only as an appropriator. As to what the law would be between one claiming as a riparian owner against a mere appropriator who had not complied with the Code I express no opinion.

78 Cal. 273

McLENNAN *v.* McDONNELL. (No. 12,606.)

(*Supreme Court of California.* February 26, 1889.)

1. VENDOR AND VENDEE—BONA FIDE PURCHASER—NOTICE.
Plaintiff and C. purchased land, plaintiff being named as grantee in the deed, by direction of C., who had exclusive possession of the land until December 28, 1885. June 5, 1884, C., for a valuable consideration, deeded the land to plaintiff, but the deed was not recorded, and December 28, 1885, he deeded it to defendant. Plaintiff testified that in August, 1885, when defendant requested plaintiff to renew a mortgage for $700, which plaintiff owed defendant, the latter requested plaintiff to include the debt of C. to defendant, which plaintiff refused to do, saying that he had "bought C.'s interest, and could show it to him in black and white if he wanted it." Defendant admitted that such conversation took place. *Held* sufficient evidence to justify the court in finding that defendant had notice of plaintiff's deed.

2. DEED—VALIDITY—DELIVERY.
Plaintiff testified that the unrecorded deed was given him in his own house by C. the day it was made; that it was drawn by a third person, and plaintiff requested C. to sign it, which the latter did, and left it on the plaintiff's table, from which plaintiff picked it up and put it away. *Held* a sufficient delivery.

3. SAME—DESCRIPTION OF INTEREST—WORDS OF LIMITATION.
Under the granting clause in the deed of "all the right, title, and interest of the said party of the first part, the same being a one-half undivided interest in and to the following described property," the grantee takes all the right, title, and interest of the grantor, and the words "being a one-half undivided interest" are not words limiting the extent of the previous terms of conveyance, or excepting out any interest conveyed by the previous terms.

4. QUIETING TITLE—DECREE—CANCELLATION OF DEED.
In an action to quiet title the court found that the deed from C. to defendant was in fact a mortgage, and in the judgment it was ordered and decreed that said deed or mortgage "is as against the plaintiff null and void, and that the same be and is hereby canceled and made of none effect whatsoever as against said plaintiff." *Held*, as the court had found that defendant had notice of C.'s deed to plaintiff, it was immaterial whether C.'s deed to defendant was regarded as a conveyance of title or a mortgage, and defendant could not complain of the finding.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Action by John McLennan against Alexander McDonnell to quiet title. Judgment for plaintiff. Defendant appeals.

J. G. McCallum, for appellant. *Robert Hardie*, for respondent.

PATERSON, J. Plaintiff and Campbell purchased the land in controversy from Baxter, who was then the owner thereof, on December 15, 1883. In the deed from Baxter, by direction of Campbell, plaintiff alone was named as grantee. It is admitted that plaintiff, under the deed, was trustee for Campbell to the extent of Campbell's interest. Campbell had exclusive possession of the land from the date last named until December 28, 1885. Plaintiff and Campbell were brothers-in-law, and plaintiff permitted the latter to occupy and cultivate the land at his own expense and risk, and for his own benefit, without rent. On the 5th day of June, 1884, Campbell made, executed, and delivered to plaintiff a grant, bargain, and sale deed of the land in controversy. The consideration named therein is the sum of $1,600, receipt whereof is acknowledged. This deed was neither acknowledged nor recorded. On December 28, 1885, Campbell made, executed, and delivered a warranty deed to defendant, purporting to convey all the land in controversy to the defendant. The consideration expressed therein is $1, but the real consideration was a prior indebtedness of $3,035, which Campbell then owed to the defendant.

The principal points in the case depend on questions of fact. The court found "that prior to the 29th day of December, 1885, and prior to the execution by Campbell to defendant of the alleged conveyance of said 29th day of December, 1885, the said defendant had full notice and actual knowledge of the fact that the said Campbell had for a valuable consideration transferred, sold, and conveyed to plaintiff all his (Campbell's) right, title, and interest in and to said land and premises, and every part thereof; that said notice was given by plaintiff to defendant subsequent to June 5, 1884." Appellant attacks this finding on the ground that it is not supported by the evidence. We think this objection is not well taken. Plaintiff testified that he had a conversation with defendant in August, 1885, in which the defendant requested plaintiff to renew a mortgage securing payment of $700 from plaintiff to defendant, and also to include in the new mortgage Campbell's indebtedness to defendant. Continuing his testimony, plaintiff said: "I told him I could not stand that,—my property could not stand that, and I refused to do so. * * * He was telling me of Campbell's circumstances; * * * that he lent Campbell considerable money. * * * He was referring that I should help him out; * * * that I should take on Campbell's indebtedness. * * * I told him I would not do it. I told him how it was; that I bought Campbell's interest, and could show it to him in black and white, if he wanted it." There is something in the testimony of the defendant, too, which seems to corroborate this statement of the plaintiff. In the transcript of his testimony the following question and answer appear: "*Question.* Did not shortly after the agreement—not long after that agreement was made by which you—upon which you lent the $700—did you not meet Mr. McLennan, and want him to give a new mortgage, and include in it the indebtedness of Campbell to you, and he refused to do so, telling you that he owned the whole property? *Answer.* I think I did; yes, sir." Upon this testimony we think the court was justified in finding the fact of notice as quoted above. It is therefore unnecessary to consider the effect of the Baxter deed on the question as to how far it was constructive notice.

It is further claimed by appellant that there is no evidence to justify the finding of the court that the deed from Campbell to plaintiff was delivered to plaintiff. This contention is as weak as the first one. Plaintiff testified, when shown the deed referred to, that it was given to him in his own house by Campbell on the day it was made, (the 5th of June, 1884,) and that it had been in his possession ever since; that the deed was drawn up by Mr. Shaw; that plaintiff requested Campbell to sign it, which he did, and after some general conversation as to the transaction, in which Campbell stated that the land was then in plaintiff's possession, Campbell signed the deed, and left it lying on plaintiff's table, from which plaintiff picked it up and put it away. Aside from any presumptions arising from plaintiff's possession of the deed, this evidence is sufficient to sustain the finding of the court.

It is claimed that there is a conflict in the findings. It is said that the first finding, namely, "that the plaintiff was the owner of the entire property," is contradicted by finding 4, which shows that Campbell was the owner of 2637-4435 thereof. This contention is based upon the construction which appellant gives the granting clause of the deed from Campbell to plaintiff. It is claimed that under this deed plaintiff took only an undivided one-half of the land in controversy. The language of the deed is as follows: "Witnesseth, that the said party of the first part, for and in consideration of the sum of $1,600, * * * by these presents does grant, bargain, and sell, convey, and confirm unto the said party of the second part, and to his heirs and assigns forever, all the right, title, and interest of the party of the first part, the same being a one-half undivided interest in and to the following described real property," etc. This deed clearly conveys "all the right, title, and interest" of Campbell. The words "being a one-half undivided interest" are "not words limiting the extent of the previous terms of conveyance, or excepting out any interest conveyed by the previous terms." *Dodge* v. *Walley*, 22 Cal. 228; *Wilcoxson* v. *Sprague*, 51 Cal. 640.

The court found that the deed from Campbell to defendant of December 29, 1885, was in fact a mortgage, and in the judgment it is ordered, adjudged, and decreed that said deed or mortgage "is, as against the plaintiff, null and void, and that the same be, and is hereby, canceled and made of none effect whatsoever as against said plaintiff." It is claimed by appellant that the judgment should be at least "modified so that defendant's mortgage may not be canceled, and that he may not be enjoined from a hearing upon it as a mortgage or otherwise." But the court, having found that defendant had full notice, actual knowledge, of Campbell's deed to plaintiff, it is immaterial whether the deed from Campbell to defendant be regarded as a conveyance of title or as a mortgage. As between plaintiff and defendant the mortgage or conveyance is invalid, and can never be enforced by the defendant. He will be estopped by the judgment from claiming anything under it. The same result would follow from the judgment quieting title, if the court had not ordered the cancellation of the mortgage. *Jackson* v. *Lodge*, 36 Cal. 54; *Estate of Pico*, 56 Cal. 420; *Parnell* v. *Hahn*, 61 Cal. 131.

Judgment and order affirmed.

We concur: McFARLAND, J.; WORKS, J.; THORNTON, J.; SHARPSTEIN, J.

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78 Cal. 278

WEYANT *v.* MURPHY. (No. 12,500.)

(*Supreme Court of California.* February 26, 1889.)

MORTGAGES—FORECLOSURE—REDEMPTION.

Two tracts of land were sold by the mortgagor, the purchaser of each assuming a share of the debt. One tract was conveyed to plaintiff subject to mortgages. Defendant, the purchaser of the other, paid the amount he had assumed. In foreclosure against both, plaintiff's tract was decreed primarily liable, and was bid in by defendant, under a mistake of law, for less than the amount of the decree. By agreement with the receiver, confirmed by the court, he afterwards raised his bid to the amount of the decree. *Held*, that plaintiff could not redeem from him for any lesser sum.

In bank. Appeal from superior court, El Dorado county; JOHN W. ARMSTRONG, Judge.

Complaint by S. D. Weyant against W. A. Murphy and C. W. Pierce, to redeem certain land from foreclosure sale. Judgment for plaintiff. Defendants appeal.

Freeman, Bates & Rankin, *Grove L. Johnson*, and *Beatty, Denson & Oatman*, for appellants. *Clinton L. White* and *McKune & George*, for respondent.

PATERSON, J. The material facts of this case are as follows: One Segur, who was the owner of two tracts of land, which may be designated respectively as the "El Dorado Tract" and the "Sacramento Tract," mortgaged them both to Mrs. Alice Scott, to secure the payment of $16,000. Subsequently Segur sold and conveyed the El Dorado tract to certain parties for $8,000. Of this sum $1,000 only was paid in cash. The grantees agreed to pay the remaining $7,000 to Mrs. Scott on account of the principal of said mortgage, which agreement was expressed in the conveyance. Subsequently the grantees conveyed the property to other parties upon like terms, viz.: The second set of grantees paid the sum of $1,000 and assumed the payment of $7,000 of the principal of the Scott mortgage; and this agreement was expressed in the deed. This second set of grantees conveyed to the plaintiff by a deed which expressed a consideration of $1,000, and contained the following clause: "Subject to all mortgages now existing against said above-described land." Neither the plaintiff nor any of his grantors ever paid the $7,000 above mentioned, or any part thereof.

The Sacramento tract was sold and conveyed by Segur to the defendant for the sum of $18,000. Of this sum, half was paid down, and the defendant agreed to paid the remaining $9,000 to Mrs. Scott on account of the principal of her mortgage. This agreement was performed by the defendant. He paid Mrs. Scott the $9,000 with the accrued interest thereon, leaving due to her the $7,000, and accrued interest thereon, which had been assumed by the plaintiff's grantors.

In this condition of affairs Mrs. Scott commenced a suit to foreclose her mortgage for the balance due to her, joining both the parties here as defendants in such suit, and in due course a decree of foreclosure was entered adjudging that there was due to the plaintiff in said foreclosure suit the sum of $8,756.54, and decreeing that the two tracts be sold to satisfy the same, by a receiver, who had been appointed by the court. But in view of the fact that the defendant here had paid such portion of the common burden as he had agreed to pay, and that the grantors of the plaintiff had not paid the portion which they had agreed to pay, and subject to which the plaintiff took his tract, the court in the foreclosure suit very properly decreed that the El Dorado tract be sold first. This was an adjudication that the burden of the Scott mortgage should rest primarily upon the tract of the plaintiff here.

As a matter of course, it was important to the defendant to see that the full amount of the judgment was bid upon this tract. But by a stupid blunder he did not bid that amount, but only the sum of $2,500, for which sum the property was struck off to him. Within a few days he was informed of the mistake he had made, and he then applied to the receiver for leave to increase his bid. This the receiver allowed him to do, and reported the sale to the court as for the amount of the increased bid, and the court confirmed the same. The defendant thereupon paid the full amount of the increased bid, viz., the sum of $8,756.54. We think that the evidence shows without substantial conflict that this sum was paid by the defendant here, and received by the receiver as and for the purchase price of the El Dorado tract, and not, as found by the court, as "a voluntary payment, not in pursuance of his bid, but to prevent a sale of the balance of said land."

The plaintiff tendered to the defendant the $2,500, for which the property was struck off at the auction sale, with the necessary percentage, etc.; and, this being refused, he brings the present action to be allowed to redeem for the sum as tendered. The value of the El Dorado tract is shown to be seven or eight thousand dollars.

It will be observed that the defendant had a perfect right to bid in the first instance the sum to which he increased his bid, and which he afterwards paid for the property. His not doing so was the result of a mistake of law on his part, and we think his subsequent action and that of the receiver was in perfect good faith, and not with any fraudulent intent whatever, but simply to rectify the mistake, and to do what he had a perfect right to do in the first instance. If the mistake had not been corrected by the parties, the result would be to relieve the plaintiff's property of the burden which was put upon it primarily by the decree of foreclosure, and to cast the same upon the defendant. The plaintiff appeals to a court of equity to assist him to profit by the defendant's mistake. We think the court should not lend its aid for any such purpose. He is entitled to redeem the property. But as a condition of this relief the court will require him to assume the burden which was properly placed upon him by the decree of foreclosure; that is to say, as a condition of relief, he will be required to pay to defendant, in addition to the amount placed in bank to the credit of defendant, the difference between the sum which he tendered and deposited and the amount due under the decree of foreclosure. It is immaterial that the plaintiff is not legally liable to the defendant for this difference. In imposing a condition a court of equity is not bound down to the strict legal rights of the parties, but will take into consideration all the circumstances, in order to arrive at the justice of the case. *Johnston* v. *Savings Union*, 16 Pac. Rep. 753.

The judgment and order are reversed, and the cause is remanded for a new trial in accordance with the views herein expressed.

We concur: SHARPSTEIN, J.; WORKS, J.; MCFARLAND, J.

78 Cal. 283

HAUSMAN *v.* HAUSLING. (No. 12,785.)

(*Supreme Court of California.* February 26, 1889.)

EVIDENCE—SELF-SERVING DECLARATIONS—INADMISSIBILITY.

In an action to compel defendant to convey to plaintiff an interest in a mining claim which defendant had bought under foreclosure of his lien on said claim, plaintiff's evidence was that defendant had agreed to buy an interest in the claim, and a deed of such interest had been given by plaintiff to defendant, and that the latter had tried to borrow money on it. Defendant testified that the deed was given as a further security for a debt due him, and the court found that the deed was made to enable defendant to borrow money on the mine to pay his judgment enforcing his lien against the mine. Letters from defendant to a third person were introduced to explain why he attempted to mortgage the claim. *Held*, that their admission was prejudicial error, as under Code Civil Proc. Cal. § 1870, subd. 2, a party cannot strengthen his case by his own declarations. They may be used against him, but not for him.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Bill in equity by Frederick H. Hausman against Ferdinand M. Hausling, to compel the defendant to convey to plaintiff an undivided nine-tenths part or interest in a mining claim. From a judgment for defendant and an order denying a new trial, plaintiff appeals. A former action was brought by Hausling against Hausman to foreclose a laborer's lien, and the property was sold under the decree therein entered, Hausling becoming the purchaser. The decree was affirmed on appeal. For former opinion, see 14 Pac. Rep. 856.

Otto Tum Suden and *W. B. Lardner*, for appellants. *J. M. Fulweiler* and *C. A. & F. P. Tuttle*, for respondents.

BELCHER, C. C. This is a suit in equity to compel the defendant to convey to plaintiff an undivided nine-tenths part of an interest in a certain mining claim, situate in Placer county. The court below gave judgment for the defendant, and denied a motion for new trial, and the plaintiff appealed from the judgment and order.

The facts of the case, as shown by the pleadings, are substantially the same as those set forth in the affidavits which were under review in *Hausling* v. *Hausman*, 73 Cal. 276, 14 Pac. Rep. 856. It need only be added that defendant, by his answer, denied that he ever agreed to purchase from the plaintiff a one-tenth interest in the mining claim, or ever became liable to pay any part of the losses resulting from working the claim, or that the deed from plaintiff to him was made upon the terms and conditions stated in the complaint, and he alleged that the deed was made "to prevent other creditors from attaching plaintiff's property, and as a further security upon said indebtedness of $1,425 due as aforesaid to defendant from plaintiff." At the trial the plaintiff was a witness and testified to all the facts as alleged in his complaint. He also called three other witnesses, and each of them testified that in the fall of 1885 defendant several times told witness he owned a one-tenth part or share in the mine, and, further, that in the spring or early summer of 1886 defendant had said that he had a deed to the mine from plaintiff, and wished to borrow $1,400, and secure the payment thereof by a mortgage on the mine, and would pay $50 commission to any one who would help him to do so. In defense the defendant's deposition was read in evidence, and in it he stated the facts to be as alleged in his answer, and, among other things, that "the deed of the property was given to me as a further security. * * * I never at any time claimed to be the owner of the property by virtue of the deed made to me by Hausman, but always considered the same as security for the payment of the $1,425 sued for by me, and so always told Hausman." Counsel then offered in evidence two letters written by defendant in April, 1886, "solely as explaining why the defendant had sought to mortgage the claim, as testified to by plaintiff's witnesses, and as explanatory of the deed defendant held of the mine." Counsel for plaintiff objected to the letters on the ground that they were incompetent, immaterial, and irrelevant, but the court overruled their objections, and admitted them in evidence. One of the letters reads as follows: "SAN FRANCISCO, April 25, 1886.

"*John M. Fulweiler, Auburn, Cal.*—DEAR SIR: If you can find me a party in Auburn, or any place, who will take a mortgage on the 31 property for the amount of my claim, ($1,425,) I will pay you $50 for doing so. I am anxious to leave here as soon as possible. Address me and send all papers to care of M. Koenig, No. 1527 Dupont street, San Francisco.

"Respectfully yours, F. M. HAUSLING."

The other letter was dated April 12th, and addressed to the same party. Among other things it says: "A deed has been sent up for record of all Hausman's rights, title, and interest to me, and as it is the wish of those interested to stop all further proceeding, I want the case of Luce *et al.* dismissed, so as to avoid any further expense. Concerning my suit, you will take no further steps whatever. Let it stand *in statu quo.*" The court found that the defendant never at any time made the contract alleged in the complaint to purchase one-tenth, or any part, of the mine, and as to the deed which he received from the plaintiff as follows: "(8) The deed mentioned in paragraph eleventh of the complaint was made for the purpose of enabling the defendant to borrow money on the mine to pay his judgment enforcing a lien on the mine, but he was unable to do so, and enforced said judgment by a sale of the mine on execution."

It is entirely clear that the letters were not admissible in evidence, and that the objection to them should have been sustained. A litigant is not permitted to strengthen his case by his own declarations, whether written or verbal. They may be used against him, but not for him. Code Civil Proc. § 1870, subd. 2. Nor can we say that the error was harmless, as claimed for respondent. All errors are presumed to work injury to the party against whom they are committed, unless it clearly appears that no injury could have resulted. This does not appear. On the contrary, the finding as to the deed, of which the letters were intended to be "explanatory," seems not to be in accord with the averment of the answer or the testimony of the defendant, or any other testimony found in the record. It must therefore have been based upon the letters, and without them a different conclusion, so far as we can see, might have been reached.

The other points do not require extended notice. We think the findings sufficiently covered the issues presented, and that there was no error in refusing to strike out a part of defendant's deposition.

We advise that the judgment and order be reversed, and cause remanded for a new trial.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

78 Cal. 270

HOWES *v.* ABBOTT, Auditor. (No. 12,880.)

(*Supreme Court of California.* February 26, 1889.)

COUNTIES—COMPENSATION OF COUNTY SUPERVISORS—MILEAGE.

The California county government act (St. 1883, p. 299) provides that in counties of the thirty-third class supervisors shall receive $5 *per diem* and 10 cents per mile in traveling to and from their respective residences to the county seat. *Held*, that during the sessions of the board the supervisors officially reside at the county seat and are not entitled to mileage each day, but only to one mileage each way for the session.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Application by W. L. Howes for a writ of mandate to Eugene Abbott, auditor of Tuolumne county, to draw a warrant in favor of petitioner for certain fees and mileage earned by him as supervisor of said county. The writ was refused, and petitioner appeals.

F. D. Nichol and *G. W. Nichol*, for appellant. *F. P. Otis* and *E. A. Rodgers*, for respondent.

BELCHER, C. C. Application for a writ of mandate. The court below refused to grant the writ, and thereupon this appeal was taken.

The facts are these: The appellant, Howes, was a supervisor, and the respondent, Abbott, was the auditor of the county of Tuolumne during the year 1887. The board of supervisors of the county held a special session, lasting two days, in June, and a regular session, lasting eight days, in July of that year. The appellant attended each meeting of the board, and in doing so traveled from his residence to the place of meeting and back, a distance of 12 miles, each day. He claimed as compensation for his attendance $5 per day, making $50, and mileage at the rate of 10 cents per mile, for the aggregate number of miles traveled by him in going to and from the meetings, making $12. A claim for this compensation was allowed and ordered paid by the board of supervisors, and thereupon he presented a claim to the respondent and demanded a warrant therefor on the county treasurer. The respondent offered to draw a warrant on the treasurer for the $50, and one mileage for the special and one for the regular session, making in all $52.40, but refused to draw for the balance of the mileage. The appellant declined to accept the sum offered, and thereupon commenced this proceeding to compel respondent to draw his warrant for the full amount claimed by him and allowed by the board. Upon these facts the court found, as a conclusion of law, that appellant was entitled to receive only one mileage at each session of the board, and for that reason the writ was denied.

Whether the court was right in its conclusion or not must be determined by the statute commonly known as the "County Government Act." St. 1883, p. 299. By that act the counties of the state are divided into 48 classes, and separate provision is made for the payment of supervisors in each class. The provision for counties of the thirty-third class—in which Tuolumne falls—is as follows: "Supervisors shall receive five dollars *per diem* and ten cents per mile in traveling to and from their respective residences to the county-seat. All of which compensation in the aggregate shall not exceed four hundred dollars per annum each."

The whole compensation claimed by appellant, together with that already received by him during that year, did not amount to $400; and it is argued that as the provision contains no express restriction to one mileage for each session, it should be construed to allow mileage for each day. We do not think this construction authorized. Statutes should be so construed, if possible, as to express the intention of the legislature. The term "mileage" is defined to mean "a compensation allowed by law to officers for their trouble and expenses in traveling on public business." Bouv. Law Dict.

The law requires a supervisor to attend all regular and special sessions of the board, and to be present and assist the other members in transacting such business as lawfully comes before them. And while engaged in the performance of these duties his official residence is at the county seat. In going to a place of meeting at the beginning of a session, and in returning to his home at the end of it, he is evidently "traveling on public business." But, if during a session he makes daily visits to his home, such visits must be deemed to have been made for his own convenience, comfort, or economy, or to attend to his own private affairs, and not on public business.

Legislators are allowed $8 per day, during the session of the legislature, "and 10 cents per mile for each mile of travel to and from their residences and the place of holding the session." Pol. Code, § 266. But if a legislator should go to his home every night and back every morning, during a session of the legislature, no one would expect him to claim mileage for each day, or, if he should claim it, that it would be allowed.

In our opinion the legislature did not intend to allow supervisors, in counties of the thirty-third class, more than one mileage for each session of the board, and the fact that no express provision to that effect is found in the statute cannot aid the appellant. The argument based upon the fact that the compensation of supervisors in some of the classes is expressly limited to one mileage for each session is without weight. An inspection of the statute will show that in the 48 different provisions for the compensation of supervisors scarcely any two of them are exactly alike. They appear to be independent provisions, drawn to meet supposed local wants, and as such we think they should be construed.

We advise, therefore, that the judgment be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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74 Cal. 273

ROYLANCE *et al. v.* SAN LUIS HOTEL CO. *et al.* (No. 12,000.)

(*Supreme Court of California.* December 2, 1887.)

1. APPEAL—REQUISITES—NOTICE—SERVICE.
   Plaintiffs recovered a judgment against certain of the defendants, and it was adjudged that "they take nothing against the defendant * * * company, and that their complaint, in so far as it seeks to foreclose a lien, is hereby dismissed," etc., and "that the defendant * * * company, do * * * recover from * * * plaintiffs its costs," etc. Plaintiffs then served upon that defendant the following notice: "Plaintiffs * * * appeal from the judgment * * * dismissing said action as to the defendant * * * company and for recovery by said * * * defendant from plaintiffs * * * costs of * * * action. The plaintiffs appeal from the whole of said judgment, and from every part thereof." *Held*, to include only an appeal from that part of the judgment dismissing the complaint, and for the recovery of costs against the plaintiffs, and the appeal should not be dismissed for failure to serve notice of appeal upon the other defendants.
2. MECHANIC'S LIEN—PROCEEDINGS TO PERFECT—FILING CLAIM BEFORE COMPLETION OF BUILDING.
   Section 1187, Code Civil Proc. Cal., regulating mechanics' liens, provides that "every original contractor, within sixty days after the completion of his contract, and every person save the original contractor, * * * must, within thirty days after the completion of any building, * * * file for record * * * a statement," etc. *Held*, that a claim of lien filed before the completion of the building was premature, and could not be enforced.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

This action is to foreclose a mechanic's lien. Appellants, plaintiffs, were material-men, and furnished material to be used in the construction of the hotel of the defendant, the San Luis Hotel Company. These materials were furnished directly to the defendants, who were doing work in the hotel for the original contractors. The complaint showed that the claim of lien was filed before the completion of the building. The following is the judgment of the court below: "This cause coming on regularly to be tried, * * * the court, having heard and considered the allegations and evidence of the respective parties, did * * * make and file its findings of fact and conclusions of law herein, and ordered judgment to be entered herein, that the plaintiffs take nothing herein against the defendant San Luis Hotel Company, and that the plaintiffs' complaint, in so far as it seeks to foreclose a lien, be dismissed, and that the said hotel company, defendant, have judgment against the plaintiffs for costs, and that the plaintiffs do have and recover from John D. Armstrong and William Armstrong, partners as Armstrong Bros., the sum of," etc. "Wherefore * * * it is ordered, adjudged, and decreed that the plaintiffs take nothing against the defendant, the San Luis Hotel Company, and that the plaintiffs' complaint herein, in so far as it seeks to foreclose a lien, be, and the same is hereby, dismissed out of this court; and it is further ordered and adjudged that the defendant, the San Luis Hotel Co., do have and recover of and from the plaintiff its costs and disbursements herein, now taxed at $20.25."

The following is the notice of appeal: "You will please take notice that the plaintiffs Joseph Roylance, Robert Dalziel, and Frederick Delger, partners under the firm name and style of San Francisco Brass-Works, hereby appeal * * * from the judgment * * * filed and entered in the said superior court on the 21st day of January, 1886, * * * dismissing said action as to the defendant San Luis Hotel Company, and for recovery by said last-named defendant from the plaintiffs of twenty dollars and twenty-five cents ($20.25) costs of said action. The plaintiffs appeal from the whole of said judgment and from every part thereof."

William R. Davis and *Wm. Shipsey*, (*Wm. Lair Hill*, of counsel,) for appellants. *McD. R. Venable* and *C. W. Goodchild*, (*Metcalf & Metcalf* and *F. B. Odgen*, of counsel,) for respondents.

FOOTE, C. As it appears to us, the notice of appeal in this action was intended to embrace only that part of the judgment of the court below which affected the plaintiffs in adjudging that "they take nothing against the defendant, the San Luis Hotel Company, and that their complaint, in so far as it seeks to foreclose a lien, be, and the same is hereby, dismissed out of this court," and "that the defendant, the San Luis Hotel Company, do have and recover from the plaintiff its costs and disbursements, now taxed at $20.25." It was not intended to include in the notice any appeal from that portion of the judgment where the plaintiff recovered a personal judgment against Armstrong Bros., for a sum of money. Taking all the terms of the notice of appeal together, it seems to us that the words "said judgment," where they occur in the last clause of the notice, refer not to the whole judgment as rendered by the court, but to that part of it which is set out in the language of the notice preceding the last clause thereof, which language, fairly interpreted, includes only that part of the judgment which affects the hotel company and the plaintiff, but does not include that portion which affects the rights of Armstrong Bros. Therefore the appeal, as taken, should be entertained notwithstanding that the counsel for Armstrong Bros. were not served with notice of the appeal.

But the complaint does not show that the plaintiffs are entitled to enforce any mechanic's lien upon the building of the hotel company; for as alleged in the complaint, the claim of lien was filed on the 13th of October, 1884, and the building was not completed until after that date. Hence, from that pleading itself, it appears that the plaintiffs prematurely filed their claim of lien, and according to their allegations could not enforce it. In *Perry* v. *Brainard*, 8 Pac. Rep. 882, it was said:

"The court below found that the lien which was sought to be enforced by the action was filed prior to the completion of the building, and was therefore prematurely filed. The statute reads: 'Every original contractor, within sixty days after the completion of his contract, and every person save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record,' etc. Code Civil Proc. § 1187. It will be seen that the time prescribed by the statute for the filing of the plaintiff's claim was 'within thirty days after the completion of the building.' Under a similar statute, the supreme court of Kansas lately held in two cases —*Davis* v. *Bullard*, 4 Pac. Rep. 75, and *Seaton* v. *Chamberlain*, Id. 89— that a claim so filed was premature, and a lien based thereon could not be enforced. The reasoning of that court commends itself to our judgment, and is much the same as was used here in *Dingley* v. *Greene*, 54 Cal. 335: 'No privity of contract,' said the court, in *Davis* v. *Bullard*, 'exists between the owner of the building and the subcontractor; but the subcontractor's rights are based simply and solely upon his contract made with the contractor. The contractor, and not the owner of the building, is the subcontractor's debtor, and the subcontractor has no right to claim that the building has been completed until the contractor under whom he claims has such right. Under the contract between the owner and the contractor, the owner agrees to pay the contractor a certain sum for constructing the building, and this sum is a fund which may be held under the statutes for the payment, so far as it will go, of all the claims of all the various subcontractors, for work and materials furnished by them to the contractor, who is the principal and head of all; and all the parties entitled to payment or contribution out of this fund should be able to reach the fund, and get their proportionate shares thereof at the same time or within the same period of time. Besides, one subcontractor ought not to be able to reach this fund and appropriate it to the extent of his claim before another subcontractor could reach it; for if the fund should not be sufficient to pay the claims of all the subcontractors, then each subcontractor should be paid only a proportionate share thereof. Now, the amount of all the claims of all the subcontractors can be ascertained only after all the work and materials have been furnished, and after the building has been completed, so far as the contractor is required to complete the same; for the whole of the work may in fact be done by subcontractors only, or the last item of work performed, or materials furnished, may be performed or furnished by a subcontractor. The building, in such a case, would be completed by a subcontractor; and the subcontractor completing the building, or furnishing the last item of work or material therefor, is entitled to his proportionate share of the general fund equally with the subcontractor who furnished the first item of work or material, or any intermediate portion thereof. Of course, when the contractor has furnished, through himself or his subcontractors, all the work and material which he has agreed to furnish, then the building is completed so far as he is concerned, and is also completed so far as all the subcontractors under him are concerned; and the contractor and each of the subcontractors may then file their respective statements for liens, and each will then become entitled to his proportionate share of the fund.'

"Other provisions of our statute go to show that this is the true construction of section 1187. Section 1190 declares that 'no lien provided for in this chapter binds any building, mining claim, improvement, or structure, for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same; or, if a credit be given, then ninety days after the expiration of such credit; but no lien continues in force for a longer time than two years from the time the work is completed, by any agreement to give credit.' It is obvious that if a subcontractor may file his claim before the completion of the building at all, it may very well happen that the building may not be completed until more than ninety days after the claim is filed; and since section 1190 of the Code provides that no lien shall be binding for a longer period than ninety days after the same has been filed, unless proceedings be commenced in a proper court within that time to enforce the same, it follows that under such a construction of section 1187 a suit might be maintained to enforce the lien of a subcontractor before the completion of the original contract. This would not only be to give one subcontractor a preference over another not allowed by the statute, but might subject the owner to suit, and possibly his property to sale, although strictly conforming to his contract. In further harmony with the conclusion that section 1187 fixes a common starting-point for all subcontractors under the same original contractor, is section 1195, which provides that 'any number of persons claiming liens may join in the same action, and when separate actions are commenced the court may consolidate them.' The danger suggested by appellants' counsel to subcontractors in thus holding is not perceived, for the owner who pays to the original contractor with notice that the subcontractor has not been paid will be liable to the lien of the latter, and it is an easy matter for the subcontractor to acquaint the owner with such fact."

Although the views there enunciated are not binding as authority on the point, because of the fact that a rehearing was granted by the court in bank, and the cause was compromised, and the appeal dismissed before it was finally determined, yet the reasoning is sound, and the authorities quoted in point, and, as we think, conclusive; wherefore the judgment appealed from should be affirmed.

BELCHER, C. C., and HAYNE, C., concurred.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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78 Cal. 307

In re TYLER. (No. 11,422.)

(*Supreme Court of California.* March 4, 1889.)

ATTORNEY AND CLIENT—MISCONDUCT—DISBARMENT—JUDGMENT.

In a proceeding before the supreme court of California to disbar respondent as an attorney, under Code Civil Proc. § 287 *et seq.*, the court rendered judgment of disbarment for two years, and until a judgment obtained by a third person for money collected by said attorney should be paid. It was conceded that the court might have disbarred the respondent permanently. *Held*, that the punishment inflicted was within the jurisdiction of the court, and was not void for uncertainty.

In bank.

Application by George W. Tyler to have part of the judgment disbarring him from practice as an attorney at law stricken out. For previous proceedings, see 12 Pac. Rep. 289.

Sol. Heydenfeldt, for applicant. *Edward R. Taylor*, for respondent.

WORKS, J. Proceedings were instituted in this court to disbar the respondent, which resulted in a judgment depriving him of the right to practice as attorney or counselor in any or all of the courts of this state, and that he be suspended from the practice for the period of two years from the date of the judgment, "and until the judgment in favor of J. M. Hogan, against the said respondent, mentioned and described in the accusation, shall be fully satisfied and paid, if the same shall not have been satisfied during such period of two years." The facts upon which this judgment was rendered will be found in 71 Cal. 353, 12 Pac. Rep. 289.

The respondent in that proceeding now moves this court to strike out so much of the judgment as suspends him from the practice until the payment of the Hogan judgment, the two years for which he was suspended having expired. The motion is not based upon any new or additional facts, nor is it claimed that the judgment referred to has been paid in whole or in part, or any excuse shown for not having paid the same. The sole ground upon which relief is sought is that this court had no power or jurisdiction to make an order suspending him for what is claimed to be an indefinite time.

The section of the Code upon which the judgment is based is as follows: "Upon conviction, in cases arising under the first subdivision of section 287, the judgment of the court must be that the name of the party shall be stricken from the roll of attorneys and counselors of the court, and that he be precluded from practicing as such attorney or counselor in all the courts of this state; and, upon conviction in cases under the other subdivisions of that section, the judgment of the court may be according to the gravity of the offense charged,—deprivation of the right to practice as attorney or counselor in the courts of this state permanently or for limited period." Code Civil Proc. § 299. The point made is that under this section the court could deprive him of the right to practice permanently, or for a limited period; that a limited period means a fixed and determinate period; and that the judgment rendered, being for an uncertain time, depending upon the happening of an uncertain event, was not within the power conferred by the section, and is void.

It is conceded that the court might have disbarred the respondent permanently. The accusation made against him was sufficient to warrant such an extreme punishment. In a petition to this court, during the pendency of the original proceeding, asking that the same be set for hearing, the respondent says: "Your petitioner respectfully represents that nearly three months ago there was filed in said court an accusation in writing, prepared by one E. S. Pillsbury, and signed and sworn to by one J. M. Hogan, charging me with acts that, if true, ought not only to deprive me of the privilege of practicing law in any court, but ought to relegate me to the occupation of a felon's cell." This court, upon a full and careful investigation, found the accusation to be true, and might consistently have meted out to him the punishment so rashly approved by him in advance. Therefore we see nothing in this case calling for clemency. It resolves itself into a pure question of jurisdiction in this court to render such a judgment. Upon this question we entertain no doubt. The court might have deprived him permanently of the right to practice. It did so, subject to the right of the accused to relieve himself from its effect, by making restitution of the money illegally withheld by him. In some of the states it is expressly provided by statute that where an attorney has refused, on demand, to pay over money collected by him, he may, on motion of the party aggrieved, be required to do so by an order of the court, and, upon failure, may be suspended for any length of time, in the discretion of the court. In others, the right of the courts to proceed in this summary manner, without statutory authority, is recognized and upheld by the decided cases. *Forstman* v. *Schulting*, 15 N. E. Rep. 366; *In re Paschal*, 10 Wall. 491; *Petition of Fincke*, 6 Daly, 111, 116; *Bank* v. *Todd*, 52 N. Y. 489; *Kuhne* v. *Daily*, 23 Hun, 282; *In re Mertian*, 29 Hun, 459; *Anon.*, 2 Cow. 589. See, as sustaining a judgment in effect the same as the one rendered here, *Slemmer* v. *Wright*, 54 Iowa, 164, 6 N. W. Rep. 181. See, also, as bearing upon the question, Weeks, Attys. § 81, and cases cited.

This court having the power to deprive the respondent permanently of the right to practice in the courts of this state, the punishment inflicted here was within its jurisdiction. It was not void for uncertainty. If, instead of a motion to strike out a part of the judgment, the respondent had made a showing that he had paid the judgment mentioned therein in full, and moved for an order reinstating him as an attorney, the order could have been made; but we see no reason, as the case is presented to us, for modifying the judgment.

Motion denied.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.

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78 Cal. 152

WISE *et al.* *v.* GRIFFITH *et ux.* (No. 11,040.)

(*Supreme Court of California.* January 25, 1889.)

1. MORTGAGES—FORECLOSURE—PARTIES—LIMITATION OF ACTIONS.
   A purchaser at sheriff's sale, under a judgment pending foreclosure of a senior mortgage, is not a necessary party to the foreclosure, and, when joined by an amended complaint, cannot set up a limitation which had not run when the original complaint was filed.
2. SAME—PURCHASER PENDENTE LITE.
   As against such purchaser, it is proper to show that on the day of the sale he was personally informed of the pendency of the suit.

In bank. Appeal from superior court, city and county of San Francisco; JAMES A. WAYMIRE, Judge.

Action by John H. Wise and Thomas Denigan against George Griffith and Mary, his wife, to foreclose a mortgage on three parcels of land, one of them defendants' homestead. The mortgage was executed March 1, 1876. On August 17, 1877, Henry Heuston obtained a judgment against George Griffith. This action was begun January 9, 1878, Heuston not being made a party. November 26, 1878, the two parcels of land on which the judgment was a lien were sold on execution to Heuston, who received a sheriff's deed, June 3, 1879, and recorded it June 6, 1879. Plaintiffs filed an amended complaint, July 15, 1880, making Heuston a defendant, to which the latter pleaded the statute of limitations, (Code Civil Proc. § 337, setting a period of four years to actions on contracts founded on an instrument in writing; and section 343, prescribing the same time for actions for relief not otherwise provided for.) Defendant Heuston excepted to the court's action in overruling the following question addressed to the witness Maurice Casey: "*Question.* Did you on the day of the sheriff's sale, in *Heuston* v. *Griffith*, give personal notice to the defendant Henry Heuston of the pendency of the action, *Wise et al.* v. *Griffith*, to foreclose a mortgage of the plaintiffs herein upon the property about to be sold by the sheriff?" Judgment for plaintiffs against all the defendants. Defendant Heuston appeals.

R. Percy Wright, for appellant. *Edward P. Cole*, for respondents.

THORNTON, J. We find no error in this record. The evidence of Casey was properly admitted. Defendant Heuston became a purchaser of the mortgaged property *pendente lite*, with actual notice of the pendency of this action to foreclose the mortgage made by the defendants Griffith and wife. We cannot see how the plaintiffs' action against Heuston is barred. He never was a necessary party to the action, but, as purchaser with actual notice of the pendency of plaintiffs' action to foreclose, he would have been bound by the decree against the Griffiths.

Judgment and order affirmed.

We concur: PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.

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78 Cal. 268

CLANTON *v.* RUFFNER *et al.* (No. 12,431.)

(*Supreme Court of California.* February 25, 1889.)

VENUE IN CIVIL CASES—CHANGE—DISCRETION OF COURT.

A motion for change of venue, based on the convenience of necessary witnesses, is addressed to the discretion of the court, and, when no abuse is shown, its decision will not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, Yolo county; C H. GAROUTTE, Judge.

Henly & Oates and *R. Clark*, for appellant. *Geo. P. Harding* and *F. S. Sprague*, for respondents.

BELCHER, C. C. This action was commenced in the superior court of Sonoma county to recover damages for an alleged libel, printed and published by defendants in Yolo county. The defendants demurred to the complaint and in due time and proper form demanded that the place of trial be changed to Yolo county, on the ground that they were residents of that county. The motion was granted, and the case transferred, and thereafter defendants filed their answer. The plaintiff then moved that the place of trial be changed back to Sonoma county, on the ground that the convenience of witnesses and the ends of justice would be promoted by the change. When this motion came on to be heard affidavits were presented and read. In the plaintiff's affidavit it was said that there were 28 material and necessary witnesses whom he wished to call and examine at the trial, and that all of them resided in Sonoma county. In the defendants' affidavit it was said that there were 44 material and necessary witnesses whom they wished to call and examine at the trial, and that all of them resided in Yolo county. The motion was denied, and the plaintiff appealed from the order.

It is admitted by counsel for appellant that the application was addressed to the sound legal discretion of the court below, and that the order cannot be reversed unless there was an abuse of that discretion. It is claimed, however, that in this case there was an abuse of discretion. It is contended by each party that many of the witnesses named on the other side were not necessary ones, and this would seem to be so. But, whether so or not, "the mere preponderance in the number of witnesses on the one side or the other is not necessarily decisive of the application." *Hanchett* v. *Finch*, 47 Cal. 192. The court was called upon to decide the matter in view of all the facts and circumstances presented, and, after carefully reading the affidavits, we are unable to say that it did not exercise its judgment fairly, impartially, and properly. Certainly we can see no such abuse of discretion as would justify a reversal, and we therefore advise that the order appealed from be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(78 Cal. 289)

SMITH *v.* LOS ANGELES I. & L. CO-OP. ASS'N. (No. 12,396.)

(*Supreme Court of California.* February 27, 1889.)

1. CORPORATIONS—POWER OF DIRECTORS.
   A director of a corporation is disqualified to vote, at a meeting of the board of directors, upon a resolution authorizing the renewal of notes in his own favor.
2. NEGOTIABLE INSTRUMENTS—BONA FIDE PURCHASERS—NOTES OF CORPORATIONS.
   When a note of a corporation appears on its face to have been executed by its president in his own favor, it is sufficient to charge his assignee with notice of any want of authority to execute it.

In bank. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Smith & Patton and *F. H. Howard*, for appellant. *Wells, Van Dyke & Lee*, for respondent.

PER CURIAM. This is a suit on a promissory note purporting to have been executed by one Garey, president of the corporation defendant, in his own favor, and assigned after maturity to the plaintiff. Conceding, for the purpose of this decision, that the sum for which the note was given was honestly due from the corporation to its president, the note was, nevertheless, invalid, unless authorized or ratified by the directors. The judgment of the superior court in favor of plaintiff rests upon a finding that the execution of the note was duly authorized. But the evidence shows that the only authority to execute it was the following resolution: That "all notes held by T. A. Garey, and also by H. J. Crow, be renewed, and 2 per cent. interest per month be allowed." There were seven directors of the corporation, and only four—a bare quorum, two of whom were Garey and Crow—were present at the meeting at which the above resolution was attempted to be passed. It was essential to its adoption that a majority of the quorum should vote for it, (Civil Code, § 308,) and clearly there could not have been such majority unless the vote of Garey or Crow was counted in the affirmative. Garey testifies that he did not vote at all upon the resolution, and respondent contends that so far as it concerned the renewal of Garey's notes Crow was competent to act. But we cannot assent to this proposition. He was, we think, disqualified by his direct interest in the passage of that inseparable part of the resolution which authorized the renewal of his own notes. We feel constrained to hold that the finding of an original authority to execute the note sued on is unsupported by the evidence.

As to the claim that the judgment of the superior court may be upheld on the ground that the corporation subsequently ratified the execution of the note, we can only say that upon this point the evidence is conflicting, and, as the superior court has made no finding, we cannot supply one. The fact that the note appeared upon its face to have been executed by Garey on behalf of the corporation was sufficient to charge his assignee with notice of any want of authority to execute it. *Wilbur* v. *Lynde*, 49 Cal. 290. For these reasons it will be necessary to remand the cause for a new trial, and as the question will necessarily arise in any future trial as to the effect of the judgment pleaded by defendant as an estoppel, we will add that in our opinion the superior court did not err in holding that the plea of estoppel was not sustained by the judgment and findings offered in evidence.

Judgment and order reversed, and cause remanded.

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78 Cal. 287

WOOD *v.* PENDOLA. (No. 12,618.)

(*Supreme Court of California.* February 26, 1889.)

APPEAL—REVIEW—SUFFICIENCY OF EVIDENCE.

Where there are findings sufficient to sustain the judgment, the court, on appeal heard on the judgment roll, will not examine into probative facts contained in the findings where there is nothing to show that the latter are entirely based on or controlled by them.

In bank. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Action by Marinda Wood against Lorenzo Pendola. Defendant appeals.

Frank W. Street and *Ira Hill Reed*, for appellant. *Reddick & Solinsky*, for respondent.

PATERSON, J. The appeal from the order denying a new trial has been dismissed. 19 Pac. Rep. 183. The case is before us now to be heard only on the judgment roll. The action is to restrain defendant from obstructing the flow of the waters of Coyote creek into plaintiff's ditch, to the extent of 40 inches, measured under a 4-inch pressure. Plaintiff claims to be the owner of a certain ditch, known as the "Stranahan" or "El Dorado" ditch, and a certain water-right. She charges defendant with having diverted and turned all the waters of the creek into ditches owned by the defendant, thereby preventing the same from reaching her ditch. The pleadings present four issues: *First*, as to the ownership of the ditch referred to above, and the water-right appurtenant thereto; *second*, whether this water-right is owned by the plaintiff or defendant,—whether plaintiff's right is prior to the water-rights claimed by defendant; *third*, whether the Stranahan ditch, or water-right, has ever been abandoned; and, *fourth*, whether there have been acts of diversion, as claimed by plaintiff. Upon all of these issues the court below found the facts and determined the questions in favor of the plaintiff, and judgment went accordingly. Appellant claims that the findings are insufficient to support the judgment, but this contention is not sustained by the record.

1. The court found "that at the time of the commencement of this action the said plaintiff was for a long time prior thereto, and had been, and now is, the owner of the Stranahan ditch and the water-right belonging thereto."

2. Upon the second issue the court found as an ultimate fact that the water-right referred to in the above finding, and owned by the plaintiff, was "the first right to the waters of Coyote creek, to the extent of seventy inches, measured under a 4-inch pressure." A jury was called in to advise the court upon some of the issues. There was submitted to the jury the following question: "Has any person a prior right to the waters of Coyote creek to plaintiff, Marinda Wood?" To this question the jury answered, "No," and the court adopted the finding.

3. There was submitted to the jury the question whether any portion of the original water-right belonging to the Stranahan ditch had ever been lost or abandoned by plaintiff, or any of her predecessors. The jury answered that it had not been, and this finding was also adopted by the court.

4. The acts of trespass charged by plaintiff against defendant were not denied in the answer, defendant relying upon a denial that the acts charged were wrongful or unlawful. He claimed the right to divert and use all the waters of Coyote creek. The first three findings, therefore, dispose of the contention made upon the fourth issue.

There are a great many probative facts among the findings, but the ultimate facts, as found, are as we have stated them, and there is nothing to show that the ultimate facts are entirely based upon the probative facts, or in any way controlled by them. We cannot look into the evidence to see the significance of the probative facts found by the court, and, as they appear in the record, they throw no light upon the main issues, and, as stated before, in no way limit the effect of the ultimate facts found. Judgment affirmed.

We concur: WORKS, J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.

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78 Cal. 293

In re ALLEN. (No. 12,237.)[1]

(*Supreme Court of California.* February 27, 1889.)

HOMESTEAD—EXTENT—PORTION USED FOR BUSINESS PURPOSES.

Where part of a tract of land described in a declaration of homestead is actually appropriated for family use by the declarant, but the remaining portion is used principally for the business of general blacksmithing and wagon building, carried on in a building located thereon, such latter portion forms no part of the homestead claim.

Commissioners' decision. In bank. Appeal from superior court, Butte county; LEON D. FREER, Judge.

F. C. Lusk, for appellant. *Park Henshaw*, for respondent.

HAYNE, C. This is an appeal from a judgment setting apart a homestead under the insolvency laws, and from an order denying a motion for a new trial. The declaration of homestead covered lots 4 and 5 of block 39 of the town of Chico. These two lots adjoined each other, and were together under the value of $5,000. The family dwelling was upon lot 5, and the outhouses, chicken-yard, etc., covered the rear portion of lot 4. It is conceded that the homestead was valid as to lot 5, and as to the above-mentioned portion of lot 4. But it is contended that the front portion of lot 4—about 89 feet in depth—was used for business purposes, and that there was no actual residence thereon. Upon this 89 feet there was a two-story building. In relation to this the findings (which are full of matter of mere evidence) contain the following statement: "Ever since the erection of the building it has been used principally for business purposes, to-wit, general blacksmithing, wagon building, and repairing, painting, and varnishing wagons," and the balance of the 89 feet was used in connection with said business. In preparing the opinion adopted by the department we overlooked this finding, and we think it makes a difference in the result. In the case of *Maloney* v. *Hefer*, 17 Pac. Rep. 539, which was under consideration on rehearing at the time our former opinion was rendered, the court in bank, per SEARLS, C. J., said: "It is the principal use to which the property is put, and not quantity, which furnishes the test in determining the question whether or not property is subject to dedication as a homestead. *Ackley* v. *Chamberlain*, 16 Cal. 182; *Gregg* v. *Bostwick*, 33 Cal. 220. And if only a part of the land described in the homestead declaration be actually used and appropriated as the home of the family, the remainder not so used and appropriated forms no part of the homestead claim in the sense of the statute." Upon the authority of this decision, we think the judgment in the case before us must be reversed. We do not think, however, that final judgment can be ordered in favor of the appellant, because the finding above mentioned is in direct contradiction of the sixth and eighth findings. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

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[1] Reversing 16 Pac. Rep. 319.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and cause remanded for a new trial.

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78 Cal. 296

WHITTAKER *v.* PENDOLA. (No. 12,795.)

(*Supreme Court of California.* February 28, 1889.)

1. PUBLIC LANDS—HOMESTEAD ENTRY—POSSESSION OF TRESPASSER.
A mere trespasser on the public lands of the United States, with an inclosure erected and maintained contrary to the express provisions of act Cong. Feb. 25, 1885, cannot by such occupany prevent a homestead entry of the land by a citizen who goes peaceably upon a portion of the tract, and in other respects complies with the law.

2. SAME—EVIDENCE OF ENTRY—PRESUMPTION.
That a homestead entry has been made is *prima facie* shown by the production of the receipt of the land-office for entry fees, it being the duty of the register and receiver of the local land-office, under the department regulations, to make the entry immediately upon receiving the proper fees, and it must be presumed (Code Civil Proc. Cal. § 1963, subd. 15) that this official duty was regularly performed.

3. EJECTMENT—TITLE TO SUPPORT—HOMESTEAD ENTRY—TRESPASSER IN POSSESSION.
In ejectment, where the above state of facts is established in favor of plaintiff, he has shown title to the whole tract as against defendant, a mere trespasser in actual possession of all but a few acres, and is entitled to recover, under act Cal. March 23, 1874, providing that every qualified homestead claimant residing on public lands, who shall have made his original entry in accordance with the United States laws, shall from the date of such entry be deemed to have title to and to be in possession of all the land described in such entry, as against trespassers, etc.

In bank. Appeal from superior court, Calaveras county; C. V. GOTTSCHALK, Judge.

Ejectment by George W. Whittaker against Lorenzo Pendola. Judgment for plaintiff, and defendant appeals.

F. W. Street and *Ira Hill Reed*, for appellant. *Reddick & Solinsky*, for respondent.

PER CURIAM. This is an action to recover all but two or three acres of the land described in the following receipt:

"RECEIVER'S DUPLICATE RECEIPT NO. 4,760. HOMESTEAD.

"RECEIVER'S OFFICE, STOCKTON, February 17, 1887.

"Received of George W. Whittaker the sum of sixteen dollars ——— cents, being the amount of fee and compensation of register and receiver for the entry of the east half of north-west quarter, and the east half of south-west quarter, of section 18, in township 2 north, of range 14 east, M. D. M., under section 2290, Revised Statutes of the United States.

"$16.00. JOHN E. BUDD, Receiver."

On the trial the plaintiff introduced this receipt in evidence, and testimony which showed that before the commencement of the action he had, in addition to the payment mentioned in the receipt, built a house, and taken up his residence on the two or three acres covered by his homestead location, and not sued for. It further appeared that most of the demanded premises had been inclosed and cultivated by the defendant for about two years before the issuance of the receipt, and that he had thereon a house and barn. On this case plaintiff rested, and defendant moved for nonsuit, on the ground that plaintiff had shown no title. The motion was overruled, and defendant, without offering any evidence upon his part, submitted the case. The court gave judgment for plaintiff, from which, and from an order subsequently made, overruling his motion for a new trial, defendant appeals.

The defendant, not having shown any capacity in himself to acquire the government title to the demanded premises, nor any effort or intention to do so, stands in the position of a mere naked trespasser upon the public domain, with an inclosure erected and maintained contrary to the express provisions of the act of congress of February 25, 1885, (St. 1884–85, p. 321,) and the main question in the case is whether, by such unauthorized inclosure, he can prevent a homestead entry of the land by a citizen of the United States who goes peaceably upon a portion of the tract, and in other respects complies with the law. This is the precise question, or the converse of it, involved and decided in the case of *Haven* v. *Haws*, 63 Cal. 514; and on the authority of that case we hold that this plaintiff had the right to make his homestead entry of the whole tract, notwithstanding the possession by defendant of the greater portion of it. That he made the entry was, we think, sufficiently proved *prima facie* by the production of the receipt from the land-office. Under the department regulations, of which we take notice, it was the duty of the register and receiver of the local land-office, upon payment of the proper fees, to issue this receipt, and thereupon to make the proper entry of the location. This official duty we must presume was regularly performed. Code Civil Proc. § 1963, subd. 15. And especially ought this presumption to obtain, in view of the provision of the statute forbidding the issuance of any certificate of entry prior to the expiration of five years. Rev. St. U. S. § 2291. The evidence, therefore, brought the plaintiff squarely within the provisions of the second section of the act of the legislature of this state, passed March 23, 1874, (St. 1873–74, p. 544,) which reads as follows: "Sec. 2. Every qualified homestead claimant under the homestead laws of the United States, residing on public land of the United States within this state, who shall have made his original homestead entry in accordance with said laws, shall, from the date of such entry, be deemed to have title to and to be in possession of all the land described in such entry, as against trespassers and all persons having no superior right or title to the same, as long as he shall continue to reside thereon, and to comply in good faith with said homestead laws." Under this law the plaintiff must be deemed to have the title, as against the defendant, to the demanded premises.

Judgment and order affirmed.

78 Cal. 301

BANK OF SANTA CRUZ COUNTY *v.* BARTLETT *et al.* (No. 11,968.)

(*Supreme Court of California.* March 2, 1889.)

1. COUNTIES—LIABILITIES OF OFFICERS—ALLOWANCE OF INVALID CLAIM.
The California county government act of 1883, § 7, provided that "all supervisors, and any other officer, authorizing, or aiding to authorize, or auditing, or allowing, any claim, * * * against said treasury, * * * in violation of any of the provisions of this act, shall be liable in person * * * to the person or persons damaged by such illegal authorization to the extent of his loss by reason of the non-payment of his * * * claim." A claim was allowed in favor of plaintiff's assignor, and a warrant therefor issued, but payment of the warrant was refused. It was admitted that the assignor's claim against the county and the warrant were invalid. *Held*, that no action would lie against the supervisors and auditor for damages.

2. NEGOTIABLE INSTRUMENTS—COUNTY WARRANTS—RIGHTS OF ASSIGNEE.
A county warrant has not the qualities of a negotiable paper, and the plaintiff stands in the shoes of his assignor, the original holder.

Department 2. Appeal from superior court, Santa Cruz county; F. J. McCANN, Judge.

Action by the Bank of Santa Cruz County against S. A. Bartlett and others, supervisors and auditor of Santa Cruz county, to recover the amount of a warrant drawn upon the county treasury. Demurrer to complaint sustained, and judgment for defendants. Plaintiff appeals.

Spalsbury & Burke, for appellants. *Joseph H. Skirm*, and *Underwood & McCann*, for respondents.

MCFARLAND, J. The court below sustained a demurrer to the complaint, and, plaintiff refusing to amend, final judgment went for defendants. Plaintiff appeals from the judgment. One of the defendants (as appears from the complaint) was auditor of Santa Cruz county, and the other defendants were supervisors. One Swinford, having been injured by the breaking of a bridge on a county road, presented a demand to the defendants, (supervisors,) which was by them allowed in the amount of $400; and the other defendant (auditor) drew a warrant for that amount upon the county treasury, payable to said Swinford, or bearer. Swinford sold and assigned the warrant to the plaintiff. The plaintiff presented the warrant to the county treasurer, who refused to pay it. This action was then brought against the defendants individually, plaintiff basing its asserted right of action upon section 7 of the county government act of 1883. That section is as follows: "Sec. 7. All supervisors, and any other officer, authorizing, or aiding to authorize, or auditing, or allowing, any claim or demand upon or against said treasury, or any fund thereof, in violation of any of the provisions of this act, shall be liable in person, and upon their several bonds, to the person or persons damaged by such illegal authorization, to the extent of his loss by reason of the non-payment of his or their claim." It is admitted that Swinford never had any legal claim against the county for damages, and that the warrant was unauthorized and invalid. He was not induced by any act of the defendants to give or lose any valuable thing whatever. How can he be said, therefore, to have been "damaged," or to have sustained any "loss by reason of the non-payment of his claim?" He lost nothing, for he did not have anything to lose. As to plaintiff, it has been held repeatedly that a county warrant has not the qualities of negotiable paper, and that the assignee stands in the shoes of the original holder. Plaintiff was bound to know that the warrant was invalid, and the mere transfer could not make it valuable as to any person against whom it was worthless in the hands of Swinford. It is not necessary to notice the other points made by the respondents. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

78 Cal. 304

Ex parte ARRAS. (No. 20,473.)

(*Supreme Court of California.* March 4, 1889.)

1. ASSAULT AND BATTERY—SENTENCE—NON-PAYMENT OF FINE.

Pen. Code Cal. § 245, provides, as punishment for the crime of assault with a deadly weapon, "imprisonment in the state-prison, or in a county jail, not exceeding two years, or by fine not exceeding $5,000, or by both." Petitioner was sentenced to the state-prison for two years, "as a punishment for said crime, and that in addition thereto he pay a fine of $2,000, and that he be imprisoned in the said state-prison until said fine be satisfied," etc. *Held*, that so much of the judgment as provided for imprisonment in the state-prison as a means of enforcing the payment of the fine was beyond the jurisdiction of the court, and void. THORNTON, J., dissenting.

2. SAME—HARD LABOR.

Nor had the court jurisdiction to impose hard labor as a part of the punishment.

In bank.

Application for discharge of Charles Arras, under a writ of *habeas corpus;* the prisoner being confined in the state-prison under sentence for the crime of assault with a deadly weapon.

Carroll Cook, for petitioner. *Geo. A. Johnson,* Atty. Gen., for respondent.

WORKS, J. This is an application for the discharge of the prisoner, under a writ of *habeas corpus,* from the state-prison at San Quentin. The petition alleges that the petitioner "is detained, confined, restrained, and imprisoned by virtue of a judgment and commitment, which judgment and commitment attempt to imprison him for two years in said prison, and to impose a large fine, and order his further imprisonment in said prison in case he do not pay said fine for a long period of time, to-wit, for one day for each dollar of said fine not paid; that the two years' imprisonment ordered by said judgment and commitment have, by virtue of the credits accorded to him by law, and which have not been taken away from him, expired; and that he is now held and imprisoned in said prison at hard labor solely for the purpose of collecting such fine." The warden of the prison makes return that he is entitled to the custody of the petitioner, as such warden, by virtue of a judgment of conviction and commitment of said petitioner to said prison by the superior court of Merced county. The judgment and commitment are filed with and made part of the return. That part of the judgment, material to the question raised here, is that the petitioner "be imprisoned in the state-prison of the state of California, at San Quentin, for the term of two years, as a punishment for said crime, and that in addition thereto he pay a fine of two thousand dollars, and that he be imprisoned in the said state-prison of said state until such fine be satisfied, said imprisonment not to exceed one day for each two dollars of such fine, and on the payment of such portion of said fine as shall not have been satisfied by imprisonment at the rate prescribed—that is, one day for each two dollars thereof—that he be discharged from custody on account of said fine." The return does not controvert the facts alleged in the petition that the petitioner has served the full term of imprisonment adjudged as a punishment, and that he is being held and imprisoned at hard labor solely for the purpose of collecting such fine.

It is claimed by counsel for the petitioner that the judgment, so far as it authorizes the imprisonment of the petitioner in the state-prison until payment of the fine, is void, (1) because there is no law authorizing imprisonment in the state prison for said purpose; (2) because it imposes hard labor as a part of the penalty in case the fine is not paid.

The judgment of the court is based upon section 245 of the Penal Code, which provides, as punishment for the crime of assault with a deadly weapon, (the offense of which the petitioner was convicted,) "imprisonment in the state-prison, or in a county jail, not exceeding two years, or by fine not exceeding $5,000, or by both." The court rendering the judgment evidently proceeded upon the theory that where imprisonment in the state-prison was imposed as a part of the penalty, the imprisonment for the fine must be in the same prison.

We are not inclined to this view. It is provided generally that all persons committed by authority of law shall be confined in the common jails in the several counties. Pen. Code, § 1597. Imprisonment in the state-prison is provided as a part of the punishment only in case of the commission of a felony. Pen. Code, § 17. The whole scope of the law regulating such prisons must be held to provide only for prisoners convicted of felonies, and as a punishment therefor. St. 1880, p. 67. The court below had no jurisdiction to impose hard labor as a part of the punishment. *Ex parte Kelley*, 65 Cal. 154, 3 Pac. Rep. 673.

Counsel for petitioner claims that this was the effect of the judgment here, for the reason that all persons imprisoned in the state-prison are required to labor. The act for the government of the prisons provides that "all convicts not employed on contracts may be employed by authority of the board of directors, * * * in the performance of work for the state," etc., and that such board "shall require, of every able-bodied convict confined in the state-prison, as many hours of faithful labor, in each and every day during his imprisonment, as shall be prescribed by the rules and regulations of the prison."

If the petitioner continued to be a "convict" after his imprisonment as a punishment had expired, it was the duty of the officers of the prison to compel him to perform labor, and the effect of the judgment imprisoning him there until the payment of the fine was to impose that burden upon him. If he ceased to be a convict, and could only be confined without labor, there must be a class of prisoners in the state-prison not contemplated by any law that has come to our notice, and the control and management of whom therein is nowhere provided for. It is clear to us that so much of this judgment as provided for imprisonment in the state-prison as a means of enforcing the payment of the fine was beyond the jurisdiction of the court, and void.

For the reasons given, the petitioner is entitled to his discharge, and it is so ordered.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.

I dissent: THORNTON, J.

Ex parte MIDDLETON. (No. 20,472.)

(*Supreme Court of California.* March 4, 1889.)

In bank.

Carroll Cook, for petitioner. *Geo. A. Johnson*, Atty. Gen., for respondent.

WORKS, J. The questions presented in this case are the same as in *Ex parte Arras, ante*, 683, (this day decided,) and for the reasons stated therein we hold the judgment under which the petitioner is imprisoned to be void, and that he is entitled to be discharged. It is so ordered.

We concur: BEATTY, C. J.; MCFARLAND, J.: SHARPSTEIN, J.

I dissent: THORNTON, J.

78 Cal. 388

PEOPLE *v.* O'NEIL. (No. 20,502.)

(*Supreme Court of California.* March 14, 1889.)

MURDER—DEGREE—VERDICT.

Under the provision of the California Code that, whenever a crime is distinguished into degrees, the jury, if they convict, must find the degree of the crime, a conviction for murder cannot stand, where the degree is not specified in the verdict.

In bank. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

John H. O'Neil appeals from a conviction of murder.

Joseph H. Budd, *James H. Budd*, and *H. C. Levynsky*, for appellant. *Geo. H. Johnson*, Atty. Gen., for the People.

PER CURIAM. Appellant was tried upon an information which alleged that he feloniously, unlawfully, and with malice aforethought, killed and murdered one Philip Stump. The jury returned a verdict in these words: "We, the jury, decide the defendant, John H. O'Neil, guilty as charged; the penalty to be imprisonment for life." The Code provides that, "whenever a crime is distinguished into degrees, the jury, if they convict the defendant, must find the degree of the crime of which he is guilty." It has been uniformly held that a failure to specify the degree of murder under that section vitiates the verdict. *People* v. *Campbell*, 40 Cal. 129. The attorney general confesses error. Judgment and order reversed, and cause remanded for a new trial.

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78 Cal. 381

STROHLBURG *v.* JONES. (No. 11,746.)

(*Supreme Court of California.* March 13, 1889.)

TRESPASS—PLEADING—PARTIES.

A complaint alleging that plaintiff was lawfully in possession of certain premises as tenant, and that defendant wrongfully entered thereon, and committed divers trespasses and injuries to the land, is not demurrable for the non-joinder of the landlord as party plaintiff.

Department 2. Appeal from superior court, Alameda county. E. M. GIBSON, Judge.

C. L. Colvin, *Philip Teare*, and *T. F. Graber*, for appellant. *Thomas H. Smith*, for respondent.

SHARPSTEIN, J. This is an appeal from a judgment. The complaint was demurred to, and the demurrer overruled, defendant answering. Cause tried by a jury. Verdict and judgment for plaintiff. Appellant insists that the court erred in overruling the demurrer to the complaint, and whether it did or not is the sole question for consideration. The allegations of the complaint are that on the 20th day of March, 1885, W. G. Flynn and John R. Spring, then being the owners of certain premises described in the complaint, leased and demised the same to the plaintiff for the term of one year, at a stated monthly rent; that by virtue of said lease plaintiff went into and continued in the peaceable and quiet possession of said premises until the committing of the grievances complained of; that on the 1st day of June, 1885, the defendant wrongfully and maliciously entered upon said premises, and, on divers other days between that day and the commencement of this action, committed divers trespasses, enumerated in the complaint, to the damage of the plaintiff $3,000, for which he demands judgment. One of the grounds specified as a ground of demurrer is "that there is a defect of parties plaintiff, in this, to-wit: It appears from the complaint that one W. G. Flynn and one John R. Spring are the owners in fee of the property described in the complaint, and that the injury complained of is an injury to the freehold, and also that the acts complained of are an ouster of the said Flynn and Spring, owners in fee." The allegations of the complaint show that the plaintiff was in the possession, and in the rightful possession, of the premises, under a lease from the owner thereof. "A tenant's possession, while it continues, is as complete for all purposes of redress against wrong-doers as is the possession of an owner in fee-simple." Cooley, Torts, *326. This question was discussed quite fully in *Heilbron* v. *Heinlen*, 72 Cal. 371, 14 Pac. Rep. 22. In *Pollock* v. *Cummings*, 38 Cal. 685, the court says: "In an action of trespass upon real property, the plaintiff may recover upon alleging and showing, in addition to the injury complained of, his possession of the premises." Tested by that rule, the demurrer, on the ground above specified, was properly overruled. We fail to discover that several causes of action are improperly joined, or that the complaint is ambiguous. Judgment affirmed.

We concur: McFARLAND, J.; THORNTON, J.

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78 Cal. 384

PICO *v.* COHN *et al.* (No. 12,590.)

(*Supreme Court of California.* March 13, 1889.)

1. APPEAL—RECORD—NOTICE OF INTENTION TO MOVE FOR NEW TRIAL.
   A former statute having expressly required that the notice of intention to move for a new trial should be made part of the record on appeal, and such requirement being omitted from Code Civil Proc. Cal., and there being no provision for bringing it up in any manner, such notice need not be presented on appeal; and it will be presumed, in the absence of showing to the contrary, that any question presented in the statement or specification of errors was properly presented to the court below, and passed on in its ruling on the motion for new trial.
2. SAME—REVIEW—WEIGHT AND SUFFICIENCY OF EVIDENCE.
   Where there is substantial conflict in the evidence, the decision of the court below will not be disturbed.

In bank. Appeal from superior court, Los Angeles county; WILLIAM A. CHENEY, Judge.

Action by Pio Pico against B. Cohn and others. Plaintiff appeals.

Glassell, Smith & Patton, Graves & Chapman, Anderson, Fitzgerald & Anderson, and *Campbell, Houghton & Silent*, for appellant. *R. H. Chapman, Stephen M. White*, and *Wells, Van Dyke & Lee*, for respondents.

WORKS, J. This is an action by the plaintiff and appellant to compel the reconveyance of certain real property conveyed by him to the defendant, on the grounds: *First*, that the same was conveyed as security for money borrowed; and, *second*, that the conveyance was procured by fraud.

Preliminary to a discussion of the merits of the case, we are called upon to determine whether the matters presented by the statement on motion for a new trial can be considered. The respondents contend that the statement must be disregarded, for the reason that no notice of intention to move for a new trial is set out therein, or in any way shown to have been given. The point made is that, as the notice of intention to move for a new trial is not before us, we cannot know upon what grounds the motion was made, and therefore no error appears in the record. The question is not a new one, but the decisions of this court have not distinctly and clearly settled the practice in this respect. Formerly the notice was made a part of the record on appeal by express statutory provision. But it is not so under the present Code. Code Civil Proc. § 670; *Girdner* v. *Beswick*, 69 Cal. 112, 10 Pac. Rep. 278;

Dominguez v. *Mascotti*, 74 Cal. 269, 15 Pac. Rep. 773. Nor is ther any provision of the Code requiring that such notice shall be brought to this court by including it in the statement, or in any other manner. The papers necessary to be brought up are set out in sections 661 and 952 of the Code of Civil Procedure, and the notice of intention is not one of them. The former statute having made the notice of intention a part of the record, we must assume that it was omitted from the present Code with a purpose. Being omitted from the section providing what papers shall constitute the record on appeal, and no provision being made for bringing it up in any other way, it is fair to presume that it was not intended to require it to be brought to this court at all. This leads us to the conclusion that it was the legislative intention that the notice should be the basis of the motion to be made in the court below, and that, upon the proper statement being filed, and the necessary motion made and passed upon by the court below, the notice has performed its functions, and is not a necessary part of the record on appeal, or to be presented here in any form. When the case comes to us we must look to the statement or bill of exceptions, and the specifications in which the decision of the court below is not sustained by the evidence, and the specifications of errors of law, as our guide in reviewing the case, and to these alone. If a question is presented by such specifications, and is properly saved in the statement or bill of exceptions, this court will look no further, but must presume that the question was properly presented to the court below, and passed upon in its ruling upon the motion for a new trial. We do not put this upon the ground of waiver by the opposite party, as is done in some of the earlier cases, but upon the sole ground that we must look alone to the statement or bill of exceptions for the questions to be determined, in the absence of any showing by the respondent that no notice, or an insufficient one, was given. Undoubtedly the notice of intention is necessary; but if it has not been given, or has been given too late, that must be shown by the respondent as against the settlement of the statement or bill of exceptions, or at the time of, and in opposition to, the motion for a new trial; and, if the court below rules against him, he must cause the facts necessary to present the question to be then included in the statement, or a proper bill of exceptions, so that this court can determine whether a proper notice has been given or not. The specifications in the statement or bill should conform to the notice of intention to move for a new trial. If they do not, the opposite party should move such amendments thereto as will remove therefrom all matter foreign to the grounds stated in the notice, and in settling the same the court below should see that the statement does not go beyond the notice, either in the body of it or in the specifications. If this is done, and the statement or bill is properly made up, no injury can result to any one from the failure to bring up the notice. It has been held by this court in a number of cases that it must be made to appear by the statement that a notice of intention has been given or that the giving of such notice has been waived. *Calderwood* v. *Brooks*, 28 Cal. 151; *Wright* v. *Snowball*, 45 Cal. 654; *Dominguez* v. *Mascotti*, *supra*. There may be other cases to the same effect. The legislature has said, in effect, that the notice need not come to this court as a part of the judgment roll, and has made no provision for bringing it here in any other way. The conclusion that must necessarily be drawn from this is that it was not the intention that it should come to this court at all, and we so hold. The cases cited above, and all others laying down a rule of practice, under the Code as it now stands, in conflict with the practice as above stated, are overruled.

As to the merits of the case, but one question is presented by the briefs, viz., whether certain findings of the court are sustained by the evidence. Counsel for appellant contend with great earnestness that there is no evidence against them as to some of these findings, and then proceed, in elaborate and able briefs, to prove that the evidence against them is unworthy of belief. We have carefully examined the transcript, and find that all the findings attacked are supported by some evidence. Counsel simply ask us to enter upon an investigation of the evidence to determine the credibility an weight to be given to the testimony of the witnesses, and especially that o the defendant Cohn. This we cannot do under the well-established rule that where there is a substantial conflict in the evidence, as there is here, this cour will not disturb the decision of the court below. *Bernal* v. *O'Hanlon*, 5 Cal. 284; *Bank* v. *Reel*, 62 Cal. 425. The importance of the case and th elaborate arguments of counsel might seem to call for a review of the evidence, but it seems to us to be unnecessary, and that to extend this opinion i that way could serve no useful purpose.

Judgment and order appealed from affirmed.

We concur: BEATTY, C. J.; THORNTON, J.; McFARLAND, J.; SHARPSTEIN, J.

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3 Cal. Unrep. 40

PEOPLE *v.* REED. (No. 11,769.)

(*Supreme Court of California.* December 18, 1888.)

DEDICATION—ACCEPTANCE—REVOCATION.

In 1862 the owner of a tract of land caused the same to be surveyed and platted Part of one of the streets marked on the plat was never opened or used as a publi street, and for a period of more than 20 years the owner had a barn and shed on sai part, inclosed by a substantial fence. There was no acceptance of said street unti the passage of a city ordinance, in 1884, directing the street commissioners to demand the possession of the part of the street so occupied. *Held*, that there was n sufficient dedication or acceptance, and that, if there had been a dedication, it wa revoked before acceptance.

In bank. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Action by the people against Reed to compel the defendant to remove obstructions from an alleged public street in the city of San Jose. Judgmen for plaintiff. Defendant appeals.

Wm. Matthews, for appellant. *Atty. Gen. Geo. A. Johnson* and *D. W. Harrington*, for respondent.

SHARPSTEIN, J. This action is brought to compel the defendants to remove obstructions from an alleged public street in the city of San Jose. The plaintiff alleges and the defendant denies that the land upon which the obstructions are maintained is a part of a public street. Upon that issue the court below found in favor of the plaintiff and against the defendant, and rendered judgment accordingly. From the judgment this appeal is taken. The contention of appellant is that the findings do not justify the judgment. Whether the facts found justify the conclusion that the land in controversy was dedicated and accepted as a public street is the question to be determined on this appeal. The facts found are substantially as follows:

In 1862 appellant was the owner of a certain tract of land in San Jose, and in that year caused the same to be surveyed into streets and blocks, and said blocks to be divided into lots; the streets being designated by names, and the blocks and lots by numbers, on a plat or map prepared by the surveyor. Between the years 1862 and 1877 appellant sold and conveyed to divers persons lands within the tract so surveyed and platted as aforesaid. One of the streets designated on said plat or map was Divine street, running from First street to Terraine street, through North Market and San Pedro streets. But said Divine street, or so much thereof as lies between said North Market and San Pedro streets, has never been used or opened as a public street; and for a period of more than 20 years before the commencement of this action there was a barn and shed thereon, inclosed by a substantial fence, which effectually and completely prevented any use thereof as a public street. There was no formal or other acceptance of said alleged street prior to the passage of an ordinance on the 12th day of December, 1884, directing the street commissioner of said city to demand the possession of the strip of land claimed to have been dedicated as aforesaid, and to remove all obstructions therefrom, and to throw the same open for public use.

Are the facts found sufficient to constitute a dedication of the land in controversy to a public use? We think not. In the leading case in the United States on this subject, the court says: "There is no particular form necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation." *City of Cincinnati* v. *Lessee of White*, 6 Pet. 431. In the case at bar, as before stated, the land never has been used for a public purpose. The supreme court of West Virginia says: "If there has been no use by the public, we may safely adopt the language of the court of appeals of New York, strong as it is, as laying down correctly the law in such case," *i. e.:* "The owner's acts and declarations should be deliberate, unequivocal, and decisive, manifesting a positive and unmistakable intention to permanently abandon his property to the specific public use." *Pierpoint* v. *Harrisville*, 9 W. Va. 215; *Holdane* v. *Trustees*, 21 N. Y. 477. In the case at bar the only acts of defendant which tend to show an intention to dedicate the land in controversy, are the survey and map on which a street is delineated. The intention not to dedicate is more strongly manifested by keeping the premises inclosed, and maintaining on them substantial buildings. There is a very strong resemblance between this case and the cases of *Tate* v. *Sacramento*, 50 Cal. 242, and *Hayward* v. *Manzer*, 70 Cal. 476, 13 Pac. Rep. 141, in both of which it was held that the facts were insufficient to constitute a dedication. But, conceding that the defendant in 1862 evinced an intention to dedicate the strip of land in controversy as a public street, it is not claimed that there was an acceptance of it until after the lapse of more than 20 years, during all of which time it was in his power to revoke the dedication. The only act claimed to constitute an acceptance is the passage of the ordinance for the opening of the street, which appears to us more like an attempt to take private property for public use without compensation than it does like an acceptance of a street.

We think the facts found insufficient to constitute a dedication or acceptance, and that if there had been a dedication it was revoked before there was any acceptance of it.

Judgment reversed, with directions to the court below to enter judgment for defendant upon the findings.

We concur: SEARLS, C. J.; MCFARLAND, J.; PATERSON, J.

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3 Cal. Unrep. 43

MAGEE *v.* NORTH PAC. COAST R. CO. (No. 11,730.)

(*Supreme Court of California.* December 24, 1888.)

MASTER AND SERVANT—INJURY TO SERVANT—ASSUMPTION OF RISK.

In an action by a brakeman against a railroad company for injuries received in a collision with an ox which was on the track through defendant's negligence in not keeping up proper fences, it appeared that it was apparent to any one who looked at them that the fences were insufficient to turn stock; and it was known that cattle had frequently broken through them while plaintiff was in defendant's employment, when the train would be stopped, and the cattle driven off the track; and at least once plaintiff had assisted in driving them off. Plaintiff, a man of intelligence, had, as brakeman, ridden over the road along which the fences ran for some months. The court charged that if plaintiff knew the condition of the fences, or,

as a prudent, reasonable man, should have known it, the verdict should be for defendant. *Held*, that a verdict for plaintiff could not be sustained, though he testified that he did not know the condition of the fences.

Commissioners' decision. In bank. Appeal from superior court, Marin county; J. F. SULLIVAN, Acting Judge.

Action for personal injuries by William F. Magee against the North Pacific Coast Railroad Company. From a judgment for plaintiff, and an order denying a motion for a new trial, defendant appeals.

W. H. L. Barnes, for appellant. *Hepburn Wilkins*, for respondent.

FOOTE, C. This action was brought to recover damages from the defendant for the alleged injuries suffered by the plaintiff in being thrown from a train of cars operated upon the defendant's railroad track. The plaintiff recovered a judgment for $2,500; from which, and an order refusing a new trial, the defendant appeals.

The complaint alleged that it was the duty of the defendant towards the plaintiff, one of its employes, viz., a brakeman and assistant baggage master, to keep the right of way and track of its railroad "fenced with good and sufficient fence on both sides thereof, so as to prevent cattle and animals from getting on said track," and "to provide a good, safe, and secure locomotive and tender, with a pilot cow-catcher in front thereof, and to run and operate its trains in such manner as to always have the locomotive in front of its train, and a pilot or cow-catcher in front of said locomotive engine, and in a position to remove obstructions from said track." It was then alleged that these general duties were unperformed, and that of their non-fulfillment the defendant had notice.

The charge was also made against the defendant that by reason of its negligence its railroad track and right of way were not at the time of the plaintiff's injury fenced with good and sufficient fences, by reason of which neglect a bull or ox got upon said track; and by reason of that, and the negligence of the defendant in running its locomotive engine with the tender in front, and without a cow-catcher, etc., the locomotive engine ran against the bull or ox, which collision resulted in the plaintiff (while using due care and attention in the line of his duty) being thrown off the car where he was properly stationed, and seriously and painfully injured.

There seems to be no doubt but what the facts show that the plaintiff suffered the injuries complained of through a collision of the train with the ox or bull, which had gotten upon the track through the negligence of the defendant in not keeping up proper fences. It is equally clear that the plaintiff was fully aware of the fact that the defendant's locomotive engine was run with the tender in front, and had been so run for a long time, and it is apparently conceded on both sides that under the evidence no cause of action existed in favor of the plaintiff on that ground. But it is insisted by the plaintiff, and denied by the defendant, that the negligence which caused the accident in which the plaintiff had his leg broken was by reason of the fact that the fences along the track were insufficient to turn cattle and stock, and that on account of the bad condition of the fences, well known to the defendant and unknown to the plaintiff, the bull or ox got on the track, caused a car or cars to be precipitated therefrom, the plaintiff violently thrown off and permanently injured.

The evidence unquestionably and without serious conflict shows that the fences were neither good nor sufficient; in fact, it appears from the evidence of all the witnesses who testified as to the matter that the fences were very bad; and this fact must have been apparent to even the most casual observer. They were composed of posts loosely set in the ground. There were but two planks, six inches wide and sixteen feet long, nailed parallel to each other from post to post. They were impaired by frequent nailing in some places, and could with difficulty be kept on the posts by nails. They were known to have repeatedly fallen off, or been pushed off by cattle which came out on the track. On various occasions during the time when plaintiff was in the defendant's employment the train would have to be stopped, and the intruding cattle driven off by the train hands, and upon at least one occasion the plaintiff had assisted in driving such intruding cattle off the track.

The plaintiff had been in the employment of the defendant for about a year and a half, and had been engaged for some months of this time in traveling upon its trains over the track and right of way, along which these insufficient fences ran. He declares in his evidence that he did not know of any defect in the fences, and that, so far as his observation went, they appeared to be good fences.

If it be conceded that the plaintiff paid so little attention to the fences as to suppose that they were good, it then appears that he acted in that respect in a manner entirely different from several other persons, who testify to facts from their observation which show that the fences would appear to any prudent man as being in a condition utterly inadequate to the turning of stock. The fences undoubtedly appeared to every one who looked at, and who has testified as to, them, in the case, as bad and insufficient fences.

The evidence shows plaintiff to be a man of intelligence and acuteness; so that if he did not come to the conclusion, after abundant opportunity, that the fences were bad, it must have been because he did not notice them at all, when he should have done so. If he had been a reasonably prudent man, he would have known that the fences were bad; and that cattle, which were abundant thereabout, and had gotten on the railroad track, causing the train to stop until they could be driven off, would do so again, and that a collision might take place, and he be seriously hurt.

Such being the state of the evidence, what was the duty of the jury in the premises, under the instructions of the court, unobjected to by the plaintiff, one of which was as follows: "If, on the contrary, you find that the plaintiff fully knew the unsafe condition of the fences at the place of injury, or, as a prudent, reasonable man, should have known their condition, then your verdict should be for the defendant."

It would seem that it was their duty to say that, as a prudent, reasonable man, the plaintiff should have known the condition of the fences at the place of injury, as many other witnesses who testified in the case stated facts about the fences which uniformly showed their condition to have been bad, and the plaintiff himself does not in any way whatever contradict their statements in that respect.

There is no conflict in the testimony as to the fences being bad,—a fact which must have impressed itself upon any prudent man, viewing them as he rode past them day after day for months, if he had chosen to avail himself of an abundant opportunity presented to him of looking at them, and being compelled by such observation to note their wretched condition. The only conflict is between the statement of the defendant that he did not know they were bad and insufficient fences, and that of everybody else who looked at and stated them to be insufficient.

The plaintiff nowhere even intimates that the fences were not glaringly insufficient; in fact, he succeeded by the testimony of his own witnesses in demonstrating the truth of that matter. Yet he utterly fails in his evidence to explain how he alone, of all those who gave the fences any attention, did not observe their insufficiency. How, then, could he fail to know that the fences were bad, and appreciate the risk which he ran, unless he neglected, as a prudent man, to observe the condition of the fences, which were daily within his his view? He does not say that he gave them any attention; he does not declare that those who did view them were wrong in their conclusion; he does not give any reason why he did not know their condition, which was patent to any observer; he contents himself with saying he did not know their bad condition, as they appeared to him to be good.

It is impossible, in view of the uncontradicted evidence in the record, that the plaintiff could have remained in ignorance of the insufficiency of the fences, unless he had willfully refrained from looking at them, or had utterly neglected to do so. In either event he did not act either as a prudent or reasonable man in his situation should have done.

In the case of *Sweeney* v. *Railroad Co.*, 57 Cal. 15, the engineer, who was killed by the train colliding with cattle, was shown to have known that he ran a great risk because of the entire absence of all fences along the track, and the appellate court held that a recovery could not be had against the railroad company whose train he was operating at the time he met his death.

The jury in the case in hand either disregarded the instruction of the court, or found contrary to the evidence. We, therefore, advise that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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3 Cal. Unrep. 50

In re ROSE'S ESTATE. (No. 12,408.)

(*Supreme Court of California.* December 29, 1888.)

APPEAL—TIME OF TAKING.

Under Code Civil Proc. Cal. § 939, providing that an exception to the decision or verdict because not supported by the evidence cannot be reviewed unless the appeal is taken within 60 days after the rendition of the judgment, an appeal from a decree settling an administrator's account, taken within the statutory time after the entry of the decree, but not within 60 days after the decision and the filing of the findings, is not in time to present the question of the insufficiency of the evidence. MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Tulare county; W. W. CROSS, Judge.

Wal. J. Tuska and *W. W. Foote*, for appellant. *Stetson & Houghton*, for respondent.

PER CURIAM. This is an appeal by an administrator from a decree settling his account. When the account was rendered, written grounds of contest were filed; and after trial, at which witnesses were examined, the judge of the superior court made findings and a decree whereby it was adjudged that the account presented was not correct, and that the administrator owed the estate more money than the balance of his account showed. The appeal was taken within 60 days after the entry of the decree, but not within 60 days after the announcement of the decision and the filing of the findings. There was no motion for a new trial.

The respondent contends that the question as to the sufficiency of the evidence to sustain the decision cannot be considered; and we think this position must be sustained. It is not necessary to decide whether a motion for a new trial would have been a proper remedy. Section 939 of the Code of Civil Procedure provides that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment unless the appeal is taken within sixty days after the rendition of the judgment." If the appeal be not taken within 60 days from the rendition of the judgment, the question as to the insufficiency of the evidence cannot be considered. *Clark* v. *Gridley*, 49 Cal. 105; *Handley* v. *Figg*, 58 Cal. 578; *Bettis* v. *Townsend*, 61 Cal. 333; *Moyk* v. *Peterson*, 17 Pac. Rep.

447. The words "rendition of the judgment" do not mean the same thing as "entry of the judgment." They mean either the announcement from the bench entered in the minutes, or the filing of the findings, if there are findings, or both. But it is not necessary to decide what is the precise meaning of the term here; for in this case both things occurred more than 60 days before the appeal was taken. It may seem a strange result that, in order to present the question of the insufficiency of the evidence, the appeal must be taken within 60 days from an event which may occur long before the judgment is entered. But the statute is explicit to that effect; and it may very well be that the legislature recognized the fact that a long period may happen to elapse between the rendition and the entry of the judgment, and considered it undesirable that questions as to the insufficiency of the evidence should be allowed to remain open so long. We think the provision referred to applies to decisions in probate matters like the one in this case, and hence that the evidence cannot be reviewed on this appeal.

The only questions which can be reviewed upon the appeal are as to the sufficiency of the findings to support the decree, and as to errors in law occurring at the trial. The findings seem to us to be sufficient, and we see no error in law.

The decree appealed from is affirmed.

McFarland, J. I dissent. I do not think that the action of a court in settling an administrator's account was intended to be included in the provisions of section 939 about an appeal from "a final judgment in an action or special proceeding." It is simply a probate order, and an appeal from it is specifically provided for in subdivision 3 of section 963. And, in my opinion, if an appeal be taken from such an order within the 60 days after the order has been entered, as provided in section 1715, the sufficiency of the evidence to sustain the decision may be considered.

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3 Cal. Unrep. 56

Humphreys *et al.* *v.* Hopkins. (No. 12,626.)

(*Supreme Court of California.* February 27, 1889.)

Replevin—By Receiver—Judgment.

In replevin, plaintiffs alleged that they had been duly appointed and qualified as receivers of a railroad company in another state, which thereupon delivered all its property to plaintiffs, and that the property in question had been wrongfully taken from them by defendant in this state. The answer admitted the appointment and qualification of plaintiffs as receivers, but denied that the company had delivered to them its property, and specifically denied the delivery of the property in question, which defendant claimed to hold as sheriff under an attachment issued against the company. *Held*, that the issues demanded a finding that the property had been delivered to plaintiffs as receivers before it came into this state, and that a finding that plaintiffs were entitled to its possession when taken from them by defendant was insufficient; it being but a conclusion of law.

In bank. Appeal from superior court, city and county of San Francisco, James G. Maguire, Judge.

Frank M. Stone, for appellant. *F. Z. Blakeman*, for respondents.

Per Curiam. The findings of the court do not respond to the issues. The complaint alleges, in substance, that on the 25th day of May, 1884, plaintiffs were, by an order of the United States circuit court of Missouri, appointed receivers of all the property of the Wabash, St. Louis & Pacific Railroad Company, with authority to take possession of, control, and operate its railroad, and preserve the property; that plaintiffs duly qualified as such receivers, and thereafter the said railroad company transferred and delivered all of its property to the plaintiffs, in pursuance of said order; that plaintiffs took possession of, and ever afterwards managed and controlled, the same, until interfered with by the defendant, as hereinafter stated; that the car in controversy is a part of the property so transferred; that, while plaintiffs were in possession of the car, the defendant at the city of San Francisco, April 3, 1885, wrongfully and unlawfully took it from their possession, and still unlawfully detains the same, although a demand for the possession of the car has been made by the plaintiffs.

The answer admits that the plaintiffs were appointed, and that they duly qualified and entered upon the discharge of their duties as receivers, as alleged, but denies that the Wabash, St. Louis & Pacific Railroad Company delivered any property to plaintiffs as receivers, and denies specifically that the car described in the complaint was ever transferred or delivered to plaintiffs by said company. For a further and separate answer defendant (sheriff of San Francisco) averred that he, as sheriff of the city and county of San Francisco, in obedience to a writ of attachment issued out of the superior court, had taken and held the property on the 1st day of April, 1885, at the instance of the plaintiffs in an action by Payot, Upham & Co. vs. said Wabash, St. Louis & Pacific Railroad Company, wherein said firm claimed the sum of $641.71 upon an express contract.

The court found that the car in controversy was on the 16th day of March, 1885, at the city of St. Louis, lawfully in possession of plaintiffs; that on said last-named day said car was loaded with freight by plaintiffs and sent to the city of San Francisco, where it arrived about April 1st, in the custody of the Central Pacific Railroad Company, which company was the agent of plaintiffs for the purpose of delivering freight and returning the car to plaintiffs at St. Louis; that the defendant wrongfully and unlawfully seized and took said car from the custody of said railroad company on April 3, 1885, and continued to detain the same until September 5th following, when it was taken under due process from the defendant, and delivered to the plaintiffs in this action; that on March 24, 1885, Henry Payot and Isaac Upham were partners doing business in the city and county of San Francisco, and commenced an action against the Wabash, St. Louis & Pacific Railroad Company, as alleged by defendant, and that defendant, as sheriff, took and held possession of the car, as alleged by him.

It is apparent from the allegations of the complaint that the plaintiffs are suing in their representative capacity as receivers, and it is equally clear that the defendant, in his answer, attempts to meet the claim of the plaintiffs solely upon that theory. There is nothing in the complaint to indicate that the plaintiffs intended to sue in their individual capacities. The caption of the complaint is immaterial in cases of this kind; it is the body of the complaint which shows the capacity in which a party sues, not the designation in the title of the cause. Boone, Code Pl. § 9. It is not pretended, in fact, that the plaintiffs have any title to the property other than such as they acquired by virtue of the assignment by the company under and in pursuance of the order of the United States circuit court for the Eastern district of Missouri.

In view, therefore, of the facts alleged, that plaintiffs were receivers, and that the car was a part of the property of the railroad company, transferred to them as such, and the denials that the car was a part of the property transferred as alleged, or that the plaintiffs, as such receivers, ever took possession of it, it became a material issue whether the property had come into the hands of plaintiffs under the assignment from the railroad company, as alleged. The plaintiffs were not entitled to recover unless the property had been actually delivered into their custody before it came into this state. Even if the court had found the fact to be that the property had been delivered to the plaintiffs in Missouri, the evidence is insufficient to support such a finding. The court found in general terms that the plaintiffs were entitled to the possession of the car on the 3d day of April, 1885, when it was wrongfully taken from them by defendant, and retained by him until taken from him, by due process in replevin, on September 5, 1885. This finding does not answer the objections made to the sufficency of the finding on the question of delivery. Under the issues it is a mere conclusion,—a matter of law. The plaintiffs base their right to recover on certain facts alleged, some of which are denied. The defendant is entitled to specific findings of fact upon those issues. The defendant is a sheriff. He had seized the property as the property of the railroad company under a writ issued in an action against that company at the instance of a plaintiff claiming to be a legal creditor of the company, and this was the justification which he pleaded. If he levied the writ upon the property of the company, as required by the writ, he was justified. Section 4187, Pol. Code.

Again, the defendant pleaded that the members of the firm of Payot, Upham & Co., plaintiffs in the attachment suit, were citizens of the state of California, and domestic creditors. The court found that Henry Payot and Isaac Upham were copartners doing business in the city and county of San Francisco when the suit was commenced, but did not find whether they were citizens of the state. While, perhaps, the failure to find on this issue was due to a failure on the part of the defendant, upon whom rested the burden to supply the proof, and would not justify the reversal of the case, we think there should have been a finding as to whether said parties were citizens of the state. The mere fact that they were copartners doing business in the city of San Francisco when the suit was commenced is insufficient.

As we are unable to determine the merits of the case without a finding upon the issue as to whether the car was ever transferred and delivered to the plaintiffs as a part of the property of the Wabash, St. Louis & Pacific Railroad Company the judgment must be reversed; and, as the judge who tried the case in the court below has gone out of office, the case cannot be referred simply for additional findings.

Judgment and order reversed, and cause remanded for a new trial.

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78 Cal. 310

BURKETT *v.* BURKETT. (No. 12,459.)

(*Supreme Court of California.* March 5, 1889.)

1. HOMESTEAD—CONVEYANCE TO WIFE—SUFFICIENCY.

Civil Code Cal. § 1265, provides that when a selection of a homestead is made by a married person from community property, the land, on the death of either spouse, vests in the survivor. Section 158 provides that husband and wife may contract with each other respecting property as if unmarried. *Held*, that a declaration of a homestead by a husband on his separate property vests a joint title thereto in himself and wife, and a subsequent conveyance of the property by him to his wife is valid, and passes the complete title to the wife, subject to the homestead, though sections 1242, 1243, provide that an instrument of conveyance of a homestead must be executed and acknowledged by both husband and wife.

2. DIVORCE—RIGHTS IN REAL PROPERTY.

On a subsequent divorce procured by the wife for the husband's fault, the absolute title to the property, as between them, vests in her, as she is the "former owner" within the meaning of Civil Code Cal. § 146, subd. 4, providing that on divorce, "if a homestead has been selected from the separate property of either, it shall be assigned to the former owner, * * * subject to the power of the court to assign it for a limited period to the innocent party."

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by Alexander Burkett against Orpha Burkett, to quiet title to land. Judgment for plaintiff, and defendant appeals. Civil Code Cal. § 1265, referred to in opinion, provides that when a homestead is selected by a married person from community property, the land, on the death of either spouse, vests in the survivor.

D. S. Terry and *J. C. Campbell*, for appellant. *Joseph H. Budd*, (*Dunlap & Vischer*, of counsel,) for respondent.

WORKS, J. This case presents two questions necessary to be considered: (1) Can a husband make a valid conveyance to his wife of his separate real estate, upon which he has declared a homestead, which is still subsisting at the time of the conveyance? (2) If so, what was the effect upon the title, of a divorce granted to the wife subsequent to the conveyance, the property rights of the parties not being adjudicated in such divorce proceeding? The plaintiff, being the owner of certain real estate as his separate property, declared a homestead thereon, he and the defendant then being husband and wife, and residing on the property. Subsequently he conveyed the property directly to the defendant, who was still his wife. Thereafter the defendant procured a decree of divorce, but there was no adjudication as to the property. The plaintiff prosecutes this action to quiet his title. The court below found for the plaintiff, on the ground that the conveyance was void, and judgment was rendered accordingly. The defendant appeals.

1. In this state either husband or wife may enter into any agreement or transaction with the other, respecting property, which either might, if unmarried. Civil Code, § 158. Therefore a husband may convey his real estate directly to his wife, as he may to any other person. The effect of declaring the homestead was to convert the separate title of the husband into a joint title in himself and wife to the extent of the homestead. Id. §§ 1237, 1242, 1265; *Barber* v. *Babel*, 36 Cal. 14. And thereafter the homestead could not be conveyed or incumbered, except by an instrument executed and acknowledged by both husband and wife. Civil Code, §§ 1242, 1243; *Barber* v. *Babel*, *supra;* *Flege* v. *Garvey*, 47 Cal. 375; *Gagliardo* v. *Dumont*, 54 Cal. 498; *Graves* v. *Baker*, 68 Cal. 133, 8 Pac. Rep. 691; *Porter* v. *Chapman*, 65 Cal. 365, 4 Pac. Rep. 237; *Tipton* v. *Martin*, 71 Cal. 325, 12 Pac. Rep. 244.

The cases cited construe the statute as enacted in the interest of the wife, where the declaration is by the husband, and hold that no conveyance in derogation of her rights under the homestead can be effective unless she joins in the same. But all of the cases relate to conveyances to third parties, which are necessarily in derogation of her homestead rights. It is true the case of *Tipton* v. *Martin*, *supra*, was a conveyance to the wife, but only in trust, and for the benefit of the *cestui que trust.* The case before us presents an entirely different question. The conveyance was not in derogation of the homestead rights of the wife. Being a conveyance of the legal title from one of the joint owners of the homestead right to the other, the property must be held to remain a homstead as before. The requirement of the statute that the wife shall join in the conveyance only applies to a conveyance or abandonment of the homestead. As the deed under consideration did not in any way effect the homestead, it is not within the statute, and no reason occurs to us for holding such a conveyance to be void.

In the case of *Gagliardo* v. *Dumont*, *supra*, it was said: "Under the restraints imposed by the homestead law, neither the husband nor the wife had power to transfer the homestead by a separate conveyance, nor could either incumber it to the prejudice of the other or of both, or to the destruction of the homestead itself. The obligation between them, in respect to its preservation, was reciprocal. Neither could, without the consent and concurrence of the other, alienate or transfer it. It was created as a place of residence for the family, and it is the policy of the law to preserve it intact for that purpose until both the husband and wife shall mutually resolve to destroy it by alienation or abandonment. In pursuance of that policy its destruction is prohibited, except by the joint act of both in the mode provided by the homestead law." It will be seen from the language of this and other cases that the object of the statute, as construed by this court, is to prevent the destruction of the homestead, except by the consent of the parties, expressed by a joint conveyance. If this deed could be held to have that effect, it might be declared void. But as its effect is to leave the homestead intact and vest in the wife the legal title to the property, subject thereto, no right intended to be protected by the constitution and legislation under it, is infringed or affected in any way. The question is an open one in this state, but we are not without authority to support such conveyance. *Spoon* v. *Van Fossen*, 53 Iowa, 494, 5 N. W. Rep. 624; *Green* v. *Farrar*, 53 Iowa, 426, 5 N. W. Rep. 557; Thomp. Homest. & Ex. § 473, Platt, Prop. Rights Mar. Wom. § 70, p. 225; *Riehl* v. *Bingenheimer*, 28 Wis. 86; *Baines* v. *Baker*, 60 Tex. 140; *Ruohs* v. *Hooke*, 3 Lea, 302; *Harsh* v. *Griffin*, (Iowa,) 34 N. W. Rep. 441.

The holding in the cases cited is, in effect, that the conveyance from the husband to the wife of the homestead property does not affect the homestead character of the estate, but carries his title subject thereto. She holds the title for the benefit of the family, subject to the same restriction against alienation applicable to the same in the hands of the husband. It is said in Thompson on Homesteads, (section 473:) "The policy of those statutes which restrain the alienation of the homestead without the wife joining in the deed is to protect the wife, and to enable her to protect the family, in the possession and enjoyment of a homestead, after one has been acquired by the husband. They are not intended to interpose obstacles in the way of a conveyance of the homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever may be the form of such conveyance." So in *Spoon* v. *Van Fossen*, 53 Iowa, 494, 5 N. W. Rep. 624, the court said: "Section 1990 of the Code provides: 'A conveyance or incumbrance by the owner is of no validity unless the husband and wife, if the owner is married, concur in and sign the same joint instrument.' It is urged by appellant's counsel that it would be absurd to require the wife to sign a conveyance to herself. This may be admitted, but it does not follow that a deed from the husband to the wife will operate as a surrender of the husband's homestead rights in the property conveyed. It is the policy of the law to preserve to every family a homestead. Such a course greatly subserves the interests of society and of good government; hence the law has wisely thrown restrictions about the manner of conveying or incumbering the homestead. If the nature of these restrictions is such that they cannot be observed in the case of a conveyance by the husband to the wife, it follows that the husband cannot convey his homestead rights to the wife, rather than that the conveyance shall prove effectual notwithstanding its failure to comply with the conditions of the statute. It does not follow that the deed to the wife is a nullity. It may have operated to vest in the wife the legal title to the property, but the property continued still to be the homestead of the family. The declaration in the deed of the intention to surrender homestead rights and allow the wife the absolute disposition of the property is ineffectual, because not expressed in the manner required by the law. After the conveyance the homestead remained, with the title, it may be conceded, in the wife."

In the case of *Riehl* v. *Bingenheimer*, 28 Wis. 84, the deed was to a third party in trust for the wife, and the court said: "It is contended by counsel for the plaintiff that the conveyance by Paul Bingenheimer to Judge Paine is void, because the premises sought to be conveyed by it were a homestead, and the wife of the grantor did not join in such conveyance. The statute then was, and still is, that a mortgage or other alienation of a homestead by the owner thereof, if a married man, shall not be valid without the signature of the wife to the same. This statute was enacted to protect the wife, and to enable her to protect her family, in the possession and enjoyment of a homestead, after one had been acquired by her husband; but evidently it was not intended to interpose obstacles in the way of the conveyance of such homestead to the wife, or to the wife and children, with the consent and approval of the wife, whatever might be the form of such conveyance. Under the circumstances of this case we are of the opinion that the conveyance to Judge Paine was not an alienation of the homestead, within the meaning and intent of such statute. The express trust which was attempted to be created by that conveyance is clearly a passive one, and the grantee took no title by virtue of the conveyance, but the legal estate vested immediately in the defendant, the plaintiff, and Elizabeth, to the extent of the estate therein granted to them respectively."

It is claimed by the respondent that the homestead laws of other states differ from our own and for that reason the decisions of the courts of such states cannot be relied upon. But we find that the statutes in the states referred to are the same, in principle, as the Code of this state, in respect to the power and manner of alienating the property. However this may be, we should not hesitate to hold such a conveyance to be valid, independent of authority. That such conveyances should be upheld seems to us to be eminently just, and entirely consistent with the letter and spirit of the homestead laws. We can see no just reason for permitting the husband to question his own conveyance of the property, and, as no one else is complaining, or could be injured thereby, the same must be upheld.

The respondent makes the point that this was a mere gift, and, the mode of making it being incomplete, it cannot be enforced. If the gift were not perfectly executed, and this were an attempt to compel a specific performance, the rule invoked would be applicable. But as we have held that the execution of the conveyance was perfect without the signature and acknowledgment of the wife and the action is by the grantor to avoid the same, the point is not well made.

2. We pass to the question as to the effect of the divorce upon the title. At the time the divorce proceeding was instituted and the decree rendered therein, the property was a homestead upon the separate property of the wife by virtue of the declaration by the husband and his subsequent conveyance to her. There was no adjudication as to their rights in the property. In that proceeding the rights of the parties to the property might have been determined, and, if the plaintiff had shown any just ground for setting the whole or any part of the same off to him, this might have been done for a limited time, under subdivision 4, § 146, Civil Code, which provides that "if a homestead had been selected from the separate property of either, it shall be assigned to the former owner of such property, subject to the power of the court to assign it for a limited period to the innocent party." The husband having conveyed the property to the wife by a valid deed, prior to the commencement of the divorce suit, she must be regarded as the "former owner" under this section, and entitled to the property subject only to the power of the court to set the same apart to the husband for a limited time, if he appeared to be the innocent party.

It affirmatively appears from the record before us that the plaintiff was not the innocent party in the divorce suit, but, if he had been, his only right was to ask to have the property set apart to him in that proceeding. Not having done so, her title to the property became absolute, as between them, from the granting of the divorce.

As the facts are fully found by the court, and the error is in the conclusions of law drawn therefrom, a new trial is unnecessary.

The judgment and order appealed from are reversed, with instructions to the court below to enter judgment on the findings in favor of the defendant.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

78 Cal. 317

People *v.* Lee Chuck. (No. 20,483.)

(*Supreme Court of California.* March 5, 1889.)

1. Homicide—Trial—Harmless Error.
In a prosecution for homicide, a witness testified, in answer to a question as to how long he had known defendant, that he knew him before he killed the decedent. *Held*, that error in allowing such testimony was harmless, where it appeared that the killing was an undisputed fact.

2. Same—Alibi—Evidence.
Evidence that defendant was found several hours after the homicide, and after a warrant had been issued for him, apparently in a place of hiding, was not admissible to disprove an *alibi*.

3. Same.
It appeared that other persons than defendant were present at the homicide, for whom warrants of arrest had been issued, on the charge that they were guilty of complicity in the crime, and the defense introduced evidence to show that the homicide had been committed by defendant and such other persons in self-defense. *Held*, that the admission of evidence that, although every effort had been made, such other persons could not be found, the evidence being offered to show the guilt of defendant, was fatal error.

4. Same—Trial—Argument of Counsel.
In such case, where the attorney for the state, in arguing for the admission of such evidence, commented at length upon it, with the evident intent of prejudicing the minds of the jury against defendant, the refusal of the judge to prevent his remarks was error.

5. Same—Misconduct of Jury.
The drinking of intoxicating liquor by a jury while deliberating on their verdict, in a prosecution for murder, is cause for setting aside a verdict of guilty; and it is not necessary to show that defendant was actually injured thereby, though Pen. Code Cal. § 1181, subd. 3, provides for a new trial where the misconduct prevents a fair consideration of the case.[1] Beatty, C. J., dissenting.

6. Same.
Where a new trial is sought on the ground of the misconduct of the jury, the cross-examination of parties filing affidavits in support of the verdict of the jury is within the discretion of the trial court.

7. Same—Appeal—Objections not Made Below.
The alleged misconduct of a juror, which was not made one of the grounds for a new trial, will not be considered on appeal.

8. Same—Instructions.
Where an instruction on a certain point, standing alone, is open to criticism, but the instructions, taken as a whole, fairly state the law on such point, there is no ground of objection.

9. Same—Objections to Evidence.
A ruling of the court in favor of the admission of evidence, on an objection being made to a question asked of a witness, will not be reviewed, where the record does not show that the question was answered.

10. Witness—Examination—Evidence on Former Trial.
Where a witness is interrogated with regard to statements made by him at a former trial, he has the right, if such statements were reduced to writing, to have the writing presented to him, and read.
McFarland, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; D. J. Toohy, Judge.

Geo. A. Knight and *H. H. Lowenthal*, for appellant. *Geo. A. Johnson*, Atty. Gen., for appellee.

Works, J. The appellant was charged, tried, and convicted of the crime of murder in the first degree, and sentenced to death. He moved the court below for a new trial, which was denied, and now prosecutes this appeal.

Several grounds for reversal are urged, which may be grouped and considered as follows: (1) Alleged erroneous rulings of the court below on the admission and exclusion of evidence; (2) misconduct of the district attorney;

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[1] *Contra*, see Burgess v. Territory, (Mont.) 19 Pac. Rep. 558; Rider v. State, (Tex.) 9 S. W. Rep. 688, and note.

(3) misconduct of one of the jurors in visiting and inspecting certain premises during the trial, unaccompanied by the officer of the court, and without leave, (4) misconduct of the jury in drinking intoxicating liquors while deliberating upon their verdict; (5) error in the instructions of the court.

The evidence is not all in the record. The bill of exceptions recites, substantially, that there was evidence tending to show that the appellant shot and killed one Yen Yuen, on one of the streets of the city of San Francisco; that he attempted to escape, was followed by an officer, whom he also attempted to shoot, was arrested, and found to be armed with four revolvers, and protected by a coat of mail, made of links of steel, worn under his clothing; that at the time of the shooting he was accompanied by several other persons, who also ran away immediately afterwards; that the deceased had a pistol on his person which was fully loaded, none of the chambers having been discharged. There is no general statement showing what the defendant proved in his defense, or its tendency.

1. During the cross-examination of one Chow Hin, a witness for the prosecution, he was asked by the defense how long he had known the defendant. He answered: "Several years ago, because it was on last year six months 28 day that he killed Yen Yuen, and I knew him about a year before that." The defendant moved the court to strike out so much of the answer as referred to the killing of Yen Yuen by the defendant, on the ground that it was not responsive to the question. The motion should have been sustained, but, as the record comes to us, we cannot say that any injury could have resulted from the ruling of the court. The killing of the deceased by the defendant may have been, and we infer from the matters appearing in the record was, an undisputed, though perhaps not an admitted, fact, the defense being that the killing was justifiable. If so, the statement of the witness was harmless.

The same witness was asked whether he did not testify to certain things before the police court, and answered that he did; whereupon the prosecution asked him whether he did not at the same time make certain other statements. To this the defendant objected, and the objection was overruled, but there is nothing in the record to show that the question was answered by the witness. To render a ruling in favor of the admission of evidence material, the record must show that the question objected to was answered, thereby carrying the objectionable evidence to the jury. It is unnecessary, therefore, for us to determine whether the evidence that might have been elicited was competent or not.

The defense, on cross-examination of one Sorr Sinn, asked whether he did not on a former trial of this case make certain statements, when the following occurred: The district attorney objected on the authority of *People* v. *Ching Hing Chang*, 74 Cal. 389, 16 Pac. Rep. 201, holding that whatever the witness might have said at the former trial he had the statutory right to have it presented to him, and read, if in writing. The court remarked to counsel for defendant· I would sustain you if I could reverse the supreme court, but I cannot." As the rule referred to is well established, and one in every respect fair and just, it is fortunate that the court below was not possessed of the power to reverse it. There was no error in this ruling.

The bill of exceptions recites: "Evidence having been introduced by the prosecution tending to show that Lee Chuck, the defendant, and Quan Gee and Chung Kit and Chung Wye and Chung Sam were present at and participated in the killing of Yen Yuen, the deceased, the defense then introduced evidence tending to show an *alibi* for Quan Gee and Chung Kit, and also tending to show that Lee Chuck and Chung Wye and Chung Sam were first attacked by Yen Yuen and Chow Hin and others, and that Lee Chuck and Chung Wye and Chung Sam shot in self-defense at Yen Yuen and his party." The prosecution then proved by the witness Cox that he was an officer; that he had received certain warrants of arrest for the persons above named, and that he had never been able to serve two of them, although he had made every effort to find the parties, and the warrants not served were offered in evidence, and excluded; but the court permitted the witness to testify that he had searched diligently for the parties who had not been found, and that if he could have found them he would have arrested them on the charge set out in them, which the district attorney had openly stated to the jury was the same offense for which the defendant was being tried. As to the other party named, the prosecution was permitted to prove that he had been arrested where he had been found several hours after the shooting, in a small "cubby hole" at the top of a house near the place of the shooting. The witness was permitted to testify minutely to the nature of the room, its furniture, the means of reaching it, with the view, we suppose, of showing that he was there in hiding to avoid arrest. The evidence was objected to by the defense on the general grounds that it was immaterial and incompetent. For what purpose or upon what theory the evidence was admitted does not clearly appear. We can only infer it from the statement of the district attorney, made in support of his offer, which will be set out hereafter in connection with another point made. His position, in brief, was that as to those who were not found it tended to show that they were not innocent and acting in self-defense, as claimed, or they would not have run away; and that the fact that they were not present to explain what occurred at the time of the shooting was a circumstance against the defendant, and was "offered to show the utter improbability of this self-defense fabrication; that is why this is offered."

There is nothing to show that the defendant was in any way responsible for their absence, or that he was not as desirous that they should be present at the prosecution. This is to permit the act or conduct of one party, after a crime is claimed to have been committed, indicating his guilt, to be proved as against another in no way connected with such act or conduct. We are wholly unable to see upon what rule of law or justice such a ruling can be upheld. *People* v. *Sharp*, 107 N. Y 427, 14 N. E. Rep. 319, is a case in point. There the defendant was charged with bribery. The prosecutor, as a part of his evidence, offered to show by a detective officer that he was employed to serve subpœnas upon three other parties, all of whom the district attorney claimed to be material and competent witnesses, and to show, further, that the detective was unable to find them in the state, but did find one of them in Canada, and learned that the others were there, but did not see them. These persons were named in the indictment as co-defendants with Sharp, and the evidence already in tended to show that they were mediaries between the persons offending against the statutes relating to bribery. It was not claimed by the prosecution that the defendant was privy to their absence. The district attorney disclaimed any intention of proving the flight of those persons as co-conspirators, and so make use of their absence as evidence of guilt, or an admission of their conduct that the accusation against the defendant was true, but for the purpose of explaining his inability to produce them as witnesses. In the case before us the district attorney openly avowed that the evidence was offered to disprove the defendant's defense, or, in other words, to prove his guilt. In the case referred to the court says: "The evidence already in was, so far as Sharp was concerned, altogether circumstantial, but tended to show that the persons named, or some of them, were qualified from actual knowledge to give evidence bearing more or less directly upon the very point in issue. We think evidence of their absence was inadmissible. It could have no legitimate bearing upon the issue, and the danger is very great that such testimony will prejudice a party against whom it is offered. It may be and frequently is admissible in answer to evidence from the other side, which would naturally call for an explanation. But the absence out of the jurisdiction of the court of an associate, or one seemingly connected with the defendant in the act charged, is easily construed as evidence of guilt, and, unless the occasion calls for such proof, it should not be allowed. It is an old maxim that 'he confesses the fault who avoids the trial,' but in its application, even to the fugitive, there is great danger of error. A man may avoid the trial for many motives besides consciousness of guilt, but, however actuated, his conduct can in no degree, in a court of justice, reflect upon another. Its admission in this case was virtually saying to the jury: 'There is better evidence, and it might be had from the defendant's associates. It is not the fault of the prosecution that the evidence is not before you, but because of the voluntary act of those who, with the defendant, stand charged with the offense.' Thus the non-production of the witnesses is made to supply the place of proof of the issue; with that issue the evidence has no possible connection. The rule is that where a party to an issue on trial has proof in his power which, if produced, would render material, but doubtful, facts certain, the law presumes against him if he omits to produce that proof, and authorizes a jury to resolve all doubts adversely to his defense. But the rule cannot be applied unless it appears that the proof, whether it is a living witness or paper, is within his power. It is easy to see that the evidence offered here might be used for an ulterior purpose, although not pressed by the prosecution, yet entertained and made effective by the jury, and there certainly could be no presumption that the prosecution had the power to produce any particular witness, certainly not one of those named, nor did the law require it of them. It is therefore impossible to find any reason for or lawful purpose to be gained by the proof offered, and its admission was a very dangerous innovation upon the general rule, which excludes it as irrelevant to to the issue. * * * Proof even of the absence of these persons was inadmissible. But that was not all. The proof was not only of their absence, but of unavailing search by a detective, the service of a subpœna upon some of them, and the failure to obey its mandate. Under the circumstances of the case the ruling of the court in this instance may not have been of much importance, and upon it alone we should not grant a new trial. But the legal principle which requires relevant and material evidence, and admits no other, is important; and, however serious the charge against an accused may be, and however great the evil it uncovers, he cannot properly be made the subject of a judicial sentence, unless the crime is substantiated according to the established rules of evidence."

It will be seen that the evidence improperly admitted was held not to be of sufficient importance to warrant a reversal of the case, but it must be borne in mind that the evidence there was not offered to prove guilt, while here it was offered for that purpose, and so went to the jury. Having gone to the jury for that purpose, its injurious effect upon the rights of the defendant must be apparent. We hold that this was a fatal error, for which a new trial should have been granted.

As to the evidence of the arrest of the party who was found by the officer, it was claimed by the district attorney to have been competent to disprove an *alibi* attempted to be proved by the defendant. If competent at all for this purpose, the proof of his presence near the scene of the alleged crime was all that the prosecution was entitled to. The fact that there was a warrant for his arrest for the crime for which the defendant was on trial, and that he was found under circumstances tending to show that he was in hiding, and seeking to avoid arrest, were wholly immaterial. But we are quite clear that it was not competent for that purpose. There is nothing to show that his whereabouts tended in any way to establish the presence of the defendant at the place of the killing, and it appeared that the time to which the testimony referred was several hours after the homicide occurred. It was error to admit the evidence.

2. It is claimed that the assistant district attorney was guilty of misconduct which prevented the defendant from having a fair trial. At the time the

warrants above referred to were offered and under discussion, the following proceedings took place: "*Assistant District Attorney.* The defense set up here is the plea of self-defense. They claim that Yen Yuen, Chow Hin, and other persons assaulted Lee Chuck, Chung Sam, and Chung Wye, and under such circumstances that would make Chow Hin the principal in an attempt to murder,—murder by way of lying in wait, which would be murder in the first degree. We now offer to show that upon the same day— *Attorney for Defendant.* I object to the counsel's statement, and as to his offer of proof. He offered the warrants, and the objection is before the court. *Assistant District Attorney.* I am answering your objection. We offer to show that upon the same day, the 28th day of July, Chow Hin, who, it is alleged, picked up Yen Yuen's pistol; Chow Hin, the unsuccessful murderer of Lee Chuck; and Chow Hin, the person who will be rated here as a highbinder and a gambler,—Chow Hin went down to the proper police authorities, and made complaint against Chung Sam and Chung Wye, and had warrants issued for their arrest for murder; that these warrants were placed by the chief of police in the hands of the most skillful detective in the Chinese quarter. *Attorney for Defendant.* I most strenuously object to the statement of counsel as to the warrants, and what disposition was made of the warrants. He offered certain warrants against Chung Sam and Chung Wye, and I say it is improper to prejudice the jury by speaking of cases,—of any other person except the defendant. The object is to prejudice the minds of the jurors against the defendant. *The Court.* Proceed. *Attorney for Defendant.* I except to the ruling of the court on behalf of the defendant. *Assistant District Attorney.* I offer to show further that this skillful detective officer, who has had several years' experience, who has had eight or ten years' experience among the Chinese, searched high and searched low, and searched every Chinese outgoing steamer which he could search, and has not been able to discover either Chung Sam or Chung Wye, the innocent attacked parties who were with Lee Chuck at the time that Yen Yuen and Chow Hin and Fong Fat and those other people made this malicious attack upon them with pistols, on Washington street. We want to go to the jury on that fact, and we want to ask why these men are not here. We want to know why they should run away from here; why they do not make their appearance here, if they were attacked; why these men who took part in this conflict do not come here to this court, and explain how it was, of all the people in the world, Chung Sam and Chung Wye, the men who were with Lee Chuck. *Attorney for Defendant.* I protest now, in the name of justice, that the district attorney be not allowed to proceed in the manner in which he does. It is improper testimony, and an illegitimate manner to produce testimony before the jury. *Assistant District Attorney.* It is not in this view that this testimony is offered. *Attorney for Defendant.* I protest against it, and I want the record to show it. *Assistant District Attorney.* It is offered to show the utter improbability of this self-defense fabrication; that is why this is offered."

We have been called upon many times to caution, sometimes to rebuke, prosecuting officers for the overzealous performance of their duties. They seem to forget that it is their sworn duty to see that the defendant has a fair and impartial trial, and that he be not convicted except by competent and legitimate evidence. Equally with the court the district attorney, as the representative of law and justice, should be fair and impartial. He should remember that it is not his sole duty to convict, and that to use his official position to obtain a verdict by illegitimate and unfair means is to bring his office and the courts into distrust. We make due allowance for the zeal which is the natural result of such a legal battle as this, and for the desire of every lawyer to win his case, but these should be overcome by the conscientious desire of a sworn officer of the court to do his duty, and not go beyond it.

We regret to say that the assistant district attorney seems to have failed, in this instance, to apply this salutary check to his conduct. The evidence he was seeking to have admitted was clearly incompetent. What was said was not only an argument in favor of its admission, but as to its effect. The evident intent was to prejudice the jury against the defendant by commenting upon the conduct of others, over whose action he was not shown to have any control, and that in language the impropriety of which is apparent at a glance. The court was appealed to time and again to prevent it, but declined to do so. While we might hesitate to reverse the case on this ground alone, we hold it to have been error. See, as bearing on this point, *People* v. *Mitchell,* 62 Cal. 411, and cases cited; *State* v. *Smith,* 75 N. C. 306.

Questions of this kind usually arise out of the closing arguments of counsel, but the rule must be the same at whatever stage of the cause the improper language is used.

3. It is claimed that there was misconduct on the part of the jury which entitled the defendant to a new trial. As to the alleged misconduct of one of the jurors in visiting and examining certain premises unattended by an officer, and alone, it was not made one of the grounds for a new trial, and for that reason cannot be considered here.

The grave charge is that the jury drank intoxicating liquors while they were deliberating upon their verdict. The affidavits show, beyond question, that the case was given to the jury at 3:35 o'clock in the afternoon; that they had failed to agree up the hour of 6:30, when they were taken, in charge of a deputy-sheriff and bailiff, to a restaurant for dinner; that they were served with a "French dinner," and with other refreshments, partook of a half-dozen quart bottles of claret wine and a half bottle of cognac, the latter being used as flavoring for their coffee; that they were about an hour at the restaurant, when they returned to their room, and within two hours agreed upon the verdict that was returned into court. There are affidavits showing that when they returned from their dinner their conduct and appearance, or that of some of them, were such as to indicate that they had been indulging in intoxicating liquors, and it is alleged that their having done so resulted in their agreeing upon the verdict. The two officers in charge make affidavit that none of the jurors were intoxicated, or gave any evidence of being in that condition. Each of the jurors makes an affidavit in which he admits that they drank wine, and took cognac in their coffee, but he does not know how many bottles. Their affidavits are, we believe, substantially, if not precisely, alike, and in each it is said: "And this affiant further avers that upon the said occasion this affiant was not drunk or intoxicated, and that this affiant's intelligence and good judgment were not obscured or affected in any way by intoxicating drinks of any character, and, as far as his observation extended, no one of said jury became drunk or intoxicated upon said occasion, and that the intelligence and good judgment of no one of said jury became or was obscured by intoxicating drinks upon said occasion;" and, further, "that he, for himself, did not find any such verdict against the defendant by reason of partaking of the liquor and wine above mentioned; and this affiant repels and repudiates the truth of any insinuation that he, or, so far as his observation extended, any of the members of the jury, found any such verdict against the defendant by reason of partaking of the liquor and wine above mentioned." It appears, therefore, that the amount of liquors mentioned was consumed. Whether it was equally divided, one pint of the wine to each juror, does not appear. If any juror drank less, he has refrained from saying so, perhaps out of delicacy for the feelings of his associates, who would be convicted thereby of having taken more.

The learned attorney general contends that this was not such misconduct as should reverse the case, because the wine was "California claret," and the cognac was used as a "flavoring for coffee." Whether he intends to insinuate that California claret is too weak to intoxicate, or to claim that to drink wine of our own make should not be treated as misconduct, does not appear; nor does he show that cognac is less effective when adulterated with coffee. The affidavits show that the wine was intoxicating, and the prosecution introduces the affidavit of the proprietor of the restaurant to show its age, quality, and probable effects. He says: "Said claret wine was a good quality of California Zinfandel wine, of four years of age;" and that he has "been engaged in the restaurant business for a period of ten years past; that he has had great experience with wines, and their effects, and that he scouts as foolish and absurd the idea that twelve full-grown men could be seriously or at all affected by using—if they did use—six bottles of claret at dinner, with a little cognac in their coffee afterwards."

It must be conceded that this is some evidence that the whole twelve could not have been seriously or at all affected, and perhaps that none of them were so affected, assuming that the wine and cognac were equally divided. We are thus led to consider, at the outset, whether this court should stop to inquire what was the effect of the drinking of these liquors. That the jury drank the liquors is not denied. The sole question raised is whether the mind of any member of the jury was so affected thereby as to impair his intelligence or judgment, or render him less competent to transact with clearness and impartiality the grave duty resting upon him. It is infinitely more important that the channels of justice be kept pure and untainted than that the verdict against this defendant shall be maintained. The question is not a new one. In some cases it has been held that for a juror to take a drink of liquor during the trial was sufficient ground for granting a new trial. The case before us presents quite a different question. Here the trial had closed. The life of the defendant was in the hands of the jury. They were deliberating upon a question of the gravest consequence to the defendant, to society, and to themselves. They had, up to the time of partaking of the liquors, failed to agree, and soon after agreed upon and returned a verdict that, if sustained, must send the defendant to the gallows. It seem to us that if the fact that the jury drank intoxicating liquors, without proof that it affected their minds, or the conclusion reached by them, could be held sufficient to set aside the verdict in any case, no stronger case than the one before us could be presented. We are of the opinion that where the proof of the drinking is clear and undisputed, and that it was done while the jury were actually deliberating upon their verdict, in a capital case, a verdict of conviction should not be allowed to stand. This is our conviction, independent of authority, but the great weight of authority is to the same effect. *People* v. *Gray*, 61 Cal. 164, 183; *Leighton* v. *Sargent*, 31 N. H. 119; *Brant* v. *Fowler*, 7 Cow. 562; *People* v. *Douglass*, 4 Cow. 26; *Wilson* v. *Abrahams*, 1 Hill, 207; *Jones* v. *State*, 13 Tex. 168; *State* v. *Baldy*, 17 Iowa, 39; *Ryan* v. *Harrow*, 27 Iowa, 494; *Davis* v. *State*, 35 Ind. 496; *State* v. *Bullard*, 16 N. H. 139; *Pelham* v. *Page*, 6 Ark. 535; *Gregg* v. *McDaniel*, 4 Har. (Del.) 367.

In the case of *People* v. *Douglass*, *supra*, the court said: "It will not do to weigh and examine the quantity which may have been taken by the juror, nor the effect produced." And in *Leighton* v. *Sargent*: "For the cause that brandy was furnished to the jury, and drank by several of them, while deliberating upon the cause, after retiring to form their verdict, we think the verdict must be set aside. The quantity drank was probably small, but we cannot consent that that fact should make a difference."

So in *State* v. *Baldy*: "The parties have a clear right to the cool, dispassionate and unbiased judgment of each juror, applied to the determination of the issues in the cause; and the use in any degree of that which stimulates the passions, and has a tendency to lessen the soundness of judgment, is itself conclusive evidence that the party who has the right to the exercise of that dispassionate judgment has been prejudiced in not having it, as perfect as it existed in the juror when accepted, applied to the determination of the cause.

If this is true as a general rule, and as applicable to civil cases, *a fortiori* is the rule applicable in criminal cases, and especially in this case, in which the offense charged involves obedience to passions stimulated more than others by the use of spirituous liquors, and of course, in its correct determination, requiring the most careful guarding against undue influence from them." And in *Davis* v. *State* it is said: "The bailiff, we may presume, had been sworn, in the usual form, to take charge of the jury, and keep them together without meat or drink, water only excepted, etc. The jurors had taken upon them an oath well and truly to try the cause, etc., and had been solemnly sent out to deliberate upon questions involving the life of an unfortunate fellow-being. If misbehavior, such as that shown by the affidavits, and which is without attempted palliation or justification, should not be regarded as sufficient to set aside the verdict, it would be a stigma upon the law and a disgrace to the courts. We do not mean to say that the court should enter upon the question as to how far such conduct was or was not excusable or innocuous. It will be time to decide that question when it shall come up. In this case it does not arise. We concede that on this point the authorities are not uniform. But as to the sufficiency of such misbehavior, unexplained, to set aside the verdict, the authorities are abundant and satisfactory." Also in *State* v. *Bullard:* "There had indeed been other acts of misconduct in the case, but we think that the old law forbidding the use of refreshments at all to jurors deliberating upon a verdict, although relaxed materially from its early severity, has not yet so far yielded as to exempt them wholly from the control of the court in this particular. And we are of the opinion that the use of stimulating liquors by a jury deliberating upon a verdict in a criminal case, without first showing a case requiring such use, and procuring leave of court for that purpose, is a sufficient cause for setting aside a verdict found against the prisoner in such circumstances, whether the use was an intemperate one or otherwise."

The respondent cites the following authorities not already referred to as opposed to the doctrine that the mere fact that the jury drank intoxicating liquors is sufficient to set aside the verdict, without a showing that it did or might have affected the result: Pen. Code, § 1181, subd. 3; *People* v. *Williams*, 24 Cal. 31; *People* v. *Brannigan*, 21 Cal. 339; *People* v. *Symonds*, 22 Cal. 349; *People* v. *Dennis*, 39 Cal. 625; *People* v. *Turner*, Id. 370; *People* v. *Anthony*, 56 Cal. 397; *People* v. *Lyle*, 4 Pac. Rep. 977; 1 Bish. Crim. Proc. § 999; *State* v. *Caulfield*, 23 La. Ann. 148; *Davis* v. *People*, 19 Ill. 74; *Thompson's Case*, 8 Grat. 657; *State* v. *Upton*, 20 Mo. 398; *Rowe* v. *State*, 11 Humph. 492; *Roman* v. *State*, 41 Wis. 312; *Westmoreland* v. *State*, 45 Ga. 225; *Kee* v. *State*, 28 Ark. 155; *Russell* v. *State*, 53 Miss. 382.

We have given these authorities our careful attention, and find that, while they support the general rule that misconduct of the jury should not avoid a verdict unless it appears to have injured the complaining party, in our judgment they do not shake the well-established and salutary rule above laid down, when applied to a capital case, where the misconduct occurred while the jury were actually deliberating upon their verdict.

Section 1181 of the Penal Code, relied upon by the respondent, provides (subdivision 3) that a new trial may be granted to the defendant "when the jury has separated without leave of the court, after retiring to deliberate upon their verdict, or being guilty of any misconduct by which a fair and due consideration of the case has been prevented." It is urged upon us that the section referred to sets forth and limits the kind of misconduct for which a new trial may be granted, and that to authorize the setting aside of the verdict it must affirmatively appear that a fair and due consideration of the case is prevented. Such a construction of the statute would compel a defendant, in every case of this kind, to show affirmatively that he had been actually injured by the misconduct complained of. None of the cases cited go to that extent, and, if they did, we should not be inclined to follow them. That the jury in this case was guilty of misconduct we presume none will deny. The wrongful act committed was one the direct tendency and natural consequence of which was to affect their capacity to perform their duties. Such being the nature of the misconduct complained of, and the act being committed at the most critical time in the trial, when a cool head and unclouded brain was so essential to the preservation of the rights of the defendant, to allow the verdict to stand could not, in our judgment, be justified by any rule of law, reason, or justice.

Of the many cases cited by respondent there is but one where the punishment was death, and in none of them was the liquor drank while the jury were deliberating upon their verdict. In most, if not all, of them, it is conceded that the act was reprehensible, and should be punished; but they say that as the act was committed at a time during the progress of the trial, when it affirmatively appeared that no injury could have resulted, the verdict should not be disturbed. Thus in *Russell* v. *State, supra*, the court said: "No cause can be more baneful to the purity of a verdict than the use of intoxicating drinks by the jury while engaged in their deliberations. Nothing can be more revolting to a sense of justice or of decency than the idea of the life or liberty of a citizen depending upon the maudlin deliberations of drunken jurors. The parties in a civil suit, and *a fortiori* the defendant in a criminal prosecution, have the right to demand that the case shall be tried, not only by jurors who are not drunk, but by men whose minds are not even influenced or clouded by liquor. Intoxicating liquors as a beverage, therefore, should be rigidly and carefully excluded from the jury-room; and, if absolutely necessary for medical purposes, should be administered only in small portions, upon the prescription of a physician, and under the sanction of the judge. But, while the introduction of such liquors in any other manner is highly censurable, and should be the subject of exemplary punishment, it will not vitiate the verdict, if it can be affirmatively shown not to have injuriously affected the deliberations of the jury. The trial lasted five days. The liquor was given to the jury on the night of the second and early in the morning of the third day. The state had not then closed its testimony in chief, nor the defendant commenced his. The quantity of liquor was small, and a portion of the second supply was drunk. Several of the jury are proved to have been affected by the spoilt beef, and it is stated that a number of them partook of the liquor. The quantity was therefore presumably insufficient to have seriously affected the minds of any of them. In addition, it was received at night and early in the morning, some hours before they were called upon in court to listen to testimony, and two days before they retired to consider their verdict. Lastly, it is proved that 'their conduct during the whole trial was marked by great dignity, decorum, and propriety.' Under these circumstances, we think it may be fairly said that it has been affirmatively shown that the verdict was not affected by the liquor."

In the case of *People* v. *Lyle, supra*, this court said: "The legal presumption is that jurors perform their duty in accordance with the oath they have taken, (*People* v. *Williams*, 24 Cal. 31;) and that presumption is not overcome by proof of the mere fact that during the trial, which lasted over thirty days, two or three of the jurors, after the adjournment of the court for the day, drank a few glasses of liquor at the expense of the district attorney; that one of them partook of a dinner at the house of the same officer under circumstances which rendered the act of invitation necessary, and of a supper at the hotel of his associate counsel under like circumstances. Such acts, however improper or indiscreet, could not in themselves have affected the impartiality of any one of the jurors, or disqualified him from exercising his powers of reason and judgment, and they will not warrant a court in setting aside a verdict. 'While the law,' says Chief Justice SHARKEY, 'is rigidly vigilant in guarding and preserving the purity of jury trials, yet it will not, for light or trivial causes, impugn the integrity of juries, or question the solemnity and impartiality of verdicts.' *Hare* v. *State*, 4 How. (Miss.) 187. It is the settled rule that to warrant the setting aside of a verdict and granting a new trial, upon the ground of irregularities and misconduct of a jury, it must be either shown as a fact or presumed as a conclusion of law that injury resulted from such misconduct. When it is clear that the party against whom the verdict has been found was not injured by the misconduct, the verdict will not be disturbed."

It must be conceded that this case supports the contention of the respondent, but the facts are so different that it should have but little weight; and so far as it declares, in general terms, that to warrant the setting aside of a verdict, and granting a new trial, upon the ground of misconduct of a jury, it must be either shown as a fact, or presumed as a conclusion of law, that injury resulted from such misconduct, it is not in harmony with the cases on the question before us, nor does it coincide with our views on the subject, when applied to the circumstances of this case. In the case of *People* v. *Gray*, 61 Cal. 164, 186, (decided by the court in bank, all of the justices concurring,) it was said: "It should be added here that, if it is necessary that intoxicating liquors of any kind should be drank by a juror, application for leave to do so should be made to the court, who can make such allowance as will be proper. Jurors should not be allowed to judge for themselves in this matter. A defendant in a criminal case should not be called on to consent; and in any case when the party consents, if the juror becomes intoxicated, the verdict should not stand. The purity and correctness of the verdict should be guarded in every way, that the administration of justice should not be subjected to scandal and distrust." And it was there held that liquors furnished the jury were not suitable food such as they were allowed to have by section 1136 of the Penal Code. The court below should have granted the defendant a new trial on this ground.

4. The appellant complains of one of the instructions of the court, in which it was attempted to define the right of self-defense. This instruction, taken alone, may be subject to criticism; but, taking the instructions as a whole, we think the law on that point was fully and fairly stated.

5. The appellant asked leave of the court to cross-examine the parties who filed affidavits in support of the verdict of the jury, which was denied, and this is urged as error. The defendant was not entitled to such cross-examination as a matter of right. The court might, in its discretion, have allowed it, but the refusal to do so was not error.

Judgment and order reversed, and cause remanded for a new trial.

We concur: THORNTON, J.; SHARPSTEIN, J.

BEATTY, C. J. I concur in the judgment and in the opinion of Mr. Justice WORKS, except upon one point. It appears that after the case had been submitted to the jury, and they had been for three or four hours deliberating of their verdict, they were by direction of the court sent in custody of two sworn officers to dinner. They were taken by the officers to a public French restaurant, where, in accordance with the invariable custom of the place, they were served with six quart bottles (a half-bottle each) of California claret, which they consumed with their dinner, and a small *modicum* of brandy, which they used with their coffee. In other words, they had, under the sanction of the court, and in the presence and custody of its officers, an ordinary dinner, in a respectable house, embracing only the usual concomitants of that meal at that place. As to whether the jurors were at all affected by the wine and brandy so partaken, the affidavits were conflicting, but certainly there was ample evidence to warrant the judge of the superior court in finding that none of them were affected; and unless we are warranted in holding, as mere matter of law, that any drinking of wine by a jury, after retiring for deliberation, however moderate, and whether sanctioned by the trial court or not, is misconduct *per se*, or unless we can find as matter of fact that men who use wine and brandy in the manner and to the extent these jurors did, and as thousands of men do every day without impeachment of their sobriety or decorum, are thereby necessarily deprived of their ordinary judgment and discretion, we cannot say that this jury was guilty of misconduct, or the defendant prejudiced in this particular. There is, it seems to me, a clear distinction in principle between this case, in which the jurors did, openly and without attempt at concealment, what was apparently, if not expressly, authorized by the trial court, and that class of cases in which jurors have themselves clandestinely conveyed intoxicating liquors into the jury-room, or where, with their connivance, it has been smuggled in by other unauthorized persons. In such cases the means of procuring the liquor amounts in itself to grave misconduct, and evinces a total disregard on the part of the jurors of their obligations and of the rights of the parties. By reason of this distinction, we are not, in my opinion, constrained by the authorities to hold, and I am unwilling to say that the jury in this case was guilty of misconduct.

I dissent: McFARLAND, J.

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3 Cal. Unrep. 64

CARTER *v.* PAIGE. (No. 12,637)

(*Supreme Court of California.* March 7, 1889.)

1. APPEAL—REVIEW—MATTERS NOT APPARENT OF RECORD.
   On appeal from a judgment on the judgment roll alone, which shows that the judgment was entered on default of defendant to answer or demur to an amended complaint, the objection that the amended complaint was not filed within the time provided in the order allowing the amendment, and that it does not affirmatively appear that the time was extended, will not be considered, as the order allowing the amendment is no part of the judgment roll.
2. PRACTICE IN CIVIL CASES—JUDGMENT—VACATING—APPEAL.
   The fact that the amended complaint was filed after the time prescribed is an irregularity merely, and can be reviewed only on a motion to set aside the judgment, and on an appeal from the order denying the motion.

In bank. Appeal from superior court, Stanislaus county; CHARLES H. MARKS, Special Judge.
D. S. Terry, for appellant. *Stanton L. Carter*, for respondent.

McFARLAND, J. Plaintiff had judgment in the court below. Defendant appeals from the judgment upon the judgment roll alone.

The judgment roll shows that, after defendant had answered the original complaint, an amended complaint was filed on the 6th day of June, 1887. There was no answer to the amended complaint. On July 23d—about 47 days after the filing of the amended complaint—the court rendered judgment for plaintiff. This judgment commences as follows: "In this action the defendant, Timothy Paige, having been regularly served with process, and having failed to appear and answer to the plaintiff's amended complaint filed herein on June 6, 1887, and served on defendant's counsel on June 2, 1887, and the legal time for answering or demurring to said amended complaint having expired, and no answer or demurrer having been filed to said amended complaint, the default of said defendant, Timothy Paige, in the premises, was duly entered herein according to law on the 15th day of July, 1887, upon demand of the plaintiff's attorney in writing filed herein." It then recites that plaintiff introduced evidence upon the matters alleged in the amended complaint; finds from the evidence that all the averments of the said amended complaint are true; and adjudges that plaintiff recover of defendant the sum of $10,500.

There is in the transcript filed by appellant what purports to be an order of the court made April 26, 1887, that "the court grants plaintiff ten days in which to file an amended complaint, and the defendant ten days thereafter in which to file an answer to said amended complaint." The indorsement upon the amended complaint shows that it was not filed within the 10 days. And the point (and the only point) made by appellant is that as the amended complaint was not filed within the 10 days, and as it does not affirmatively appear that there was an extension of time within which to file it, given either by the court or by stipulation of parties, therefore the filing of the amended complaint was unauthorized, and defendant could disregard it; the clerk had no right to enter a default; and the judgment was erroneous.

But, in the first place, on this appeal we can look only at the judgment roll; and the order allowing the amended complaint is no part of it. Code Civil Proc. § 670; *Livermore* v. *Webb*, 56 Cal. 489. The judgment roll does not show want of jurisdiction, or error, or even irregularity. Whether a default was or was not entered by the clerk was immaterial. *Montgomery* v. *Tutt*, 11 Cal. 316.

Moreover, if we could consider the order allowing the amendment within 10 days, the fact that the amended complaint was filed after that time would not render it a nullity. It would be, at most, only an irregularity; and it could be reviewed only upon a record made on a motion in the court below to set aside the judgment, and on an appeal from an order denying such motion. *Bailey* v. *Sloan*, 65 Cal. 387, 4 Pac. Rep. 349. See, also, *Lower Kings, etc., Co.* v. *Kings, etc., Co.*, 67 Cal. 577, 8 Pac. Rep. 91.

It is unnecessary to consider respondent's objections that the transcript is not properly certified and authenticated, and that it does not contain the whole judgment roll.

Judgment affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

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78 Cal. 358

CLELAND *v.* WALBRIDGE. (No. 12,731.)

(*Supreme Court of California.* March 9, 1889.)

APPEAL—PRACTICE—BILL OF EXCEPTIONS.

An order striking out an amended complaint will not be reviewed where there is no bill of exceptions showing why or upon what showing it was stricken out. The fact that the papers are printed in the transcript, simply marked by the judge as having been read on the hearing, is not sufficient.

Commissioners' decision. In bank. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

Action by J. S. Cleland against J. M. Walbridge. From a judgment on an order striking out the second amended comp'aint plaintiff appeals.

J. S. Beard, (*E. H. Wakeman*, of counsel,) for appellant. *H. B. Gillis* and *H. B. Warren*, (*A. L. Hart*, of counsel,) for respondent.

HAYNE, C. In this case the defendant's demurrer to an amended complaint was sustained. The learned judge filed a document which is really an opinion and order sustaining the demurrer, but which the parties have called a "judgment." Subsequently a second amended complaint was filed, and the defendant filed a demurrer thereto. Apparently no action was taken on this demurrer. Nearly three years afterwards the plaintiff obtained leave to file a third amended complaint. The defendant moved to strike out this last complaint, and the court granted the motion, and ordered judgment for the defendant, which was entered. The plaintiff appeals from this judgment.

It is to be surmised from some papers printed in the transcript that this motion was made and granted upon the ground that the third amended complaint was the same in substance as the one to which a demurrer was sustained. But the papers referred to are not incorporated in a bill of exceptions, but are simply marked by the judge as having been read on the hearing of the motion. This is not sufficient. The order striking out the complaint was not itself appealable, but was reviewable on appeal from the judgment. *Swain* v. *Burnette*, 18 Pac. Rep. 394. And in such case there must be a bill of exceptions. *Strathern* v. *Dakin*, 63 Cal. 478, and cases cited in section 262, Hayne, New Trials & App.

It is true that the judgment recites that a motion to strike out the third amended complaint was made and granted; and that by reason of the law, and of said order, judgment was given for the defendant. This recital sufficiently informs the appellate court that the complaint was stricken out, and that therefore judgment was entered in favor of the defendant. But it does not show why the pleading was stricken out, or upon what showing; and it must be presumed in support of the judgment that it was properly done, in the absence of a showing to the contrary.

We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

78 Cal. 345

PEOPLE *v.* PRATT. (No. 20,413.)

(*Supreme Court of California.* March 7, 1889.)

1. CRIMINAL LAW—JURISDICTION.
Defendant, a citizen of the United States, while living in a foreign country, under a treaty between the United States and that country, was surrendered to a police agent, and brought to California, on request of the governor, by the foreign government, the United States government having declined to make the request, there being no extradition treaty with the foreign government. *Held*, that the California court, having jurisdiction of the offense with which defendant was charged, had jurisdiction to try him on his being brought before it, even if the act of the governor in obtaining his return was illegal.

2. NEW TRIAL—IMPEACHMENT OF VERDICT—AFFIDAVITS OF JURY.
Affidavits of jurors, which impeach the verdict, cannot be considered on motion for new trial.

3. CRIMINAL LAW—APPEAL—SETTLING BILL OF EXCEPTIONS—REFUSAL.
Where bills of exception were prepared, amendments proposed and left with the judge, and nothing further was done for nearly two years, other bills, not containing the same exceptions, having been settled meanwhile, when application was made to the judge to settle the first bills, evidence that the judge then stated that he knew nothing about the first bills, and that they were not in his possession, does not show such a refusal to settle the bills as to bring the matter within Pen. Code Cal. § 1174, which provides that where the trial judge refuses to allow an exception, the party may apply to the supreme court to prove the same.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

Calvin Pratt appeals from a conviction for forgery, and from an order denying his motion for a new trial. Pen. Code Cal. § 1174, referred to in the opinion, provides, among other things, that, when a trial judge refuses to allow an exception, the party desiring it may apply to the supreme court by petition to prove the exception.

Henry E. Highton, for appellant. *George A. Johnson*, Atty. Gen., and *J. A. Hosmer*, for the people.

Foote, C. The defendant was convicted of the crime of forgery, and has appealed from the judgment rendered, and from an order denying his motion for a new trial. After the cause had reached this court upon appeal, the defendant filed a petition under section 1174 of the Penal Code, to have certain bills of exception settled which he claimed had been refused to be allowed by the judge of the court below. It appears that the bills were prepared, amendments proposed, and they were then left with the judge for allowance or settlement. No further attention seems to have been paid to the matter for some time, nearly two years having elapsed since the bills were placed in the hands of the judge, another voluminous bill of exceptions having meanwhile been settled and allowed, which is in the transcript here, but contains none of the exceptions now prayed to be allowed. On the 14th of July, 1888, for the first time, (the case being then here on appeal,) application was made to the trial judge to settle and allow the first bills, when he stated that he knew nothing of them, and that they were not in his possession.

Passing the question as to whether the proceedings instituted by the defendant as to proper notice to the parties concerned are in accordance with the rules usual in the appellate court as to such a matter, it is evident that the defendant has not shown such a refusal on the part of the judge below to settle and allow the bills as brings the matter within the section of the Penal Code, *supra*. His petition should therefore be denied. Conceding, without deciding, that the special plea to the jurisdiction of the court can be considered now, as also the action of that tribunal in overruling and in refusing to hear evidence to establish it, it appears to us that the court was not in error.

The facts set up in the plea, and the evidence offered, are to the effect that the defendant was living in Japan, as he was entitled to do, as a citizen of the United States, under a treaty existing between these two governments, when, "without any charges having been entered against him, or any legal examination had, as is provided by the laws of Japan or the laws of the United State, he was by force of arms, and against his will, brought thence into the city and county of San Francisco in this state, where he has since been by force of arms detained, and so continues to be. The defendant was not demanded of the Japanese government by the United States government, nor surrendered by the Japanese government to the United States government. On the contrary, the United States government, on being asked by the governor of the state of California to request the Japanese government to deliver up the defendant on the charge set forth in said information, expressly declined to make any request whatever of the Japanese government for the surrender of the defendant, stating in its refusal that the practice of the United States had been and was to refuse to ask or accept the surrender of a fugitive from the United States from any foreign country with which they did not have an extradition treaty." It is then charged that the governor of California, with knowledge of such refusal, and acting as such governor, made a formal request on the Japanese government for the delivery up of the defendant to a police officer of the city and county of San Francisco; that solely in compliance with that request the defendant was against his will forcibly delivered to the police officer, and was brought by him to said city and county. The defendant protested against all these acts, contending that as a citizen of the United States he has a right to reside where he then was, under its treaty with Japan. He also objected because, as he alleged, the governor of California, in his action, had violated the constitution of the United States in making the request which he did of the Japanese government.

The governor of California could not make any treaty with Japan, and seems merely to have made a request that a party charged with a criminal offense, of which the courts of the state had jurisdiction, might be delivered to a police officer of San Francisco, and returned to be tried for his alleged crime to the state whose laws he was asserted to have violated. If, as the defendant claims, the governor had no legal right, as such, to demand and obtain his return to California, then it would seem that he was returned by means of illegal force used by that officer and his assistants, and through the wish of the Japanese government to oblige the governor as being the executive officer of one of the United States. While this might be said in a certain sense to be a violation of the defendant's personal right, and a kidnapping, so to speak, so far as the governor's action is concerned it does not appear that the Japanese government has complained in any way of his act. The matter then resolves itself into this: that, as between the governor and the defendant, the latter has suffered a deprivation of personal liberty in a case where the governor had no legal power to act. The defendant being before the proper court, which had jurisdiction of his offense, it matters not how he may have entered into the presence of the court; it was its duty to try him. "The jurisdiction of the court in which the indictment is found is not impaired by the manner in which the accused is brought before it." *Mahon* v. *Justice*, 127 U. S. 708, 8 Sup. Ct. Rep. 1208, and cases cited. "It would indeed be a strange conclusion if a party charged with a criminal offense could be excused from answering to the government whose laws he had violated, because other parties had done violence to him, and also committed an offense against the laws of another state." *Mahon* v. *Justice*, 127 U. S. 712, 8 Sup. Ct. Rep. 1211; *Ex parte Ah Men*, 19 Pac. Rep. 381. The governor of the state cannot oust the courts of the commonwealth of their right to try an individual charged with an offense over which they have jurisdiction, because of the fact that he has been instrumental in having the defendant there by violation of his personal rights. It will not do to say that a fugitive from justice can escape the punishment for his crime because the governor of a state may have violated some law. The people of a state are not bound by any illegal act of their governor, nor should they be.

The argument of the defendant to the effect that the state is bound in law and good morals to have this defendant released, and that her courts should so hold, strikes us as being without force. The governor, evidently actuated by the motive that one charged with a high crime should have meted out to him just punishment, may have taken steps to bring him before the bar of a court of justice having jurisdiction of his offense, which are not warranted by law, but that is a matter personal to the governor, with which neither the commonwealth nor the courts have any concern. This is not the case of a defendant who has been extradited for an offense under a treaty existing between the United States government and some foreign power, where it is attempted to try him for some other offense for which he has not been extradited.

The affidavits of the jurors, which were procured to be taken by the defendant for use on his motion to obtain a new trial, are not entitled to any consideration, as they went to the impeachment of their verdict. *People* v. *Gray*, 61 Cal. 183.

On the whole case, presented as it has been upon both sides fully and ably, we perceive no prejudicial error, and advise that the judgment and order be affirmed.

We concur: BELCHER, C. C., HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

78 Cal. 341

STEARNS v. HOOPER *et al.* (No. 11,526.)

(*Supreme Court of California.* March 7, 1889.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

In an action for damages to plaintiff's wharf, by defendant's schooner being blown against it by a violent gale, plaintiff alleged that the accident might have been avoided if the schooner had been properly fastened to its buoy, or if it had put out to sea when it began to drag towards the wharf, and that the master was negligent in not calling on a steam-ship near by to tow the schooner out to sea. The master, mate, and one of the crew of the schooner testified that they did all possible to secure the vessel, and two master mariners testified that they could have done nothing more than was described, and that it would have been impracticable and dangerous to have put out to sea, or for the steam-ship to have towed the schooner out. *Held*, that a finding for defendants on the ground that the accident was inevitable was warranted.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Stearns against Hooper and others for damages to plaintiff's wharf. Judgment for defendants, and plaintiff appeals.

Milton Andros and *Charles Page*, for appellant. *Daniel T. Sullivan*, for respondents.

PATERSON, J. On the 30th day of December, 1878, the schooner Alice, then owned by the defendants, arrived at the port of Santa Barbara, and made fast to plaintiff's wharf for the purpose of discharging her cargo. While the crew were engaged in transferring the cargo of lumber to the wharf, plaintiff notified the master of the schooner that in his (plaintiff's) opinion a heavy gale would soon arise, and that he (said master) should before night cast off the lines and fasts by which the vessel was attached to the wharf, and haul her up to a certain buoy which he (the plaintiff) had placed at about 100 fathoms from the end of the wharf, and make her fast thereto. Early in the afternoon of that day, and after a part of the cargo of lumber had been discharged, the lines holding the schooner to the wharf were thrown off, and she was hauled out towards the buoy, about 35 fathoms from where she had been lying at the wharf. A nine-inch hawser was then run out to the buoy. As the storm increased, the crew hauled in on the line until the vessel came within 50 fathoms of the buoy. The master dropped the port anchor at the time he made fast to the mooring buoy, but did not drop the second anchor until the vessel had dragged well in towards the wharf. The vessel dragged both the mooring buoy and the anchor until about 7 o'clock in the evening of the 31st of December, when a heavy breeze struck her, and drove her into the wharf, causing the injury for which plaintiff claims damages in the sum of $5,000.

It is claimed by appellant—*First*, "that if the said master of said schooner had pulled up to and made fast said schooner to said buoy in a proper, careful, and skillful manner, and in a proper position with reference to the wind and sea, all danger of said vessel drifting against or striking said wharf by reason of a heavy gale and sea, which arose in the afternoon of said 30th of December, might have been by him then and there avoided," and that, if he had let the second anchor go when he found his vessel was dragging, the accident would have been averted; *second*, that the accident might have been easily avoided by casting out the lines and putting out to sea when he found the vessel dragging in towards the wharf; *third*, that the master was guilty of negligence in not calling upon the steam-ship Ancon, then lying at the wharf, to tow the schooner out to sea.

The court found the facts upon all the issues in favor of the defendants, and concluded that the accident was inevitable. We think there was material evidence to support all the findings of the court, and, of course, if there was, under the well-established rule the judgment and order must be affirmed.

1. The master of the schooner testified that he was 45 years of age, and had been going to sea for 32 years. Had been a master mariner 7 years in command of schooners and brigs on the coast of California. That at the time of the accident he had a full complement of competent seamen on board. He described the manner in which he made fast to the buoy, and cast the port anchor. He continued: "There was nothing else in my judgment which I could have done to make myself secure for the night. * * * The wind came up about 9 or 10 o'clock. It blowed pretty fresh, and came in with a rain squall. After that squall came we could not have slipped our cables and gone to sea. * * * Mr. Stearns told me he had a 3,300-pound anchor to the buoy, and thirty fathoms of 2½-inch chain attached to it. He told me that if I had the hawser I represented I had, he would defy any wind to drag me with that buoy. * * * Just about the time when we went into the wharf, the breeze struck us, and swung us right on. I think that must have been a cyclone or tornado. It was no ordinary wind."

The mate of the schooner, Westerberg, testified that they had the port anchor down all the time, with 45 fathoms of chain, and the hawser out to the buoy; that they had dropped the starboard anchor before she began to drag; that they "could do nothing more, it was so rough;" that they "had all their lines out,—everything dragged." The witness Nelson, who was one of the crew, testified substantially to the same facts, and said: "Everything was done in a seaman-like and skillful manner."

2. C. Less testified that he was a master mariner; had been going to sea for 22 years; had commanded schooners of all sizes, from 45 tons up to 144 tons; that he knew the roadstead of Santa Barbara; had been there about five times, but never in tempestuous weather; knew Stearn's wharf and the buoy called the "Big Buoy;" that, if a heavy storm broke upon him while he was moored to the big buoy with his anchor down, he could do nothing more; that it would not be prudent for a master mariner seaman, under the circumstances, to attempt to go to sea. W. E. Plummer, another witness on behalf of defendants, testified that he was master of the steamer Newport. Had been 30 years a master mariner; 39 years at sea; 9½ years sailing up and down the coast of California. Had been at Santa Barbara a great many times; knew Stearn's wharf, and had discharged cargoes there. The circumstances occurring on the 30th and 31st of December were related to him, and he was asked to say, as an expert, whether, in his opinion, it would have been prudent to slip the cables and attempt to go to sea. He answered that he would not consider it prudent to attempt to do so; that he would "sooner hold on there."

3. The master of the schooner and the witnesses Nelson, Less, and Plummer all testified, in substance, that it would have been impracticable and dangerous for the steamer Ancon to have towed the schooner to sea. The witness Plummer testified that he had been in command of the Ancon, and that, if an attempt had been made by the captain of the Ancon to leave the wharf, in all probability he "would have got across her bow and cross her hawser, and be right athwartships. Then away would go steam-boat, wharf, and all."

The foregoing extracts from the testimony show, we think, that the findings of the court are supported by material evidence. There is sufficient, at least, to make a substantial conflict in the evidence. It is unnecessary for us, therefore, to review the evidence which tended to support the allegations of the complaint. The learned judge of the court below saw and heard the witnesses, passed upon their credibility, and determined the weight of evidence. We see no abuse of discretion.

Judgment and order affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J,

3 Cal. Unrep. 66

HANSON *v.* HANSON. (No. 11,494.)

(*Supreme Court of California.* March 11, 1889.)

1. JUDGMENT—VACATION.

In California the trial court has no power to review its own order setting aside a judgment for want of service of summons, where the order was regularly made after hearing and consideration.

2. SAME.

A judgment which is void for want of jurisdiction may be set aside, in California, on motion made on notice, though more than a year has elapsed since entry of the judgment.

Commissioners' decision. In bank. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action for divorce by J. F. Hanson against Delia Hanson. Defendant appeals from an order setting aside an order vacating a judgment by default.

P. M. Sullivan, J. J. Bruton, E. W. Britt, and *Ball & Craig*, for appellant. *D. M. Hanson, A. E. Noel*, and *R. W Crump*, for respondent.

HAYNE, C. Appeal from an order setting aside an order vacating a judgment by default. The action was for divorce. No answer having been put in, the default of the defendant was entered, and after evidence had been taken a decree of divorce was made. After more than a year from the entry of this decree the defendant moved, upon notice, to have the decree set aside upon the ground that she had never been served with summons. This motion was granted; and it must be assumed from the record that it was granted upon the ground upon which it was made, viz., that there had been no service of summons upon the defendant. About three weeks after this the court made a second order setting aside the first order. The ground upon which this second order was made does not appear from the record. But it is stated by the counsel for the respondent that it was made upon the ground that more than a year had elapsed between the entry of the decree and the motion to set it aside, and that therefore the defendant could not have it set aside upon motion, but was obliged to resort to an action; in other words, that the court had no power to act in the way it did. But we think that the court had such power. If the decree was made without service of process upon the defendant, and without appearance by her, it was absolutely void. And it was held in *People* v. *Greene*, 16 Pac. Rep. 197, after careful examination of the authorities, that a judgment which is void for want of jurisdiction over the party may be set aside on motion, made upon notice, notwithstanding the fact that more than a year has elapsed since the entry of such judgment. The only difference between that case and this is that there the judgment was void upon the face of the judgment roll, while here the decree (having been entered upon an affidavit which was sufficient in form, though false in fact) was not void upon the face of the roll, but had to be shown to be void by evidence of the want of service. But while this might make a difference upon a collateral attack, it makes none upon a direct attack. And it has been held that a motion made upon notice is a direct, and not a collateral, attack. *People* v. *Mullan*, 65 Cal. 396, 4 Pac. Rep. 348; *People* v. *Greene, supra.*

The court, therefore, had power to make the order setting aside the decree; and such order was regularly made after hearing and consideration. This being the case, the court had no power to vacate it because subsequent reflection had induced it to believe that it was erroneous. Litigation must have some end. There must be some time when a judgment or order which the court had power to make becomes final, and the party is turned over to the appellate court for relief. It is true that there are some cases in which a trial court may review its own action; but such cases are prescribed by statute, and the trial court is confined to such cases, and has no power in review in other cases. *Carpenter* v. *Superior Court,* 19 Pac. Rep. 174; *Wunderlin* v. *Cadogan,* 75 Cal. 617, 17 Pac. Rep. 713. And there is no provision authorizing the review by the trial court of an order setting aside a judgment for want of service of summons, where such order was regularly made after hearing and consideration. It is true that where a judgment or order was inadvertently or improvidently made, as, for instance, where the court was imposed upon by some trick or artifice, or where it did not intend to make the order entered, as where there has been some clerical misprision, the court may set it aside. But this being an unusual case will not be presumed upon appeal, but must be shown affirmatively. *Carpenter* v. *Superior Court, supra; Wunderlin* v. *Cadogan, supra.* Unless this were so, no case could be reversed on appeal unless the record contained an affirmative showing that there had been no trick or artifice, or other case of inadvertence or improvidence, which is certainly not necessary.

But, if the court had the power to review its action because it had come to a different conclusion after reflection, we think that, even upon this theory, the order appealed from must be reversed; for, in our opinion, the first order was properly made. See *McBlane* v. *McBlane, ante,* 61.

We therefore advise that the order appealed from be reversed, and the appeal from the judgment dismissed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and the appeal from the judgment dismissed.

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78 Cal. 366

CALLAHAN *v.* DUNN, State Comptroller. (No. 12,682.)

(*Supreme Court of California.* March 12, 1889.)

1. DRAINAGE—DAMAGES—MATERIAL FURNISHED.
   Laws Cal. 1885, p. 78, provided (section 3) that "all persons having claims, 'unaudited by the state board of drainage directors,' for work done or materials furnished under the provisions of 'An act to promote drainage,' approved April 23, 1880, [and which had been declared unconstitutional,] are authorized to present their claims to the state board," and have them allowed. Plaintiff, in proceedings to compel the state comptroller to draw a warrant for his claim as audited, the basis of which claim was a judgment condemning his land for drainage purposes under the act of 1880, alleged that by that judgment it was adjudged that the land should be condemned, and that plaintiff should recover therefor the sum of, etc. *Held* that, even assuming that land so taken can be regarded as "material furnished," within the meaning of the act of 1885, yet, as it is not shown that the award was for "damages" sustained, but rather for the proposed "taking" of the land, nor that any final order of condemnation was made or recorded, as required by Code Civil Proc. § 1253, which provides that "thereupon" the property shall vest in the corporation, and, as the award was never paid, the title to the land condemned never vested in the drainage district, and hence nothing was "furnished," and plaintiff is not entitled to payment.
2. SAME—COMPLAINT—ALLEGATIONS OF DAMAGE.
   An allegation that the award was "as compensation for the property condemned and taken, and as damages thereby done to his property not taken," evidently refers to an injury which would result to the remainder of plaintiff's tract from a segregation of the portion condemned; but as there was no taking, and so no segregation, that element of damage did not accrue.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

George A. Johnson, Atty. Gen., for appellant. *J. H. Craddock,* for respondent.

HAYNE, C. This was an application for *mandamus* to the state comptroller, to compel him to draw his warrant in favor of the plaintiff for the sum of

$1,618. Final judgment was rendered in plaintiff's favor upon demurrer to the complaint, and the defendant appeals.

The basis of the claim is a judgment of condemnation of plaintiff's land for the use of drainage district No. 1, established by the "Act to promote drainage," passed in 1880. See Laws 1880, p. 123. It is alleged that by the judgment it was adjudged that the land should be condemned, and that plaintiff should recover therefor the sum of $1,618; that there was in the treasury sufficient money to the credit of said drainage district, "applicable to the payment of its judgment debts, including the judgment debt of this plaintiff;" that plaintiff presented "his said judgment claim" to the state board of examiners, who allowed it, but that the comptroller refuses to draw a warrant "for said judgment claim."

The act of 1880, referred to in the complaint, was declared unconstitutional in *People* v. *Parks*, 58 Cal. 625. It is evident, therefore, that plaintiff's claim is of no validity, unless it be validated by subsequent legislation. It is contended that such legislation is to be found in the act of 1885. See Laws 1885, p. 78. And hence it is plain that in order to entitle plaintiff to any relief his case must fall within the latter act. The act of 1885 was passed for the purpose of making provision for the payment of claims which had arisen under the first act. It deals with three classes of cases. The first section provides that the treasurer shall pay all warrants which had already been drawn. The second section provides that the comptroller shall draw warrants for all claims which had already been allowed by the board of drainage directors constituted by the first act, and that the treasurer should pay such warrants. The third section provides for the auditing and payment of unaudited claims. If the case of the plaintiff comes within the act at all, it must come within the third section, which is as follows: "Sec. 3. All persons having claims 'unaudited by the state board of drainage directors,' for work done or materials furnished under the provisions of 'An act to promote drainage,' approved April 23, 1880, are authorized to present their claims to the state board of examiners. All claims so presented shall be itemized, and verified by the claimant, his heirs or assigns. The state board of examiners shall audit and allow said claims, either in whole or in part, or reject the whole, as they may deem just and proper, and certify the amount so allowed to the state comptroller, who shall draw his warrant in favor of each claimant for the said amounts upon the state treasury. The state treasurer is authorized and required to pay the same out of any money in the general fund not otherwise appropriated: provided that unaudited claims of $10,000 only shall be allowed by the provisions of this section."

We do not think that the complaint states a case within this provision. Whatever may be the nature and validity of the discretion confided to the board of examiners, they are certainly confined within the limits fixed by the provision under which they are to act. And by the terms of that provision they are empowered to act upon claims "for work done and materials furnished under the provisions of 'An act to promote drainage.'" If the claims are not of that character, the board has no power to act upon them. The claim here was for compensation for land condemned for the use of the drainage district. And we are somewhat inclined to doubt whether such land can be held to be "materials," within the meaning of the provision. But, assuming that it may be so considered, we do not think that under the averments of the complaint it can be said to have been "furnished" to the drainage district. It is true that a judgment is alleged to have been rendered for its condemnation; but the money was not paid for it, and the final order of condemnation is not alleged to have been made or recorded. Consequently the title did not vest in the district. The act of 1880 provided that the condemnation proceedings should be had under the provisions of the Code of Civil Procedure. And the provision of the Code is as follows: Sec. 1253. "When payments have been made, and the bond given, if the plaintiff elects to give one, as required by the last two sections, the court must make a final order of condemnation, which must describe the property condemned, and the purposes of such condemnation. A copy of the order must be filed in the office of the recorder of the county, and thereupon the property described therein shall vest in the plaintiff for the purposes therein specified." Now, whether or not the making and recording of a "final order" of condemnation are necessary to the vesting of the title, it certainly does not vest before the payment is made, which the complaint shows was not done. The title to the property, therefore, never passed to the drainage district. And it can never pass, because, according to the plaintiff's own averment, "the corporate existence of said drainage district number one was determined and dissolved, whereby all proceedings by or against said corporation under the act aforesaid ceased." This being the case, is the plaintiff, who has never parted with his property, entitled to payment for it out of the state treasury? We think that, inasmuch as he has never parted with the property, he cannot be said to have "furnished" it to the drainage district.

It is to be observed that the judgment upon which the plaintiff bases his claim is not alleged to have been for damages to his property. The constitution provides that "private property shall not be taken or damaged for public use without compensation." And if it had appeared that the judgment was for damages actually sustained by the property from some act of the alleged corporation, it is possible that a different result would follow, although we express no opinion as to that. But it is not averred that the judgment was of that character. The allegation that the sum recovered was "as compensation for the property condemned and taken, and as damages for the injury thereby done to his property not taken," evidently refers to an injury which would result to the remainder of plaintiff's tract from the segregation of a portion. But if there is no segregation the damage would evidently not accrue.

It is to be further observed that we are not saying that the vesting of the title is the only meaning of the word "taken," in the eminent domain clause of the constitution. That was at one time held. See *Fox* v. *Railroad Co.*, 31 Cal. 538. But the position was receded from, and it was held that "the occupation of land by the corporation for its own purposes pending the proceedings for condemnation is a taking of the property within the meaning of the constitution." *Davis* v. *Railroad Co.*, 47 Cal. 523; *Water-Works* v. *Sharpstein*, 50 Cal. 284; *Sanborn* v. *Belden*, 51 Cal. 266; *Vilhac* v *Railroad Co.*, 53 Cal. 208. And if it had been alleged that the judgment was for such occupation, it is possible that a different case would be presented, although we express no opinion upon the question.

But, as we construe the complaint, the compensation awarded by the judgment upon which the claim is based was for the land itself, and for the damages which would result from a segregation; and if the value of an occupation entered into the question at all, it was at most only a part of the compensation awarded. And even upon that hypothesis the claim for the whole judgment could not be sustained.

The other allegations of the complaint do not, in our opinion, interfere with the conclusions above expressed. We therefore advise that the judgment be reversed, with directions to sustain the demurrer to the complaint.

I concur: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is reversed, with directions to sustain the demurrer to the complai

78 Cal. 380

HEBBRON *v.* GRAVES. (No. 11,657.)

(*Supreme Court of California.* March 13, 1889.)

PUBLIC LANDS—PATENT FROM STATE—EJECTMENT.

A state patent to land (other than in a sixteenth or thirty-sixth section) is *prima facie* valid, without showing a prior grant from the United States, and, if a defendant in ejectment can attack it at all, the burden is on him to show the invalidity.

Commissioners' decision. Department 1. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

N. A. Dorn and *W. M. R. Parker*, for appellant. *S. F. Geil* and *H. V. Morehouse*, for respondent.

FOOTE, C. This action is in ejectment, Plaintiff had judgment, from which, and an order denying a new trial, this appeal was taken. The plaintiff introduced in evidence a certain state patent for the land in dispute. This was objected to by the defendant on the alleged ground "that no predicate had been laid therefor. That the United States government is the source of all title; and, as none of this land is of a sixteenth or thirty-sixth section, there is no proof that the state of California had any interest in the land which could be granted." Whether such a patent "is conclusive or not, it is at least *prima facie* valid; and, if a defendant in ejectment can attack it at all, the burden is on him to show the invalidity." *People* v. *Stratton*, 25 Cal. 242; *Leviston* v. *Ryan*, 75 Cal. 293, 17 Pac. Rep. 239, and cases cited. There is nothing in the record going to show the invalidity of the patent. The main point in the controversy was as to the true location of the line between two sections of land denominated 19 and 20. Although the evidence was to some extent conflicting, the court below was warranted in making its findings. No prejudicial error appearing, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C., HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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78 Cal. 360

WRIGHT *v.* CALIFORNIA CENT. RY. CO. *et al.* (No. 12, 821.)

(*Supreme Court of California.* March 12, 1889.)

1. CARRIERS OF PASSENGERS—EJECTION OF PASSENGER—EVIDENCE.
Civil Code Cal. § 484, requires railroad companies to have conspicuously posted in their cars their rules regarding fare and conduct of passengers. Plaintiff was ejected from defendant's train for refusing to pay an extra charge for riding in a certain car. Plaintiff claimed that he was wrongfully made to leave the car. He testified that the conductor pointed out to him, posted in the car, the regulations of the company; also that the conductor explained that he was required to collect an extra fare for riding in that car. There was no evidence or pretense that the explanations were not true. *Held*, that the court properly assumed that there was a regulation requiring an extra fare for riding in that car, and that plaintiff knew and willfully disobeyed it.

2. SAME—PROVINCE OF JURY.
Plaintiff having testified that he might have gone from the car into a first-class passenger car, the court was not required to submit the questions whether the regulations were public, uniform in their operation, or reasonable.

3. SAME—RETURN OF TICKET.
The fact that plaintiff's ticket was not returned to him cannot aid him in his action for damages for ejection.

4. SAME—NECESSARY FORCE.
Where plaintiff admits that he received all his injuries after he had gone out of the car, and as a result of his holding on to the railing in resisting the force of those

removing him, and the evidence does not show that more force than was necessary to put him off was employed, he cannot recover for injuries, on the ground of the force employed.

5. SAME—PLACE OF EJECTION.

Where plaintiff testified that the ejection occurred at the railroad station at A., and other witnesses alluded to A. as a small town where the train stopped, Civil Code Cal. § 487, requiring the ejection to be at any usual stopping place, or near any dwelling-house, is sufficiently met.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Action by B. C. Wright against the California Central Railway Company and E. B. Leonard, for damages for ejection from a train. Plaintiff appeals from a judgment of nonsuit. Civil Code Cal. § 487, requires an ejection of a passenger to be "at any usual stopping place, or near any dwelling-house."

Williams & McKinley, for appellant. *A. Brunson*, for respondents.

BELCHER, C. C. This action was brought to recover damages for being put off a railroad car. The court below granted a nonsuit, and the plaintiff appealed from the judgment and an order denying him a new trial. The material facts are as follows:

On the 26th of July, 1887, the plaintiff purchased a round-trip ticket on defendant's railroad from Los Angeles to San Diego and back. With other passengers he went into what is called a "chair car," and sat down, no one informing him that the car was a special one. The train started, and when a few miles out the conductor went into the car, and took up the part of plaintiff's ticket which was from Los Angeles to San Diego, and gave back the return portion thereof. He then collected the tickets from other passengers in the car, and, having done so, went back to plaintiff, and demanded 25 cents more for the privilege of sitting in that car. Plaintiff refused to pay the extra charge, and asked the conductor if he did not furnish seats to sit in. The conductor replied: "Yes; but not in this car. This is a chair car. You can take a seat in the other car." Plaintiff said he had a first-class ticket, and did not propose to take a seat in the other car. The conductor called his attention to "a card up in the car stating terms and so forth," and said it was the regulation of the company. He explained why the 25 cents was an extra charge; said it was a chair car, and it was the rule. The conductor went to plaintiff three or four times, and asked him if he would pay the two bits or go into the other car, and said if he didn't do so "we will put you out; we will put you in." Plaintiff persistently refused to comply with the conductor's request, saying he "didn't care for the two bits, but it was the principle of the thing." When the train reached a station called Azusa the conductor and another man went up to plaintiff; and, taking him by the arms, led him to the front door of the car, where he caught hold of the iron railing, and resisted with all his might. They tried to put him into the car immediately in front of the chair car. That car was a first-class passenger car, and he could have gone into it and continued his trip there if he had wished to do so. After he was on the ground the men invited him to go into the car, but he refused, preferring to leave the train and abandon his journey. The conductor did not return, or offer to return, to him his ticket, or any money in lieu thereof.

Plaintiff claims that he was wrongfully made to leave the chair car; that he was ruptured and seriously injured, while standing on the platform, and holding on to the railing of that car, by the efforts to put him into the other car; and that he suffered great mental and bodily distress in consequence of the wrongful acts of defendants; and is entitled to demand and receive therefor damages in the sum of $25,000.

It is urged that the court erred in granting the nonsuit, because there was no evidence showing any regulation of the railroad company requiring the payment of an extra rate on the chair car, and that, if there was such a regulation, it was a matter to be proved in defense, and could not be inferred from what was said by the conductor. The Civil Code provides that "every railroad corporation must have printed and conspicuously posted on the inside of its passenger cars its rules and regulations regarding fare and conduct of its passengers." Section 484. We think it sufficiently appears that the defendant company had complied with this requirement. The plaintiff testified that the conductor "pointed out to me, posted up in the car, the regulations of the company." He further testified, in effect, that the conductor explained to him that he was required by the regulations to collect from passengers riding in that car an extra charge, and there was no evidence, and there is no pretense, that the explanations were not true. It seems clear, therefore, that the court was justified in assuming that there was a regulation of the company requiring payment of an extra rate on the chair car, and that plaintiff knew of its requirements, and willfully refused to comply with them.

But it is said that, in order to be valid, "such regulations must be lawful, public, uniform in their application, and reasonable," and that whether they were so or not were questions of fact, which should have been submitted to the jury. And in this connection it is suggested that, "from anything that appears from the evidence, it may have been the only car provided with seats at all." The evident purpose in requiring the regulations to be posted in the car was to make them public, so that all passengers could read them, and be fully informed as to their provisions. The conductor demanded and received from the other passengers in the car an extra sum for riding in it, and there was nothing in the evidence tending to show that the regulations in question did not fully comply with all the conditions named. The suggestion that the car in which the plaintiff was riding may have been the only car provided with seats is met by the plaintiff's own testimony that "I was able to have gone from the chair car where I was into a first-class passenger car." This being so, the court was not required to submit to the jury the questions as to whether or not the regulations were public, uniform in their operation, or reasonable.

It is next claimed that if the regulations existed, and were lawful and proper, plaintiff's ticket should have been returned to him. Conceding this to be so, it cannot aid him here. He might have gone into a first-class passenger car, and continued his journey, and was invited to do so, but refused. He voluntarily left the train, and terminated his trip, and, if he was entitled to "stop over" and use the ticket on another train, his claim must be for a return of the ticket money, and not for damages for being put off. The facts in *Bland* v. *Railroad Co.*, 55 Cal. 570, were different, and that case is not in point.

It is contended that more force was used in ejecting plaintiff from the car than was necessary. He admitted at the trial that he received all of his injuries after he had gone out of the car, and while he was holding to the railing on the platform. He should have gone voluntarily into the next car or to the ground, and if he had done so he would have had no injury to complain of. He chose, however, to hold on with all his might, and to resist the efforts to remove him. The force was to overcome that resistance, and the evidence fails to show that any more force was used than was necessary for that purpose. If he was injured, therefore, his own wrong contributed immediately and proximately to the result, and he must bear the consequence.

Lastly, it is said that it was incumbent on the defendants to show as a defense that they ejected plaintiff at a usual stopping place, or near a dwelling-house, and the fact that they did so could not be presumed on a motion for nonsuit. The answer is that the plaintiff testified that "this occurred at the Azusa station; at the railroad station at Azusa;" and his other witnesses spoke of Azusa as a small town where the train stopped. This was sufficient to meet the requirements of section 487, Civil Code, and no further proof on this point was necessary.

We find in the record no error calling for a reversal, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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78 Cal. 374

ONETO *v.* RESTANO. (No. 12,495.)

(*Supreme Court of California.* March 12, 1889.)

1. WATERS AND WATER-COURSES—WATER-RIGHTS AND EASEMENTS—PRESCRIPTION—ADVERSE USE.
In an action to determine the right to certain water which defendant claimed the right to use on alternate days, there were findings that defendant's predecessor in title leased from plaintiff's predecessor the right to so use the water; that more than five years before suit brought, defendant paid plaintiff's predecessor a certain sum, in consideration of which the latter waived all claim to one-half of the water; that defendant has since claimed the right to use, and has used, the water "as his own property;" and that his possession, claim, and use have been quiet, peaceable, open, and notorious. *Held*, that they did not show that defendant's use was adverse, and were insufficient to support a judgment in his favor on the ground of a prescriptive right.

2. SAME—LEASE—CONSTRUCTION.
The use before and since the lease having been of all the water on alternate days, the lease "of one-half the water * * * every alternate day" entitled the lessee to half the water to be obtained by using all half the time; and the intention was not to give the lessee the right to use half on alternate days, thus leaving him free to claim the other half absolutely, and the use of defendant's predecessor could give him no prescriptive right.

3. SAME—RELEASE.
But defendant would acquire a prescriptive right where, having claimed the right to the water irrespective of the lease, he made a verbal compromise with the lessor, and paid the amount agreed upon, and used the water adversely for five years afterwards.

4. SAME—PRESCRIPTION—PAYMENT OF TAXES—BURDEN OF PROOF.
One claiming by prescription is not bound to show payment of all taxes where it does not appear that any taxes have been assessed. He need not prove that no taxes have been assessed.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Action by Giovani Oneto against Giacomo Restano, brought in 1887. The findings trace the title to the water in controversy from Bache to Restano, who acquired his land in 1880, and describe the use thereof by the several claimants. The fourteenth and seventeenth findings are as follows:

"*Fourteenth.* That on the 1st day of May, 1877, the said David Sanguinetti, leased from Joseph Bache, for the term of ten years, one-half of the water running in the said flume and ditch every alternate day, from 12 o'clock noon to 12 o'clock noon of the succeeding day."

"*Seventeenth.* That immediately prior to the time the said defendant, Giacomo Restano, entered into possession of the said lots, deeded to him as aforesaid by David Sanguinetti, he, said defendant, went to said Joseph Bache, from whom said Sanguinetti had secured said lease as aforesaid, and offered to him, the said Bache, the sum of fifty dollars for the purpose of having him, the said Bache, waive and surrender to him, said defendant, any and all claim which he, said Bache, might at said time have to the one-half of the waters of the said spring and creek, used before said time by said David Sanguinetti, on said lot, * * * leased as aforesaid by said Bache to said Sanguinetti; that at said time the said Bache did accept the said offer of fifty dollars, and agreed, in consideration of the payment thereof by said defendant, to waive all his claim to the said one-half of the said waters, and to surrender any and all of his claims thereto to him, the said defendant; that defendant did thereupon pay to him, the said Bache, the said sum of fifty dollars, and the said Bache did then and there, in consideration of the said payment, waive any and all of his claims to said one-half of the said waters, and did then and there surrender to him, said defendant, all such rights; that immediately thereafter, on the 11th day of January, 1880, the said defendant entered into possession of the said lots and of said water, and ever since said date has been claiming the right to use as his own property the said waters of said creek and said spring, through the said ditch and flume, on the said lot, * * * on each alternate day, from 12 o'clock noon to 12 o'clock noon of the succeeding day, and has been since said time using the said waters on said lots and at said times."

Plaintiff appeals.

F. W. Street and *A. L. Hart*, for appellant. *F. D. & G. W. Nicol* and *P. W. Bennett*, for respondent.

HAYNE, C. Suit to determine the right to certain water. The trial court gave judgment for the defendant, and the plaintiff appeals.

The subject-matter of the suit, as defined by the complaint, is the water of a certain spring, which the predecessor of the plaintiff conducted through a flume or ditch across the land of the predecessor of the defendant to his own land. The answer hints at other water coming through the same flume or ditch, and the findings set forth the fact; for while it is found that one Joseph Bache, the plaintiff's predecessor, was the owner of the spring, it is also found that he and other parties "did, by means of the said ditch and flume, commence to collect therein and convey therethrough the water of said spring, together with the waters of Sonora creek." And all through the findings the water in controversy is spoken of as the water "of said creek and spring." It would seem from the evidence that the main portion of the water comes from the spring; but the relative proportions are nowhere shown. It does not appear what right the parties had to the waters of the creek; but it seems that they treated it as on the same footing as the water of the spring; for in the lease mentioned below they refer to the water as that flowing through the ditch, which phrase would include the water from both sources. But it is evident that the right of the plaintiff to the waters of the spring would not be affected by the fact that other water flowed through the ditch; and for the purposes of this opinion we shall consider the subject of the action to be that alleged in the complaint, viz., the water of the spring.

In view of the fact that the predecessor of the plaintiff is found to have been the owner of the spring, the defendant's claim to its waters can only be sustained upon the basis of a prescriptive right; and we think that the findings are not sufficient to support a judgment in his favor upon that ground. The finding in this regard is that "the possession, claim, and use of the defendant and his grantors, as in these findings set forth, have been quiet, peaceable, open, and notorious." This finding is clearly insufficient, in that it does not state that the use was adverse or continuous. *Unger* v. *Mooney*, 63 Cal. 595. In another place the findings show that the use was continuous; but they nowhere show that it was adverse. The statement that the defendant used the water "as his own property" does not necessarily mean that the use was adverse to the plaintiff. Defendant may have had a qualified or limited property in the water. If the use was under a lease from the plaintiff's predecessor it might be said, in one sense, that defendant used the water "as his own property." Where a party relies upon a prescriptive right the finding should not be in any such ambiguous phrase. There is nothing inconsistent with this in *Water Co.* v. *Richardson*, 72 Cal. 603, 14 Pac. Rep. 379. There the finding expressly stated that the use of the water was "adversely to the whole world." Nor do the probative facts set forth in the seventeenth finding necessarily show that the use was adverse. See *Emmal* v. *Webb*, 36 Cal. 1, 204; *Biddel* v. *Brizzolara*, 56 Cal. 381; *Packard* v. *Johnson*, 57 Cal. 183, 184. The judgment must be reversed upon this ground. But inasmuch as certain questions upon the evidence will arise upon a retrial, and have been discussed by counsel, we proceed to examine them.

It appears that in 1861 one Joseph Bache was the owner of the spring above mentioned, and conducted its waters through a flume or ditch across the land of two brothers named Antonini, (now owned by the defendant,) to his own land, which is now owned by the plaintiff. The parties were friendly, and it was agreed between them that, in consideration of certain work to be done upon the flume or ditch, the Antoninis could use the water on alternate days. This was by permission of Bache, and under him. One of the Antoninis testified as follows: "We had no arrangement with Bache about this water; we only got the water from Bache just as a favor from a neighbor." And Bache's son says: "They were good neighbors, and my father let them have the water whenever they needed it. My father says: 'Whenever you come to sell out the place, Mr. Antonini, I want to have my right to the water.'" In 1877 the Antoninis conveyed their land to one Sanguinetti; and shortly afterwards a lease was signed by both Bache and Sanguinetti, and recorded, whereby, in consideration of one dollar, Bache leased to Sanguinetti for the term of 10 years "one-half of the water flowing in his ditch * * * every alternate day from 12 o'clock noon to 12 o'clock noon the next day." The evidence sufficiently shows the delivery of this lease. And, notwithstanding some ambiguity in its language, we think it clear from the circumstances that the proper construction is that the lessee was to have the use of half of the water only, and that such half was to be arrived at by the use of the whole stream for half the time. This seems to have been the practical construction put upon it by the parties. And we think it wholly inadmissible to say that the intention was to give the lessee the right to the use of half of the stream on every alternate day, leaving him free to claim the other half absolutely. Such being the evidence, we think that the defendant cannot rely upon the use of the water by his predecessors as giving him a prescriptive right, and that the cases cited by the learned counsel are not in point.

In January, 1880, Sanguinetti conveyed his land to the defendant, "together with all the water-rights belonging to, or heretofore used in connection with, said lots of land." It does not appear that the defendant used the water under the lease. According to the plaintiff's own testimony, when the defendant acquired the land he "refused to take another lease from me. He said to me that he was entitled to one-half of the water, and he was going to have it. He also said, if by law I was entitled to all the water, that he would not let the water go through his ranch." And according to the testimony of one Marengo, who conducted the negotiation with Sanguinetti on the part of the defendant, the following is what occurred: "I said to Bache, 'I think we can compromise this matter with you.' He said, 'We can, if you will pay me something.' I asked him how much he wanted. * * * He said, 'If you will pay me $100, I will do it.' I told him, 'If you want, I will give you $50, and be done with the matter.' He thought a little while, and then he says, 'All right.' So he took it; was glad to take it. This agreement was made with Bache before the deed from Sanguinetti was made to Restano. Restano was to pay Sanguinetti $3,000. He only paid him $2,950. The other $50 I told Restano to pay to Bache. We paid Bache the $50 the same day the deed was executed, after the deed was made, and before Restano went into possession. I was present when Giacomo Restano paid him the money. Restano went into possession of the place next day. From that time up to the present time I know Restano has been claiming one-half of the water, and asserting such claim over it." It is conceded by the learned counsel for the defendant that this agreement did not amount to a valid conveyance of the water-right, for the reason that it was not in writing. But he contends that it is evidence tending to show that the use by defendant was adverse to Bache, and to establish a prescriptive right in the defendant; and in this we agree. If the defendant can show upon a retrial a sufficient adverse use of the water for five years from the above transaction, we think he will be entitled to judgment in his favor.

It is argued for the plaintiff that in order to recover upon this ground the defendant must show that he paid all the taxes which have been assessed. It has been held, however, that if no taxes are found to have been assessed it need not be found that the party claiming by adverse possession has paid taxes. *Heilbron* v. *Ditch Co.*, 75 Cal. 117, 17 Pac. Rep. 65. In other words, the requirement as to payment of taxes does not apply where none have been assessed to anybody. And the inference is that the burden of showing that none have been assessed is not upon the claimant by possession. That is a negative which he is not required to prove. This is the rule which convenience requires; for it is an easy matter for the other party to show that an assessment has been levied, but a difficult one to show that none have been levied for a series of years.

We advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

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78 Cal. 371

POOL *v.* CLIFFORD. (No. 12,860.)

(*Supreme Court of California.* March 12, 1889.)

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY.

In an action to recover the value of certain horses, the evidence as to ownership of the horses was that plaintiff had several thousand dollars in money, which she loaned to her husband. She testified: "The money was in the stable, in the safe. My husband used it as he pleased. Susie [one of the horses] was bought with my money, and he said I should have her as security. I loaned my husband $200 to buy her." Other horses were bought much in the same way, and were brought to the stable, and used by the husband in his business. Plaintiff further testified: "Whenever he used my money to buy property, horses, he gave them to me as security. None of this property was purchased without it being reported to me, and I acquiesced in it." *Held*, under this evidence, that the ownership of the property was in the husband.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

L. W. Elliott, for appellant. *J. C. Campbell*, for respondent.

HAYNE, C. Action to recover the value of certain horses and other personal property. Verdict for plaintiff for $800. Defendant appeals. It is contended that there is no evidence that the plaintiff was the owner of the property. As to two of the horses, Tommy and Dandy, which, however, do not seem to have been of much value, there can be no doubt that they belonged to the plaintiff. They were raised upon her ranch, and she allowed her husband to use them in the business. But we cannot say that there was any evidence that the other horses were the property of the plaintiff. It appears that the plaintiff had several thousand dollars in money, which she lent to her husband. She says: "The money was in the stable, in the safe. My husband used it as he pleased. I gave him the money, and he used it as he deemed it advisable in the business. He didn't tell me all his business, but he often told me, whenever he got the money, he would do as he deemed best. The money was there, and he would use it as he deemed profitable for the business. Susie was bought with my money, and he said I should have her as security.

* * * I loaned my husband $200 to buy her." Other horses, carts, etc., were bought much in the same way, and were brought to the stable and used by the husband in his business. Plaintiff says: "Whenever he used my money to buy property, horses, he gave them to me as security. None of this property was purchased without it being reported to me, and I acquiesced in it."

This is the substance of the testimony in relation to the question of ownership. We think it must be held that the wife loaned the money to the husband, and that the horses were his property. The "security" which she seems to have supposed she had amounts to nothing, because she never had possession of the property. The defendant's motion for nonsuit should have been granted except as to Tommy and Dandy. The deed offered by defendant should have been received in evidence, the description being, in our opinion, sufficient to recover all the personal property which the husband had. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and cause remanded for a new trial.

THORNTON, J. I concur in the judgment of reversal, on the ground that the complaint of plaintiff should have been stricken out and the action dismissed on defendant's motion to dismiss the action. The defendant, after issue joined, gave notice to plaintiff's attorney of the taking of the deposition of plaintiff on the 15th of February, 1888, at a place and time stated in the notice. Along with this notice was served an affidavit that Jennie R. Pool was the plaintiff in the action. Plaintiff was duly subpœnaed to appear at the time and place mentioned above. The plaintiff refused to appear at such time and place to give her deposition. On these facts the defendant, on the 15th of February, 1888, the day on which the action was tried, moved the court below to dismiss the action, which motion was denied, and defendant excepted. I am of opinion that the defendant had the undoubted right to have the complaint of plaintiff stricken out, under section 1991, Code Civil Proc. In this case a party to an action willfully refused to obey a subpœna, or to be sworn as a witness. In either case, defendant was entitled to have the complaint of such party stricken out. It makes no difference that plaintiff's motion was in form to dismiss the action, instead of to strike out the complaint. Striking out the complaint is substantially dismissing the action. The motion may well be to dismiss the action or to strike out the complaint. I will add, further, that there was manifest error committed by the court at the trial in excluding from the jury the deed of assignment of January 8, 1887, executed by Pool to Clifford, with evidence of its acknowledgment and record. There is no defect or insufficiency in the description in the deed. This description is general, but it is aided in that regard by the schedule, which was erroneously excluded by the court, as was the bond executed by Clifford as assignee.

3 Cal. Unrep. 69

SYMONS *v.* BUNNELL *et al.* (No. 12,558.)

(*Supreme Court of California.* March 15, 1889.)

1. RULES OF COURT—SUSPENSION OF.
   Rules of court are but a means to accomplish the ends of justice, and it is always in the power of the court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it.
2. NEW TRIAL—SURPRISE—AFFIDAVITS.
   Where the affidavits are conflicting as to the question of surprise, made the ground of a motion for a new trial, the court below cannot be said to have acted without the exercise of a proper discretion.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

Ejectment by William Symons against E. F. Bunnell and Joseph Clark. Judgment for plaintiff, and defendants appeal. They complaint that the case was set for trial on plaintiff's motion, without any notice of such motion, and without consent; that such notice or consent was required by a rule of the trial court; and that the court should have granted a continuance for that reason.

I. M. Kalloch, (*Theodore Bradley,* of counsel,) for appellants. *F. D. & G. W. Nicol* and *P. W. Bennett,* for respondent.

FOOTE, C. An appeal from a judgment in ejectment and an order denying a new trial. The grounds of the contention of the appellants are that the court below abused its discretion in not allowing a continuance of the cause upon their motion, and in denying their motion for a new trial based upon surprise which ordinary prudence could not have guarded against. The action of the court, under the circumstances, (as stated in the affidavits used in the motions to set aside the judgment and for a new trial,) in going on with the trial of the case in violation, as it is alleged, of one of its rules, was not erroneous. Such rules are but "a means to accomplish the ends of justice," and it is always in the power of the court to suspend its own rules, or to except a particular case from their operation, whenever the purposes of justice require it. *Pickett* v. *Wallace,* 54 Cal. 147, and cases cited. The affidavits were conflicting as to the question of surprise, and the court below cannot be said to have acted without the exercise of a proper discretion. The defendants have been deprived of no legal right, and the judgment and order should be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

78 Cal. 399

In re GOOD *et al.* (No. 12,418.)

(*Supreme Court of California.* March 15, 1889.)

INSOLVENCY—WHEN APPLICATION FOR DISCHARGE GRANTED.

Under the California insolvent act of April 16, 1880, providing that no discharge shall be granted if the debtor, being a merchant or tradesman, has not kept proper books of account, an application by a firm to be adjudged insolvent, and for a discharge, will be denied where it appears that, owing to the omission of certain entries of moneys lent to the firm to use in its business, the firm was wrongly made to appear solvent, although such omissions were made in good faith. PATERSON and MCFARLAND, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

J. F. Wendell and *Fred W. Hall*, for appellant. *Naphtaly, Friedenrich & Ackerman*, for respondents.

HAYNE, C. H. C. Good and James Roney were partners, "carrying on a grocery and bar business at Vallejo in a small way," for about four years. On the 3d day of July, 1886, they filed a petition in the superior court of Solano county, asking to be adjudged insolvents, and in February, 1887, Good applied to the court for a discharge from his debts. This application was opposed by some of the creditors, on the ground that the firm of Good & Roney had not kept proper books of account, and it was specified that they did not enter in their books "an indebtedness of said firm to John Good, amounting to about $7,500, and did not enter in said books an indebtedness of said firm to Walter C. Good, amounting to about $2,500, and thereby falsely made it appear by said books that said firm was indebted in a less sum, to-wit, $10,000 less, than said firm actually owed, and thereby falsely made it appear by said books that said firm was solvent, and that the indebtedness of said firm did not exceed its assets, whereas said firm was wholly insolvent, and its actual indebtedness largely exceeded the value of its assets." Good filed an answer to the objections made to his discharge, and, admitting that the indebtedness of $7,500 to John Good, his father, and $2,500 to Walter C. Good, his brother, was not entered in the books of the firm, averred that the books were not kept by himself, but by James Roney, and that neither of the partners was an expert book-keeper, and that they did not consider it necessary to enter those items; that the items were for moneys loaned to the firm to enable the partners to commence and continue their business, and constituted their capital stock, and that promissory notes therefor had been given. He also averred that the omissions were made in good faith, and without any intention to deceive or defraud any one, or to make the firm appear solvent when it was insolvent, and that no creditor of the firm was injured or defrauded thereby; that the books correctly set forth the mercantile transactions of the firm, and did not purport to show its indebtedness for money borrowed, and for which notes had been given, and therefore did not falsely or at all make it appear that the firm was indebted in a less sum than it actually owed, or falsely or at all make it appear that the firm was solvent, or that its indebtedness did not exceed its assets. Upon the specifications of their grounds of opposition, and the answer thereto, counsel for the opposing creditors moved the court to deny Good's application for a discharge, and the motion was granted. From that order this appeal is prosecuted.

We think that the order was proper. The insolvent act was passed on the 16th of April, 1880, and provides that "no discharge shall be granted, or, if granted, shall be valid, if the debtor, * * * being a merchant or tradesman, has not, subsequently to the passage of this act, kept proper books of account." Section 49. The books, as kept, showed that the firm was in good condition. If the omitted entries had been made, the books would have shown that the firm was utterly insolvent. Was it "proper" that they should show the true condition of affairs? What else are books for? If the omitted entries had been of outside matter, they would not have had to be made. But that is simply because the statute does not require books to be kept as to outside matters. These entries were not in relation to outside matters. They were for money lent to the firm as such, for the express purpose of being put into the business. Such being the case, we cannot see how it can be said that they were not within the provision of the statute. But stress is laid upon the fact that the omission was "in good faith." This simply amounts to saying that, although the partners did not comply with the law, they did not mean anything by it. This might be material if it were proposed to inflict a positive punishment on them. But no crime is charged against them. They were simply offered a valuable privilege upon certain conditions, and they have not complied with the conditions. Good faith in the matter may enter into the question under certain circumstances; but it is not controlling. Suppose that a merchant should not keep any books at all. Would it make any difference that he acted in perfect good faith, and did not think that books were necessary? Or suppose that, in perfect good faith, and from sheer stupidity, he kept books that were utterly incomprehensible. Would it avail him that his intentions were good? We do not think it would. As said by GRIER, J., in *Re Solomon*, 2 N. B. R. 287, concerning a similar provision in the federal bankrupt law, the object of the provision was "to enable any competent person to determine from the books and invoices the real condition of the debtor's affairs." Or, as said by BLATCHFORD, J., in *Re Garrison*, 7 N. B. R. 287, the purpose was to require them to "keep such books in relation to their business as will furnish an intelligent account to their creditors of the state and course of their business transactions, not leaving such account to be made up from memory or from sources other than such books." The requirement is in our judgment a wholesome one. It is difficult to prove fraud or want of "good faith." Any lawyer who has had much experience in this class of cases knows that, as a rule, creditors for moderate amounts prefer to let the matter go rather than to undertake the difficult and expensive task of a contest upon such a basis. Crowds of fraudulent bankruptcies take place in consequence. In view of this the statute has very wisely made the failure to keep proper books one of the tests. As a matter of course, trivial inaccuracies are not to be regarded, and books which would be proper for one kind of business might not be proper for another. The provision, like every other, must receive a reasonable construction. But we do not think that a set of books which shows that the firm was in good condition when in fact it was utterly insolvent, can be held to be "proper" in any view. We therefore advise that the order appealed from be affirmed.

I concur: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

PATERSON, J. I dissent. As the motion was made upon the pleadings, all the averments of the answer are taken as true. It is therefore admitted that proper books were kept of all the mercantile transactions of the firm; that the omissions complained of were made in good faith, without any intent to deceive or defraud any one, and that no creditor of the firm was injured or defrauded thereby; that the partners honestly supposed it was not necessary to enter in their books accounts of moneys which they had borrowed on their promissory notes before commencing business, and which constituted their capital stock. Now, conceding that some notes or *memoranda* of this borrowed money should have been entered in the books, the question is, did the failure to make the entries, under the circumstances shown, necessarily deprive the appellant of all right to a discharge from his debts? I am unable to see any good or sufficient ground for holding that it did. The statute was intended to be beneficent in its scope and purposes. In passing it, the legislature evidently thought that the best interests of the state and of its citizens would be promoted if one who had become insolvent, while endeavoring honestly and fairly to carry on some business, could surrender his property to his creditors, and then be discharged from his debts, and permitted to commence his business life anew. Many restrictions were thrown around the proceedings, but they were intended mainly to hinder fraudulent and dishonest debtors in their efforts to escape from the just claims of their creditors. An examination of the section of the insolvent act referred to will show that the keeping of books is made a condition of discharge only in case of merchants and tradesmen. It will also be seen that, while many grounds for denying the discharge are specified, all but two of them are based upon the fraudulent and wrongful acts of the debtor. The exceptions are the failure to keep proper books of account by the merchant or tradesman, and an application for discharge made within three years next after a prior discharge. Each case must depend upon its own peculiar circumstances. In *Re Graves*, 24 Fed. Rep. 551, the court said. "No fraud or dishonesty is charged, and it would seem not to be the policy of the courts to keep a young man under the harrow for years, when the only accusation against him is that he failed to insert in his cash-book the items of his daily sales,"—and it was held that although his cash book was imperfect, inartistic, and inaccurate in a strictly commercial sense, it was not so improperly kept as to justify the court in withholding the discharge.

McFARLAND, J. I concur in the views expressed by Mr. Justice PATERSON.

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78 Cal. 405

PEOPLE *v.* HILL. (No. 20,498.)

(*Supreme Court of California.* March 15, 1889.)

1. CRIMINAL LAW—APPEAL—BILL OF EXCEPTIONS.
   Where a defendant in a criminal case in preparing a bill of exceptions relies upon a waiver of the two-days notice of presentation for settlement, required by Pen. Code Cal. § 1171, such waiver should be made of record, or by some writing, and not left to the uncertainty of parol evidence.
2. SAME—PROOF OF NOTICE OR WAIVER.
   Where it does not appear that any showing was made to the trial court that the two-days notice was given, or that it had been waived, there is no improper refusal to settle the bill of exceptions.

In bank. Application by Charles O. Hill for *mandamus* against D. J. Toohy, judge below.

John D. Whaley, for applicant. *D. J. Toohy*, respondent *in pro. per*.

WORKS, J. The appellant makes application for a *mandamus* to compel the judge of the court below, who has retired from office, to settle and sign a bill of exceptions in this case. The motion for a new trial was denied, and judgment rendered March 3, 1888, and on the 12th of March 15 days' additional time was given within which to file the bill of exceptions. The affidavit of the attorney for the defendant shows that a draft of the bill was presented for settlement on the 24th day of March, but the judge who tried the case makes affidavit that it was never presented to him for settlement, and the minutes of the court, which are made a part of his return to the alternative writ, are silent on the subject. There is nothing to show that the proposed bill of exceptions was ever served upon the district attorney, or that notice of the presentation of the same for settlement was given him. There is an affidavit by a former attorney of the defendant, that on the 6th day of March the assistant district attorney, in open court, waived the two-days notice required, and the appellant then presented the proposed bill to the judge for settlement, but, if any such action was taken in open court, it does not appear of record. The same attorney makes affidavit of the same waiver of notice and presentation of the proposed bill of exceptions in open court on the 24th day of March, but the record discloses nothing of the kind, and, as we have said, the judge denies that the proposed bill was ever presented to him for settlement.

There is nothing to show that any showing was made to the judge of the court that the two-days notice required by section 1171 of the Penal Code was given, or that it had been waived, nor is it shown that the waiver claimed to have been made was ever brought to his attention before instituting this proceeding. Therefore, leaving out of consideration the conflicting evidence upon the question whether the proposed bill was ever presented or not, it does not appear that the judge has improperly refused to settle the bill of exceptions. *People* v. *Sprague*, 53 Cal. 422. Besides, we are of the opinion that where the defendant, in a criminal case, relies upon a waiver of the notice required by the statute, such waiver should be made of record, or by some writing, and not be left to the uncertainty of human memory.

Writ denied.

We concur: BEATTY, C. J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

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78 Cal. 300

In re SACKETT'S ESTATE. (No. 12,679.)

(*Supreme Court of California.* March 1, 1889.)

ADMINISTRATORS—POWERS AND DUTIES—PAYMENT OF DEBTS.

Code Civil Proc. Cal. c. 3, art. 7, providing for the appointment of a special administrator, does not authorize him to pay claims against the estate. It requires, in section 1412, that the order of appointment shall be entered on the court minutes, and that it shall specify the powers given him. A special administrator, without any order of court, paid a claim, and upon the settlement of his accounts it was disallowed by the court. *Held*, in the absence of the record of his appointment showing the powers given him, it did not affirmatively appear that the court erred.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Upon the settlement of the accounts of H. J. Barling, special administrator, etc., of the estate of Hannah M. Sackett, deceased, a voucher for $400 presented by him, it being the amount paid to a creditor of his intestate, was disallowed, and he appeals.

Daniel Titus, for appellant. *Selden S. & Geo. T. Wright*, for respondent.

SHARPSTEIN, J. Appellant was appointed special administrator of said estate, and as such filed his account for settlement. Exceptions were filed thereto. The court allowed certain of the exceptions, and disallowed others. The court found that he had received $1,275.10, and that he should be credited with $848.25. Appellant claims that the court erred in disallowing a claim of $400, which he paid Scholle Bros. for rent due them from deceased at the time of her death. It does not appear that this claim was ever presented to the court or judge, or by the court or judge directed to be paid. Article 7, c. 3, Code Civil Proc., provides for the appointment and prescribes the powers and duties of special administrators, but does not authorize or require them to allow or pay claims against estates. The appointment must be made by entry upon the minutes of the court, specifying the powers to be exercised by the administrator. Id. § 1412. That entry is not now before us, and we are not able to determine what powers beyond those specified in the Code were conferred on the appellant. On the record before us we are unable to discover that any error was committed by the court below, and the order must be affirmed. Order affirmed.

We concur: THORNTON, J.; MCFARLAND, J.

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78 Cal. 410

HOULT *et al.* *v.* BALDWIN. (No. 12,092.)

(*Supreme Court of California.* March 18, 1889.)

SALE—ACTION FOR PRICE—EVIDENCE—SUFFICIENCY.

On the trial of an action for the price of a combined header and separator, it appeared that on the delivery of the machine it was taken from the cars, properly put together, and carefully moved, and that it broke down from its own weight. A new driving-wheel precisely like the first was put on, which broke in the same manner. Both plaintiffs testified, but one had nothing to do with the manufacture of the machine, and the other testified that after the second break-down they strengthened other machines constructed by them in the part that broke, and that only one machine constructed exactly like defendant's was sent out, and that it broke down in the same part. The manufacturer of the casting testified that it was manufactured according to contract, but that he did not think it was of sufficient strength, without the additions subsequently made. *Held*, that a finding for plaintiff was not supported by the evidence.

In bank. Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

Lloyd & Wood and *Louttit, Woods & Levinsky*, for appellant. *J. C. Campbell* and *W. L. Dudley*, for respondents.

WORKS, J. Action to recover the price of a combined header and separator. This is the second appeal to this court. The facts will be found stated in *Hoult* v. *Baldwin*, 67 Cal. 610, 8 Pac. Rep. 440. In its former decision, reversing the case, this court said that the principal questions for the jury were: (1) Would the machine, as sent forward, do good work in cutting and thrashing ordinary grain, from one to five feet in height? (2) Was it reasonably fit for the purpose for which it was ordered? (3) Was there any latent defect, arising from the process of manufacture, not disclosed to the buyer?

Upon the second trial these precise questions were put to the jury in the form of special interrogatories. The first and second were answered in the affirmative, and the third in the negative. A general verdict was also returned for the plaintiffs for the amount of their claim, with interest, and judgment was rendered accordingly. There was a motion for a new trial by the defendant, which was denied, and he appeals from the order denying him a new trial and from the judgment. The principal question presented on this appeal is as to the sufficiency of the evidence to sustain the findings and verdict of the jury.

The sole question presented by the evidence was whether or not the driving or guiding wheel of the machine was defective or insufficient. There was no question made upon the warranty that the machine would do good work in cutting and thrashing ordinary grain, from one to five feet high. It may be conceded, for the purposes of this case, that the machine would have done the work, as warranted, if the grain had been brought to it. The trouble seems to have been that it could not be taken to the grain, for the reason that it was not able to carry its own weight. We have read the evidence carefully, and find that it is shown, beyond any question, that the machine was taken from the cars, properly put together, and carefully moved, and that it broke down of its own weight; that a second driving-wheel, precisely like the first, was furnished, which, upon a second attempt to move the machine, gave way in the same manner. This seems to us to have been almost conclusive proof either that this part of the machine was not of sufficient strength, admitting it to have been properly constructed, or that it was defectively manufactured. From which of these causes the defect resulted, if either, is immaterial. In addition to the fact that this part of the machine gave way, as stated, it is shown that the plaintiffs strengthened the same in all the machines sent out thereafter. Besides, it was shown by one Lewis, a witness on the part of the defense, that this casting was improperly constructed. After showing that he was an expert in that kind of work, he says: "For the purpose for which the casting was intended, it was wrong in shape. The plate was thin; at its thickest part it was five-eighths of an inch, and the standard was three inches in diameter, and cast solid on this plate. The standard extended in height about twenty or twenty-four inches, tapering about two inches, and at the end of that point there was a wrought-iron band shrunk on, and at the end there was a pintle. This wrought-iron had nothing to do with the broken part. The plate and standard were all one casting, and it was bolted through the plate to the push-beam. The lower pintle came out from the end of the beam. The upper one was at the upper end of the tiller-post, and the wheel was attached to these pintles, and this made the guiding apparatus of the machine. The plate being thin, and the standard being three inches in diameter, it would be weakened at the point of contact between the standard and the plate, on account of the difference in cooling. One would cool much faster than the other. The plate would cool much faster. That is a great difficulty foundrymen have to contend with, and this casting was wrong in shape for the purpose for which it was intended. It would be liable to break, and the place where it would break would be the point of contact between the standard and the plate, in the same way in which that one was broken which was exhibited to me."

The plaintiffs each testify in general terms as to the condition and fitness of the machine for the work to be done. Mr. Young says: "The castings for it were made in the Globe Foundry & Machine-Shop, in Stockton. George Lissenden did the wood-work. I shipped the machine about the 12th day of May, 1878. I took the machine from the shop, and loaded it on the cars. We took part of it apart on the platform at the depot. We had four animals to draw it from the shop to the depot. I cannot say how many blocks we crossed. The streets were in an ordinary condition. We crossed all the street crossings. We crossed two railroad tracks. The turning-wheels stood at an angle of about forty-five degrees while crossing the railroad,—I mean the tiller-wheel, or the standard of the tiller-wheel, that was broken. I put it upon the cars. It was in good condition when we put it upon the cars. Everything was all right. There was nothing wrong that I could see. I started seven of the same make that year, and they all worked well in grain from one to five feet in height." He further stated that the machine was "capable of cutting grain from one to five feet in height." It was shown by the witness that Mr. Hoult superintended the making of the machines, and that the witness saw them in course of construction, and saw the parts put together; that they put out thirteen of the machines that year, the other twelve being duplicates of this one, the one sold to the defendant being the first; and that the principle of this machine was precisely the same as a number of other machines that did work; after which he further testified: "I was on ten of them that season; started ten of them myself in the field in Merced, in grain from two and a half to five feet high, on the land of Mr. Huffman, Merced county,—on level land. Have seen the same kind of machine working since that time. The guiding-wheels of all the machines were made at the Globe Foundry. In taking the machine from the shop to the depot, and crossing the street crossings, and crossing the railroad track, and in making this turn at the depot, I consider a much harder test was made of the machine than any test in the field. I consider it a severe test. The machine was all right when taken apart and put upon the cars. I am satisfied the machine will do all that is claimed for it. In my opinion, it is fit for the purpose for which it was made. There was no latent defect arising from the process of manufacture not disclosed to Mr. Baldwin." It will be seen that this witness had nothing to do with the manufacture of the casting, and he so testifies in express terms. As to the only question, therefore, about which there was any real controversy, he was not an expert, and should not have been allowed to give an opinion, and would not have been, probably, if the objection to his giving an opinion had been confined to that branch of his testimony. Having given an opinion, under such circumstances, it was entitled to no weight whatever, and should be given none in arriving at a conclusion as to the sufficiency of the evidence. After testifying that the other machines were exact duplicates of the one sold to defendant, he was asked, on cross-examination, whether the other machines were not strengthened where this one is claimed to have been weak, and answered: "I don't know."

Mr. Hoult, the other plaintiff, testified as follows: "The machine shipped to Baldwin was well constructed. In my opinion, it would do good work in cutting and thrashing ordinary grain, from one to five feet in height. I think it was reasonably fit for that purpose. I don't know of any hidden defects in that machine, through any casting or wood-work. My opinion is based upon seeing duplicates of the same machine work, I mean a machine of a similar pattern in all respects. After the telegram for this second plate, we came to the conclusion there might be something wrong, and put a strap on it to make it stronger. Some of them had gone out without that, though, but those that remained we put a strap on, and then, after that, we added more metal to the plate, for they would break occasionally. There was never one broke before, to my knowledge. We made the plates after that seven-eighths of an inch thick. I saw the machine running with a plate similar to the one on Baldwin's machine during the year 1878. It was at Hughes' place, at Waterford, Stanislaus county. The grain was from two to four feet, —ordinary grain. I did not use the machine. I went there to look at it. It worked well. The tiller-post and plate on that machine was of the same dimensions as the one shipped to Baldwin,—the same kind. It did not have the strap on it, or anything else, but I will say it broke afterwards. It broke the next season. I think the machine sent to Baldwin would have done what we guarantied it to do under proper handling. I could not say whether the machine sent to Baldwin was the first one or not in the year 1878. My recollection is that two, may be three, machines were sent out during 1878, after that sent to Baldwin, on which the improved tiller-post was not placed. My recollection is clear in regard to one machine that went out, and that is of the machine of which I have spoken, and in which the tiller-post broke down the subsequent year." It thus appears that, as to the matter in controversy here, this witness, like the other, was not an expert, and was testifying without knowledge. His testimony makes it clear that but one machine like the one sold to the defendant was sent out, and that it gave way at this same weak spot, though not so soon as the one sold to the defendant.

One Lissenden was called for the plaintiffs, and testified that he had been a manufacturer of agricultural implements for more than 40 years, and that the material used in the machine was "first-class, number one material, and done satisfactory to the contractor;" that during his experience he had been using castings such as were used in these machines; that he tapped all of the castings, by way of testing whether they were perfect or not, and that there were no defects in any of the castings when they were put on; and that the shrinking was done by one Mosey, who was a competent man. It may be doubted whether this witness was shown to be an expert in the matter of these castings; but, admitting that he was, he testified as follows on the direct question in controversy: "*Question.* State to the jury whether or not, from your knowledge of the construction of these machines, from your knowledge of the material that went into them, and from your knowledge as a machinist, for the purpose for which they were manufactured and put together, whether or not they were fit for the purpose of cutting and thrashing ordinary grain, from one to five feet in height? *Answer.* I do not care to answer that question direct. Men have various opinions in reference to that. I can state that the quality of the material was first-class, and the work done first-class, according to the contract, but there are various opinions as to the qualifications of these machines in the field. I will testify that I did not intend to say that the machine is just as I would have done it, but it was built according to contract, and the work was done first class, and the material was first class." And on cross-examination: "*Question by Counsel for Defendant.* I understand you to say, in answer to a question by counsel on the other side, that you knew and gave it as your opinion, because of your knowledge and experience in the business, that the tiller-post sent Baldwin was a sufficient casting for that purpose. *Answer.* Yes, sir; it was a sufficient casting, in my opinion, with the strap or stirrup. *Q.* Without the strap or stirrup, was it sufficient? *A.* I don't think it was. I don't think it was weak around the foot of the post." The strap or stirrup was one of the improvements made in other machines subsequent to the sale to defendant. The evidence of this witness weakened, rather than strengthened, the plaintiff's case.

This is the substance of the evidence on this point. Applying to it the law, as declared by this court on the former appeal, it seems to us that the findings and verdict of the jury are entirely without evidence to support them. There were objections to some of the evidence, particularly the opinions given by the plaintiffs, and some of the instructions were complained of, but the conclusion we have reached renders it unnecessary to consider these questions. Upon the main issue in the case, in fact the only one material to have been considered, there was no substantial conflict in the evidence, and the verdict and judgment must be set aside for that reason.

Judgment and order appealed from reversed, and cause remanded.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.

78 Cal. 389

BAILEY *v.* FOX. (No. 12,592.)

(*Supreme Court of California.* March 14, 1889.)

1. SALE—RESCISSION—DELAY.

Defendant, being the owner of a stock of hardware, sold a one-third interest each to plaintiff and one M., and formed a partnership with them. A large part of the stock was sold, and new stock purchased on credit, for which all the partners were liable. Afterwards plaintiff sued to rescind the sale, on the ground that a false inventory of the stock had been made, and that defendant had misrepresented the profits of the business. The discovery of the alleged fraud was made in May, but the offer to rescind was not made until the following October. *Held,* that the offer to rescind came too late.

2. SAME—TENDER—SUFFICIENCY.

The offer made by plaintiff to deliver to defendant the goods on hand, and pay him the amount realized from the sale of those disposed of, was not a sufficient tender. Defendant, before paying back the purchase money, was entitled to receive the identical things sold.

3. SAME—RESCISSION.

Plaintiff's right to rescission was also defeated by the fact that at the time the offer to rescind was made the whole of the stock had become partnership property, in which M., who was not made a party to the action to rescind, had an interest, making it impossible to place the parties *in statu quo.*

4. EQUITY—RESCISSION OF CONTRACT—PLEADING.

No cause of action was stated in the complaint so far as it related to the alleged fraudulent representations respecting the former profits of the business, where it contained no allegation that the plaintiff was induced thereby to pay a higher price for the goods than he would otherwise have done, nor that the business was not profitable after plaintiff bought into it.

In bank. Appeal from superior court, Stanislaus county; W. O. MINOR, Judge.

Suit by Samuel B. Bailey against John Fox, to rescind and cancel a contract of sale. There was a judgment for plaintiff, and defendant appeals.

Schell & Bond and *W. E. Turner*, for appellant. *Hatton & Fulkerth* and *W. L. Dudley*, for respondent.

WORKS, J. On the 4th day of November, 1885, the appellant, being the owner of a stock of hardware and agricultural implements, sold a one-third interest therein to the respondent. The terms of sale were that an inventory of the stock should be taken and completed on or before November 30, 1885, the same to be valued at net San Francisco wholesale prices, and when the value was thus ascertained the value of the fixtures should be added, and the respondent should then pay the one-third of the amount thereof, as follows: Fifteen hundred dollars in cash, and the balance in two secured notes of equal amounts, payable January 1, 1887, and January 1, 1888, respectively. The sale was consummated in accordance with this agreement on the 30th of November, 1885. At the same time the appellant sold a like interest in the stock to one Meinecke on the same terms, whereby the parties to this suit and said Meinecke each became the owner of one-third interest in said stock. The inventory was taken in the presence of the respondent, who assisted in taking the same. The value of the stock and fixtures was found to be $6,434.32. It was a part of the agreement that the three owners of the stock should form a copartnership and carry on the business, the respondent and Meinecke to take the active management of the business, and the appellant, who had no knowledge of the business, to furnish some one in his place. The copartnership was formed by a written agreement, by which it was stipulated that the same should continue for three years, the profits and losses to be equally divided, and that the stock of the copartnership should be the stock on hand, all being equal owners therein.

This action is to rescind and cancel this contract of sale. Two grounds therefor are stated in the complaint: "(1) That the defendant, on said 4th day of November, 1885, and repeatedly before and at the time of his said offer to sell said stock of goods and interest in said business to plaintiff, and for the purpose of inducing said plaintiff to buy the same, and with the intent to deceive and defraud said plaintiff, did falsely and fraudulently state and represent to said plaintiff that said business as then and theretofore conducted by him was and had been a profitable and paying business, and that defendant had realized up to said time of said sale a fair profit in his said business; that plaintiff had confidence in said defendant, and believing said statement and representations so made by said defendant to be true, and relying thereon, purchased said interest in said stock of goods, wares, and merchandise, with said interest in said business and fixtures, and paid him therefor said sum of $6,434.32, in cash and notes, as hereinbefore stated; that in truth and in fact, and as defendant well knew, said statements and representations were false, and said business was not then, nor as it had theretofore been conducted by him, a profitable or paying business, and the defendant had not realized up to the date of said sale, or at any time, a fair or any profit whatever from the same. (2) Said plaintiff further charges and avers and shows, upon and according to his information and belief, that the said defendant, with the intent to defraud this plaintiff, caused and procured a false invoice and valuation to be made of said stock of goods, and in and by which the price thereof was greatly enhanced over and above net San Francisco wholesale prices, to-wit, in the sum of about thirty-five hundred dollars; all of which was and is in violation of said agreement between said plaintiff and defendant, and in fraud of said plaintiff, and by reason thereof defendant fraudulently obtained from said plaintiff the sum of about eleven hundred and seventy-five dollars." It is further averred that when plaintiff discovered that these representations were false, and that the inventory had been falsely taken, "plaintiff informed and notified said defendant thereof, and then and there demanded of said defendant that he return to this plaintiff the sum of $1,500, being the sum or amount which he had paid to said defendant as a part of the purchase price of said stock of goods, business, and fixtures; and that he also surrender and give up to plaintiff said two promissory notes of $2,468.16 each, hereinbefore described, the plaintiff at the same time offering to return to said defendant all of his one-third interest in said stock of said goods then on hand, and to account to him in cash for the value of such part or portion as had been sold, and to restore to him in kind or value everything which he had received from said defendant under and by said contract, upon the condition that the said defendant do likewise. But said defendant refused and still refuses to return to said plaintiff said sum of $1,500, or any part thereof, or give up or surrender said promissory notes, or either of them, to the great wrong and damage of said plaintiff in the sum of $6,434.32." There is no allegation in the complaint showing, or tending to show, that the business had not been profitable under the new management, or any other facts tending to show the materiality of the representations in respect to former profits, or that any damage or injury had resulted to the plaintiff by reason thereof.

The court finds against the plaintiff as to the allegation of fraud in taking the inventory, so that he must recover, if at all, upon the ground of false representations as to former profits in conducting the business. The court finds the making and consummation of the sale, in substance, as stated above; that the false representations were made, and believed and relied upon by the plaintiff, and that said business had not, prior to the sale, been profitable. Whether it had since been profitable or not is not found. It is further found that the plaintiff did not discover that said representations were false until June, 1886; that in the mean time the defendant had assigned the notes to a third party as collateral security; the copartnership had continued to carry on the business, had contracted an indebtedness of about $6,000 for other goods, purchased to replenish the stock, and had sold several thousand dollars' worth of the stock, a part of which had been sold on credit; that "plaintiff is not incapable, by reason of said copartnership, or the said business or outstanding indebtedness, of restoring defendant to his former condition, or to make restoration, if the notes which the defendant holds against the plaintiff be delivered up and canceled." The court further finds that "there was no unreasonable delay on the part of plaintiff in bringing this action," and that he has been damaged in the sum of $6,434.32, being the amount paid and agreed to be paid by him for the stock of goods.

The conclusions of law are as follows: "(1) That said contract was and is fraudulent and void, and that plaintiff is entitled to have it rescinded, canceled, and set aside; and it is so ordered. (2) That said plaintiff is entitled to have and recover of and from said defendant the sum of fifteen hundred dollars, ($1,500,) and legal interest thereon from November 30, 1885; and it is so ordered. (3) That said plaintiff is entitled to have and recover of and from said defendant the surrender of the said two promissory notes for $2,468.16, each to be canceled and destroyed; and it is so ordered."

It will be seen that these conclusions of law are to the effect that the contract should be canceled; that plaintiff recover back his $1,500, with legal interest, from the date of its judgment; and that the notes given by him should be surrendered to him and canceled. This seems to us to be a cancellation of one side of the contract, leaving the other side intact. It leaves the plaintiff with all the stock of goods purchased by him remaining unsold, and all the money realized from sales of that disposed of, and the defendant takes nothing. This is partially remedied by the decree, which, in addition to the matters provided for in these conclusions of law, decrees "that Samuel B. Bailey, plaintiff, restore to John Fox, defendant, all the right, title, and interest of said Bailey in and to all the goods, wares, and merchandise now on hand, and purchased by said Bailey from said Fox, under the contract of sale alleged and set forth in the complaint, and all the right, title, and interest of said Bailey in and to all the goods, wares, and merchandise now on hand and received since the making of said contract of sale, in the conducting and carrying on of the hardware business, conducted and carried on by said Bailey, Fox, and one E. Meinecke, together with all the right, title, and interest of the said Bailey in and to all indebtedness, and the evidence thereof, due or owing to said parties by or on account of the conducting or carrying on of said business." The defendant moved for a new trial, which was denied, and he appeals.

Several questions as to the misjoinder of parties and rulings at the trial are presented by the briefs, but the conclusion we have reached upon the merits renders it unnecessary to consider them.

The judgment in favor of the plaintiff is erroneous for several reasons: (1) The attempted rescission by him was not in time. (2) The tender made upon an offer to rescind was insufficient. (3) It appears to have been impossible, at the time of the offer to rescind, to place the defendant *in statu quo*. (4) The court, having found against the plaintiff in respect to the alleged fraud in taking the inventory, the findings show no cause of action, as there is no finding showing that the representations as to the former profits of the business were material, or resulted in any injury to the plaintiff.

1. It is a well-established and just rule of equity that a party who seeks to avoid a contract for fraud must rescind the same promptly after the fraud is discovered, or he will be deemed to have waived it. Civil Code, § 1691; *Pratt* v. *Fiske*, 17 Cal. 380; *Barfield* v. *Price*, 40 Cal. 535; *Cobb* v. *Hatfield*, 46 N. Y. 533; Benj. Sales, § 452; *Ross* v. *Titterton*, 6 Hun, 280; *Foley* v. *Crow*, 37 Md. 51. It is true the court finds that the fraud was discovered in June, and that when plaintiff made the discovery he notified the defendant, and demanded the rescission. The court also finds that there was no unreasonable

delay in bringing the action. So far as the finding as to the time of discovery and offer to rescind is concerned, it has no evidence to support it. The evidence of the plaintiff, which is undisputed, is that he made the discovery in May. He says: "I made the discovery that the business was not paying some time in the spring or summer, and notified Fox some time in September or October. I said all along in the spring and summer-time we found things were not as we liked there and were represented. It was earlier than May or June that we made the discovery; along about in May." The discovery being made in May, if not earlier, and the offer to rescind in September or October, there were at least four months intervening, and the plaintiff testifies that during all of that time he continued to sell the old stock of goods and purchase new stock. It would be entirely inequitable, it seems to us, to permit a party to rescind a contract after such a delay, under the circumstances of this case.

2. The tender made was not of the goods purchased, as a great part of them had been sold. The offer was to deliver the goods on hand and pay the amount realized from the sale of those disposed of. This was not sufficient. Upon a rescission the defendant, before paying back the purchase money and delivering up the notes, was entitled to receive the identical things sold. He was not bound to take the price at which they were sold. That might, so far as we know, have been less than their value. But, whether it was or not, the rule is well settled that, where the party complaining has parted with the thing purchased, he cannot rescind, but must resort to an action for damages. *Herman* v. *Haffenegger*, 54 Cal. 161; *Cobb* v. *Hatfield*, *supra;* Benj. Sales, § 452.

3. Again, at the time the offer to rescind was made, it had become impossible by the act of the plaintiff himself, or jointly with the other active partner, to place the defendant *in statu quo*. As a result of the sale, a partnership had been formed, as we have stated, and the whole of the stock had become partnership property, in which Meinecke, who was not made a party to this action, had an interest. A large part of the stock had been sold and new stock purchased on credit, for which the defendant, as well as the other partners, was personally liable. This being the situation of affairs, it was utterly impossible to place any of the parties *in statu quo*. It is well settled that under such circumstances there can be no rescission of the contract. Civil Code, § 1691; *Herman* v. *Haffenegger*, *supra; Pullman* v. *Alley*, 53 N. Y. 637; *Gould* v. *Bank*, 86 N. Y. 75; *Sinclair* v. *Neill*, 1 Hun, 80; *Hogan* v. *Weyer*, 5 Hill, 389; *Matteawan Co.* v. *Bentley*, 13 Barb. 641; Kerr, Fraud & M. 48, 328; Benj. Sales, § 452; Fry, Spec. Perf. § 706; 1 Whart. Cont. § 286; *Cobb* v. *Hatfield*, 46 N. Y. 533.

4. The complaint states no cause of action so far as it relates to fraudulent representations respecting the question of former profits of the business. It contains no allegation that the plaintiff was induced thereby to pay a higher price for the goods than he would otherwise have done, nor is it averred that the business was not profitable after the plaintiff bought into it. In other words, there is nothing in the complaint to show that the plaintiff was in any way injured by the representations, admitting them to have been false. The findings make no better case for the plaintiff than the complaint. In order to entitle a party to rescind a contract, he must not only show the fraud, but that as a result thereof some damage has resulted to him. *Morrison* v. *Lods*, 39 Cal. 381; *Marriner* v. *Dennison*, *ante*, 386. For these reasons the defendant would have been entitled to judgment in his favor on the findings in the court below, if he had asked it.

The form of judgment is objected to. We think these objections are well taken, but the view we have taken of the merits of the case renders it unnecessary to consider them at length. As the case has been fully tried by the court, and the facts found, a new trial would be fruitless under the law as stated above. Therefore the judgment and order appealed from are reversed, with instructions to the court below to so modify its conclusions of law as to conform with this opinion, and render judgment thereon for the defendant.

We concur: PATERSON, J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.

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78 Cal. 421

In re LLOYD. (No. 20,524.)

(*Supreme Court of California.* March 19, 1889.)

CONSTITUTIONAL LAW—THE JUDICIARY—CREATION OF COURTS—JUDGES.

Act Cal. March 5, 1889, provides for the creation of the "police court of the city and county of San Francisco," to consist of three judges. It also provides that the two judges then acting as judges of the police judges' courts in said city and county shall, upon the passage of the act, become judges of the police court, to hold office for the length of time for which they have been elected. *Held*, that the effect of the act was merely to add a new judge to a then existing court, and not to create a new court, and that it was not unconstitutional as an attempt by an act of the legislature to make the judges of an existing court, judges of a new court.

In bank. Application for *habeas corpus*.

J. A. Spinetti and *W. T. Baggett*, for petitioner. *Alfred Clark*, *amicus curiæ*, for respondent.

WORKS, J. This is an application for the discharge of the petitioner from imprisonment under a judgment of conviction for battery, rendered by the police court of the city and county of San Francisco. The only ground upon which the right to his discharge is claimed by the petitioner is that the act creating said court is unconstitutional. The act referred to was approved March 5, 1889. The first section thereof provides:

"Section 1. There is hereby created and established in and for the city and county of San Francisco, state of California, a court to be known as the 'Police Court of the City and County of San Francisco,' which court shall consist of three judges, who shall be elected at the general elections held according to law, each of whom shall hold office for the term of two years, any one or more of whom may hold court. The court shall be divided into departments known as 'Department Number One, Department Number Two, Department Number Three.' There may be as many sessions of said court at the same time as there are judges thereof. The judges shall choose from their number a presiding judge, who may be removed at their pleasure. He shall assign the judges to their respective departments: provided, however, that either of the judges may preside in either of the departments in the absence or inability to act of the judge regularly assigned thereto. The judgments, orders, and proceeedings of any session of said court, held by any one or more of the judges of said court, respectively, shall be equally effectual as if all of the judges of said respective courts presided at such session."

This is followed by provisions defining the jurisdiction, regulating the organization, and providing the officers for the court. Section 11 of the act is as follows:

"Nothing in this act shall be construed as affecting the two judges at present acting as police judges in the city and county of San Francisco; but they shall, immediately after the passage of this act, become judges of the police court of the city and county of San Francisco, and hold office for the length of time for which they have been elected. Within thirty days after the passage of this act, the governor of the state of California shall appoint a suitable person to act as judge of the police court of the city and county of San Francisco, who shall hold office until the first Monday in January, 1891, and he, together with two judges aforesaid, shall constitute the police court of the city and county of San Francisco until their successors are elected and qualified according to law. The salary of each of the judges of said court shall be the same as that now paid the judge of 'the police judge's court of the city and county of San Francisco.'"

At the time the statute was enacted, there existed in the city and county of San Francisco two courts known as "Police Judges' Courts," and presided over by the judges referred to in section 11 of the act. The jurisdiction of these courts was precisely the same. They were essentially one and the same court, acting in departments, and constituted the police court of the city and county. The only objection to the new act, worthy of consideration, is that it created a new court to consist of three judges, and that, being a new court, the then judges of the police judges' courts could not be declared and made judges thereof by an act of the legislature.

Immediately after the enactment of the statute H. L. Joachimsen was appointed a judge of said police court, and qualified as such; whereupon the two judges of the police judges' courts and said Joachimsen organized said court by electing one of their number presiding judge, and each of said judges was assigned to one of the departments of the court. Judge Joachimsen being so assigned to department 3, the petitioner was regularly charged before him, and tried and convicted.

Assuming that the two old judges were not parts of the court, it is urged that the court had not legally organized, and was not a court, and the trial and conviction of the petitioner were, for that reason, without authority of law. The act in question is not carefully and accurately worded, but its object, purpose, and effect seems to us to be clear enough. It does not have the effect, nor was it intended, to abolish the existing police courts of the city and county, or to create a new and independent court, but to add to the existing courts another judge, and to reorganize the court thus increased in numbers by dividing the same into departments, with a presiding judge. This is perfectly clear from the fact that the jurisdiction, powers, and duties of the court are unchanged. The only ground upon which it could be claimed that anything more was intended than above stated is the slight change made in the name of the court, and this should have no weight when, taking the whole act together, the legislative intent is so apparent.

We hold, therefore, that the act in question is constitutional, and the petitioner should be remanded. It is so ordered.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.; MCFARLAND, J.

78 Cal. 351

HABENICHT *v.* LISSAK. (No. 11,578.)

(*Supreme Court of California.* March 8, 1889.)

1. EXECUTION—SUPPLEMENTARY PROCEEDINGS—SEATS IN STOCK EXCHANGE.
A seat in a stock exchange is property, and liable for the owner's debts, notwithstanding the provisions in the by-laws of the exchange that the property is held in trust for the members, that "no member under any circumstances shall be deemed to have or claim or possess any individual right, title, or interest in the property or assets of the association" until finally dissolved, and that every applicant for membership is subjected to the scrutiny of a committee, especially as it is also provided that the member may dispose of his privileges, subject to the right of the board to reject any nominee.[1]

2. SAME—RECEIVERS.
It is proper in supplementary proceedings against such owner to appoint a receiver with power to sell the seats, and to order the owner to execute an assignment or any other instrument necessary to vest the title to such seats in the purchaser.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Supplementary proceedings by Habenicht against Lissak. From an order appointing a receiver and directing assignments of seats in a stock exchange, owned by the debtor, defendant appeals.

Henry E. Highton, for appellant. *Pillsbury & Titus* and *Horace G. Platt*, for respondent.

PATERSON, J. In March, 1884, the plaintiff recovered judgment against defendant for several thousand dollars. About a year later a writ of execution was issued on the judgment, and placed in the hands of the sheriff, by whom it was afterwards returned wholly unsatisfied. In June, 1885, the proceedings to be reviewed herein—proceedings supplementary to execution—were instituted by the plaintiff upon the unsatisfied judgment in his favor. Upon the examination of the judgment debtor, it was disclosed that he owned a seat or membership in the San Francisco Stock and Exchange Board, and another seat or membership in the San Francisco Produce Exchange. In September, 1885, upon due notice given, plaintiff made a motion for the appointment of a receiver of the two seats above named, with power to sell the same, and apply the proceeds thereof in satisfaction of the judgment. The motion was accompanied by an affidavit setting forth the facts above stated, and the additional facts that defendant had refused to apply the seats in satisfaction of the judgment, and that each of said seats exceeded in value the sum of $1,000. Upon the hearing of the motion, the defendant filed affidavits, in one of which the constitution and by-laws of the two boards were fully set forth. It appears from the constitution and by-laws of the San Francisco Stock and Exchange Board that the legal title and ownership of the property of the association is vested in certain officers "in trust for the benefit and enjoyment of its members;" that "no member, under any circumstances, shall be deemed to have, or claim, or possess any individual right, title, or interest in the property or assets of the association, except when the same shall be finally dissolved, and its affairs wound up by its then remaining members;" that every application for membership is subjected to the scrutiny of a committee, whose report, if favorable, entitles the applicant to be balloted for, and, whether favorable or unfavorable, the applicant may be rejected by 20 negative votes; that if a member of the association join any similar organization in this state he may be immediately expelled; that it is "distinctly understood and agreed between the board and each member thereof that the board reserves the right to reject any nominee."

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[1] See note to Clute v. Loveland, 9 Pac. Rep. 133, cited in opinion.

The constitutions and by-laws of the two boards are, so far as the questions before us are concerned, similar in character; and so far as the rights, duties, and interests of the members are concerned, the laws of the two boards are essentially the same as those of other stock and produce exchanges in New York and other states of the Union.

After the hearing upon the motion, the court below made an order appointing C. K. Bonestell, Esq., a receiver of both seats, with power to sell the same and apply the proceeds thereof, after payment of the expenses, to the satisfaction of the judgment, and requiring the defendant to execute any assignment or other instrument necessary for the purpose of vesting his title to the seats in such person or persons as might become purchasers thereof from the receiver, and might be qualified to hold the same under the rules of the respective boards. No provision was made in the order as to the manner of sale,—whether it should be a public or private sale. Thereafter the receiver reported to the court that he had sold the seats to one H. L. E. Meyer for the sum of $2,200. This sale was confirmed by the court, the amount realized from the sale was credited on the judgment, and the appellant was directed to execute and deliver assignments of the two seats within five days thereafter, said assignments to be deposited, pending the appeal, with the clerk of of the court. Appellant excepted to the order appointing the receiver, and directing him to sell the seats, and also excepted to the order directing the execution and delivery of the assignments, but no objection was made to the order confirming the sale.

As stated by appellant, two questions are presented here for consideration:

1. Did the seats or any interest therein constitute property within the reach of the appellant's judgment creditors?

2. If they did, was the order appointing a receiver, and the order directing the appellant to execute assignments of all his right, title, and interest in and to the seats a proper mode of reaching that property?

On the first question presented there is an apparent conflict of judicial opinions. In *Thompson* v. *Adams*, 93 Pa. St. 55, the court said: "The seat is not property in the eye of the law; it could not be seized in execution for the debts of the members. It is the mere creation of the board, and, of course, was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it. In *Pancoast* v. *Gowen*, Id. 71, the court said: "A seat in the board of brokers is not property subject to execution in any form. It is a mere personal privilege, perhaps more accurately a license, to buy and sell at the meetings of the board. It certainly could not be levied on and sold under a *fi. fa.* The sheriff's vendee would acquire no title which he could enforce." It may be said, before passing to the authorities cited on the other side of the question, that in *Thompson* v. *Adams* "the plaintiff below was not a member but had furnished the money by which Richards obtained a seat." He therefore contended that he was the equitable owner of the seat, and that the defendant had no right to apply the proceeds to debts due by Richards to other members, in pursuance of the terms of the constitution of the club. The question for the decision of the court there was whether or not plaintiff was entitled to the proceeds of the seat, either in full or *pari passu* with the other creditors of said Richards, who at the time of his decease were members of the board, or whether the claims of such members were paramount to the plaintiff's until the former were satisfied. The court decided that the seat "was to be held and enjoyed with all the limitations and restrictions which the constitution of the board chose to put upon it." And in *Pancoast* v. *Gowen* it did not appear whether there were any claims against the seat by members of the board, but "the answers of the garnishees admitted that Houston, the defendant in the judgment, owned a seat in the stock exchange, against which there were no claims by the members of that body at the time the attachment was issued, but they alleged that claims had since been presented." In the case before us it is not claimed that the defendant was, at the time of the proceedings in the court below, indebted to any of his associates in either board.

In *Hyde* v. *Woods*, 94 U. S. 523, the court decided that the proceeds of a sale of the seat in the hands of the treasurer of the board, after payment of the preferred claims of members of the board, could be reached by the assignee in bankruptcy, and of the person whose seat had been sold. While this was the only matter for decision before the court, Mr. Justice MILLER, speaking for the court, said: "There can be no doubt that the incorporeal right which Fenn had to his seat when he became bankrupt was property, and the sum realized by the assignees from its sale proves that it was valuable property. Nor do we think there can be any reason to doubt that, if he had made no such assignment, it would have passed, subject to the rules of the stock board, to his assignee in bankruptcy. * * * Though we have said it is property, it is incumbered with conditions when purchased, without which it could not be obtained. It never was free from the conditions of article 15, neither when Fenn bought, nor at any time before or since. That rule entered into and became an incident of the property when it was created, and remains a part of it, into whose hands soever it may come."

In *Clute* v. *Loveland*, 68 Cal. 254, 9 Pac. Rep. 133, this court said: "The rules expressly authorize each member to dispose of his seat, subject, however, to the condition that before the purchaser can participate in the proceedings of the board he must be elected a member thereof. The power to dispose of the seat includes the power to dispose of it absolutely or conditionally. If a member should sell his seat to one who should not be elected a member of the board, it cannot be doubted that such purchaser would take, subject to the conditions imposed by the rules of the association, the interest of the seller in the property of the association. * * * Whether the disposition be absolute at the beginning, or subsequently becomes so through judicial proceedings, the result is the same." It is true, in that case there was an agreement between the parties, Clute and Loveland, by which the latter mortgaged his seat to the former as security for the repayment of moneys due from the one to the other. But this particular feature of the case, if the seat is property, is not enough to distinguish it in principle from the one before us. The constitution and by-laws of the association seem to regard the seats as property. Article 13 of the constitution provides that a member in good standing "shall have the right to dispose of his privileges in the board, and to nominate a successor to fill the vacancy occasioned by his retirement, * * * but the board reserves the right to reject any nominee. In the event of the death of a solvent member, the board will dispose of the vacant seat to the best advantage for the benefit of his widow and children, or those persons who shall be designated by him in his last will and testament," etc. Whenever a member has been deprived of his privileges, or surrenders his membership, it is provided that his seat may be sold, and the president of the board, as trustee, shall hold the proceeds "to discharge the obligations due by such person to members of the board, and any surplus remaining shall, after having satisfied all other claims against him, be delivered to the delinquent, or to any person authorized to receive the same."

In *Londheim* v. *White*, 67 How. Pr. 467, the court said: "It must be conceded, I think, in the light of all the decisions, that a seat or membership in the stock exchange is property, and should be applied in the same manner as other property of a debtor to the payment of his debts. It may be surrounded and clogged with conditions and restrictions, but still it is property available for the payment of debts, and can be made available for that purpose, subject to and by an observance of those restrictions and conditions. * * * This question has been passed upon so frequently by the courts as to make it no longer doubtful or debatable." In *Bank* v. *Murphy*, 60 How. Pr. 426, the court, referring to the contention that such a seat is not tangible property, said: "If such a result may be attained the effort of active imagination cannot circumscribe the associations human ingenuity will produce to thus transmute veritable assets into intangible, and yet most substantial and valuable, shadows." Judge CHOATE, in the United States district court, Southern district, New York, upon an application for an order requiring a bankrupt to make a transfer of his seat in the New York Stock Exchange to the assignee in bankruptcy, or to such person as the assignee may procure as a purchaser of the seat, said: "It (the seat) is a part of the bankrupt's business assets, or more generally of his property, which it was the primary design of the bankrupt law to distribute among his creditors, and that the peculiarities which distinguish this from other property are, in view of the evident purpose and scope of the bankrupt law, mere technicalities,—cobwebs, which the law is strong enough to break through." *In re Ketchum*, 1 Fed. Rep. 842. See, also, *Powell* v. *Waldron*, 89 N. Y. 328.

We conclude, therefore, that the weight of authority and the better reasoning support the proposition that such a seat or membership is property, and should be applied, as other property of a debtor, to the payment of his debts. To hold that it cannot be thus applied would establish a rule giving to the members of such associations the power to invest fortunes under the name of licenses and privileges, and by their constitutions and regulations to establish a law of exemption for the same.

Upon the other question raised we think there can be little doubt. In *Bank* v. *Robinson*, 57 Cal. 520, it was held that proceedings supplementary to execution are intended to take the place of the creditors' bill, and in such a proceeding it was proper to order the execution debtor to make an assignment to a receiver of his patent right to an invention. It was always the rule in a proceeding known as a "creditor's bill," as we understand it, to appoint a receiver after the execution had been returned *nulla bona*. Note to *Ward* v. *Beebe*, 15 Abb. Pr. 373; *Stoors* v. *Kelsey*, 2 Paige, 417; *Hadden* v. *Spader*, 20 Johns. 554; *Londheim* v. *White, supra; In re Ketchum, supra.* Freeman, referring to such seats says: "They have been spoken of by the courts as property, and it has been said that on bankruptcy they would pass to the assignee, subject to the rules of the stock board. If this be true, they must be subject to execution in some mode, perhaps by creditor's bill, or by proceedings supplemental to execution, in which a receiver could be appointed and a transfer to him compelled." 1 Freem. Ex'ns, (2d Ed.) § 110; 2 Freem. Ex'ns, (2d Ed.) § 419; Code Civil Proc. § 564, subd. 4.

No claim was made in the court below that a better price could have been realized for the seats than was obtained through the sale by the receiver, and, as stated before, no objection was made to the order of the court confirming the sale of the seats for $2,200, nor has any appeal been taken therefrom.

The orders are affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

78 Cal. 418

HAILE *v.* SUPERIOR COURT. (No. 13,103.)

(*Supreme Court of California.* March 19, 1889.)

PROHIBITION, WRIT OF—INSOLVENCY—RECEIVERS—ASSIGNMENT FOR BENEFIT OF CREDITORS.

An insolvent debtor made an assignment for the benefit of creditors of the property in controversy to petitioner, who duly qualified and took possession. This property was attached by a creditor, and, pending replevin by petitioner, the insolvent filed her petition in insolvency, reciting the assignment of this property, and was declared an insolvent, and the sheriff was ordered to take possession of her property. A receiver was appointed upon a petition by the creditors, which petition wholly ignored this petitioner's claim to property, as assignee or otherwise, nor did it show that the property sought to be placed in the receiver's hands was the same as that assigned to petitioner. The order directed the receiver to take charge of "all property of said insolvent." *Held* that, as the order did not affect in any way the petitioner's rights, he was not entitled to a writ of prohibition.

In bank. Application for a writ of prohibition to the superior court, San Bernardino county; James A. GIBSON, Judge.

Rotchild & Ach, for petitioner. *Paris & Fox* and *H. Goodcell, Jr.*, for respondent.

WORKS, J. Application for a writ of prohibition. Order granting alternative writ, with leave to the respondent to move to vacate the same. The motion to vacate has been made, and presents the questions to be considered. The facts as they appear from the petition are substantially these: On the 2d day of January, 1889, one W. R. Tolles, being in insolvent circumstances, made an assignment to the petitioner of the property in controversy, for the benefit of her creditors. The necessary inventory and bond was filed and the property taken into his possession. On the 16th of the same month, one Sachs, a creditor of Mrs. Tolles, brought his action in the court below to recover his debt, and caused the property assigned to the petitioner to be attached, whereupon the petitioner brought his action against the sheriff to recover possession of the property. While matters stood in this condition, Mrs. Tolles filed her voluntary petition in insolvency, from which it appears that the property here in controversy had been by her assigned to the petitioner as above stated. She was duly adjudged to be an insolvent, and the sheriff ordered to take charge of her property. Thereupon the creditors filed their petition, setting out that the property of the insolvent consisted of a stock of millinery goods and other property, and stating certain reasons tending to show a necessity for the immediate sale of the property in the interest of the creditors. The petition entirely ignores any claim of the petitioner here to the property, as assignee or otherwise. The validity of the assignment to him is not questioned, nor does it appear upon the face of the proceedings that the property sought to be placed in the hands of a receiver is the same property that had been assigned to him, except that such an inference may be drawn from an allegation in the petition that the property mentioned therein is in the hands of the sheriff, and in litigation. Upon the filing of this petition an order was made reciting the substance of the petition, and concluding as follows: "It is therefore ordered that E. C. Seymour be, and he is hereby, appointed such receiver upon taking the oath and giving a bond to the state of California, as required by law, in the sum of $25,000, and that upon qualifying he take charge and possession of all property of said insolvent, real, personal, or mixed, whatsoever and wheresoever situated, and all persons having the same, or any part thereof, in his possession or their possession, are hereby directed to deliver the said property to said receiver, and all persons owing money to said insolvent are hereby directed to pay the same to said receiver, and said receiver is hereby authorized and directed to sell and dispose of all of said property at public or private sale, as he may deem best, after giving at least ten days' notice of such sale, by publication in at least one newspaper published in the following-named cities, to-wit, San Bernardino, Los Angeles, San Francisco, and that he keep the proceeds of such sale, less the necessary expenses and charges of preserving and disposing of said property, subject to the order of this court." It is alleged in the petition here that the court below, without notice to the petitioner, ordered the receiver to take possession of and sell the property assigned to him, and it was contended at the argument that the court had no jurisdiction of the person of the petitioner, and therefore no power to adjudicate upon the question as to his right or title to the property, and no authority to order his property to be sold. But the petition shows upon its face that the court below did not assume or undertake to adjudicate upon the title or claim of the petitioner to any property, nor did it order the sale of any specific property, or any property owned or claimed by him. The whole proceeding appears upon the face of the petition and exhibits, and shows that the order was that the receiver take charge of "all property of said insolvent, real, personal, and mixed," and that "all persons having the same, or any part thereof, in his or their possession, are hereby directed to deliver the said property to said receiver," and the same property is ordered to be sold. The proceedings and order, being set out as a part of the petition, must control in determining what action was taken by the court below, as against the allegations of the petition itself. The order of the court below could not affect the petitioner's rights in any way. If the receiver has taken property belonging to the petitioner under the order, he has done so without authority, and is a mere trespasser. This being the case the petitioner has his remedy against the person claiming to act as such receiver, and cannot resort to the extraordinary remedy of prohibition. Motion to vacate order granting the alternative writ of prohibition is allowed.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

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(78 Cal. 439)

GATES *v.* CARQUINEZ PACKING CO. (No. 12,531.)

(*Supreme Court of California.* March 21, 1889.)

SALE—DELIVERY TO CARRIER.

Under a contract for the sale of fruit, the seller was to deliver the fruit on board the cars, consigned to the buyer, and send daily statements of weights. Upon its arrival at the buyer's cannery it was to be immediately reweighed, and the seller notified of any substantial difference in weights, and the fruit held for 12 hours for adjustment of weights and rebate for defect in quality. In case of failure to give notice, the shipping weight was to be taken as conclusive. *Held*, that the title passed upon delivery to the carrier, and loss from shrinkage during transit must be borne by the buyer.[1]

Commissioners' decision. In bank. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

George A. Lamont, for appellant. *J. F. Wendell* and *O. P. Dobbins*, for respondent.

BELCHER, C. C. This action was brought to recover the sum of $301.60, balance alleged to be due for fruit sold and delivered by plaintiff to defendant. The court below gave judgment for plaintiff, and defendant appealed. The facts are these: The plaintiff owned a tract of land in Vaca valley, on which he was raising apricots, peaches, and Bartlett pears, and the defendant was engaged in the business of canning fruit at Benicia. On the 15th of October, 1886, the parties entered into a written contract for the sale and purchase of the fruit to be raised on the plaintiff's trees during the five years then next ensuing. The portions of the contract material to the determination of the questions presented on this appeal are as follows: "Said party of the first part sells, and said party of the second part buys, said fruit upon the terms and conditions hereinafter expressed. The party of the first part, at his own cost and expense, shall, during said term, gather said fruit each season when the same is in a suitable condition of ripeness for canning purposes, and deliver the same on board the cars at the railroad station at Vacaville, in said Solano county, consigned to party of the second part at Benicia, in open 50-pound boxes, such as are now used to transport fruit from said point to canneries. Freight from Vacaville to Benicia, and all charges thereafter, to be paid by said party of the second part. * * * Said fruit shall be consigned to the party of the second part at its cannery at Benicia, in said Solano county, and immediately upon its arrival at said cannery shall be weighed by said party of the second part. * * * The party of the first part shall send to the party of the second part, at the cannery at Benicia, a daily statement of the weights of the fruit shipped that day, and in case the weight at the cannery shall not substantially correspond with the same, or in case the quality of the fruit shall not be according to contract as herein provided, the party of the first part shall be immediately notified by telephone or telegraph, and the fruit shall be held twelve hours for inspection and adjustment of weights, and arrangement as to rebate in case of defective quality, should the party of the second part be willing to accept the same at a rebate. Should said party of the second part fail to give such notice, or so hold said fruit, the quality of the fruit and the shipping weight shall be conclusively taken as correct." It is further provided in the contract that the fruit "so delivered" shall be of certain sizes and quality, and that for "the fruit so delivered" the party of the second part shall pay certain named prices. The attorney for appellant states the case very clearly and concisely, as follows: "It is conceded that plaintiff has fully complied with all the terms of the contract on his part; that the fruit referred to in the contract was properly and correctly weighed at Vacaville, and there placed on board the cars, consigned to the defendant at Benicia. It is also conceded that the fruit, as fast as it reached the cannery of defendant at Benicia, was immediately and correctly weighed. It was found upon comparison of weights that the defendant's weights fell short of plaintiff's weights. This shortage is conceded to be attributable solely to natural causes,—from evaporation after being placed on board the cars at Vacaville, and while in transit to defendant's cannery at Benicia. The only question involved in the case is, which weights are to govern,—those of plaintiff at Vacaville, or those of defendant at Benicia? In other words, which party, plaintiff or defendant, is to bear the loss of the shrinkage of the fruit after being placed on the cars at Vacaville, and while in transit to Benicia?"

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[1] Respecting delivery to a carrier as vesting title on a sale of chattels, see Hershiser v. Delone, (Neb.) 38 N. W. Rep. 863, and note. In general, as to when title passes, see Rechtin v. McGary, (Ind.) 19 N. E. Rep. 731, and note; Jamison v. Simon, (Cal.) 8 Pac. Rep. 502, and note.

The question presented must be determined by a construction of the contract. It is argued for appellant that, looking at the whole contract, the conclusion of the court below was not warranted; but we think it was. Mr. Benjamin, in his work on Sales, states the rule as to the delivery of goods to a common carrier as follows: "It is well settled that the delivery of goods to a common carrier, *a fortiori* to one especially designated by the purchaser, for conveyance to him or to a place designated by him, constitutes an actual receipt by the purchaser. In such cases the carrier is, in contemplation of law, the bailee of the person to whom, not by whom, the goods are sent; the latter in employing the carrier being considered as an agent of the former for that purpose. It must not be forgotten that the carrier only represents the purchaser for the purpose of receiving, not accepting, the goods." Section 181. And the same learned author further says that even where the vendor agrees to make the delivery at a distant place, "thus assuming the risks of the carriage," his "duty to deliver them in merchantable condition is complied with if the goods are in proper condition when delivered to the carrier, provided the injury received during the transit does not exceed that which must necessarily result from the transit." Section 693, 3d Amer. Ed., and section 1640, Ed. 1888. Now, the plaintiff's fruit was to be weighed and delivered on board the cars at Vacaville, and the defendant was to pay the freight and all charges thereafter, and also an agreed price per pound "for the fruit so delivered." Under the rule above stated, it must therefore be held that the fruit was received by defendant at Vacaville, and the fact that the right was reserved to reject it, after its arrival at the cannery, if the plaintiff's weights proved not to be substantially correct, or the quality was not according to contract, is not material. There is a broad difference between the receipt and acceptance of goods. The right to reject goods because they are not of the kind or quality required by the contract is, of necessity, usually exercised by the buyer after they have been actually received by him; and this is always the case where they are consigned to him from another place. The country buyer may refuse to accept goods ordered from the city merchant, if they prove, when received by him, not to be of kind or quality ordered; but this does not change the rule that, if they are of such kind and quality, they will be held in law to have been delivered to him at the place of shipment, and to be at his risk while in transit. In this case it was expressly stipulated that if defendant should reject any fruit because of a substantial inaccuracy in plaintiff's weights, notice by telephone or telegraph should be immediately given to plaintiff, and, in case of a failure to give such notice, the "shipping weights" should be conclusively taken as correct. The shipping weights were the plaintiff's weights, and for what purpose were they to be deemed conclusively correct? We can see but one purpose, and that is to fix conclusively the number of pounds received and to be paid for by defendant. There is nothing in the balance of the contract necessarily in conflict with this view, and we therefore conclude that the judgment was right, and should be affirmed.

I concur: FOOTE, C.
I concur in the conclusion: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

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78 Cal. 443

COBURN *v.* BROOKS *et al.* (No. 11,576.)

(*Supreme Court of California.* March 21, 1889.)

EMINENT DOMAIN—PRINCIPAL AND SURETY.

Code Civil Proc. Cal. 1872, § 1254, relating to proceedings in eminent domain, authorizes the plaintiff to take possession, pending the proceedings upon the execution of a bond, "to pay, as well the compensation in that behalf, when ascertained, as all damages which may be sustained by the defendant, if, for any cause, the property shall not be finally taken for public use." *Held*, that it is not necessary to make a demand on the principal in order to maintain an action against the sureties on such bond.

Department 1. Appeal from superior court, city and county of San Francisco. JOHN HUNT, Judge.

Code Civil Proc. 1872, § 1254: "At any time after service of summons, the court may authorize the plaintiff, if already in possession, to continue therein, and, if not, then to take possession of and use the property during the pendency, and until the final conclusion, of such proceedings, and may stay all actions and proceedings against the plaintiff on account thereof; but the plaintiff must give security, to be approved by such court or judge, to pay, as well the compensation in that behalf, when ascertained, as all damages which may be sustained by the defendant, if, for any cause, the property shall not finally taken for public use."

Crittenden Thornton and *F. H. Merzbach*, for appellant. *Fox & Kellogg*, for respondent.

PATERSON, J. This action was commenced August 22, 1876, trial had January 6, 1886, and judgment of nonsuit thereafter entered, from which plaintiff has appealed. The action is against the defendants, as sureties, in an undertaking given under section 1254, Code Civil Proc. The defendants herein became sureties for the plaintiffs in the case of Templeton et al. v. Coburn et al., a proceeding in eminent domain then pending in the Twelfth district court. The condition of the undertaking is that said sureties "do hereby undertake, promise, and agree that the plaintiffs in this case shall and will pay all such damages or compensation as may be awarded to the defendants, or either of them, * * * if, for any cause, such land shall not be finally taken for public use, or, in default thereof, we will pay the same," etc. Upon the trial the plaintiff introduced evidence tending to prove each and every allegation of the complaint herein, and rested his case. There is no allegation in the complaint of a demand upon the principals named in the undertaking for the damages claimed by plaintiff, nor did the plaintiff offer any evidence of such demand. The judgment of nonsuit was granted solely upon the ground that the plaintiff had neither pleaded nor proved a demand upon the principals named in the undertaking, and the only question before us is whether such a demand must be alleged or proved.

The court below seems to have been embarrassed by the decisions of this court in Morgan v. Menzies, 60 Cal. 348, and 65 Cal. 243, 3 Pac. Rep. 807, and bound by the following statement of Chief Justice MORRISON on the first appeal: "It will be observed that the undertaking on the part of the defendants is that the plaintiff in the action will pay, and there is no averment in the complaint that it has not paid, or that even a demand has been made. There is not, therefore, any averment in the complaint of a breach which would give the plaintiff in this case a right of action against the defendants on the undertaking." The two decisions referred to are somewhat confusing, but, when read together, they fail to support the proposition, we think, that a demand upon the principal in cases like the one before us is necessary. In that case, the principal for whom the defendants had become sureties, was the city and county of San Francisco. An examination of the full record, including the briefs, discloses the fact that the principal contentions on behalf of the appellants therein were: *First.* That "the attachment undertaking on which the action was based was taken without authority, and contrary to law, no undertaking being required of the city. Code Civil Proc. 1058. Being unauthorized and taken by an officer without authority of law, it is void, and cannot be enforced." *Second.* That "the city and county were not in default for nonpayment, because no payment could be made under the statute then in force without a presentation of the claim to the board of supervisors by the claimant, Morgan, himself." It may be said in passing that inasmuch as the first contention was sustained by this court, holding that the undertaking was absolutely void, it was unnecessary to the decision of the case to consider the question of demand. It was argued by the appellant that "putting a party in default, as applied to the case, must mean putting him in such a position that his failure to pay becomes a default, and by not presenting the claim the city was not put in a position by which it was obligated to or could pay the demand; in other words, was not put in default. Parnell v. Hancock, 48 Cal. 452, was relied on in support of the proposition that the sureties, under such circumstances, could not be sued until the judgment against their principal was in a condition to be enforced by an execution; that, so long as anything remained to be done to put the principal in default, no action could be maintained against the sureties." The court evidently took the same view of the case as counsel for appellant. On the second appeal it was said: "On a former appeal in this case we held that no recovery could be had in the action out of which the case arises, because there was no averment and no proof that the claim of the plaintiff had been presented to the board of supervisors of the city and county of San Francisco, as required by the statute of 1863–64, pp. 152, 153, and payment demanded." It is true, the court said: "Where a demand is necessary to fix the liability of sureties to an undertaking, it is parcel of the contract, and it must be made before the commencement of an action for the breach of the undertaking, and in the action itself it must be averred and proved." But this statement must be considered in the light of the circumstances involved in the case before the court. The court had held that the city and county of San Francisco could not be put in default under the statute of 1863–64, supra, until a proper claim had been made and presented to the board of supervisors, as required by that statute. No such question is presented here. The principals referred to in the undertaking are the individuals who were plaintiffs in the suit of Templeton v. Coburn et al.

The weight of authority supports the proposition that a demand in cases like the one before us is not necessary. In Murdock v. Brooks the court said: "The point that the complaint is bad because it contains no averment that an execution had been issued and returned unsatisfied, and because no demand for payment is alleged to have been made upon the principal, is also untenable. * * * The undertaking is the independent and absolute contract of the sureties." 38 Cal. 604. In Heebner v. Townsend, 8 Abb. Pr. 237, the court said: "The undertaking may be considered as additional and collateral security for the payment of the judgment required by the statute to be given as a condition of staying the execution of the judgment during the pendency of the appeal. * * * The undertaking is an absolute undertaking that the appellant will pay the judgment if it be affirmed. * * * Notice of the affirmance of the judgment by the general term, or of the appellant's default in not paying on such affirmance, and demand of payment of the defendants, are not alleged in the complaint, and were not necessary. * * * The fact of the affirmance of the judgment was as open to the inquiry or knowledge of the defendants as of either of the parties to the judgment, and they were obliged to take notice of the default of the appellant, as it could have been ascertained by inquiry. As a general rule, no notice or demand is necessary where one guaranties the act of another, unless the contract requires it. The notice required between indorsees and the indorsers of bills of exchange and promissory notes is an exception founded on mercantile usage." To the same effect we cite Anderson v. Sloan, 1 Colo. 487; Baylies, Sur. § 82, pp. 110–112. In Pierce v. Whiting, 63 Cal. 538, the court cited Morgan v. Menzies, supra, in support of its decision therein that in order to maintain an action against the sureties on an undertaking given to release an attachment under section 555, Code Civil Proc., a demand upon the sureties and their principal for the payment of the value of the property was necessary. But the two cases are widely different. An undertaking under section 555, supra, provides that the sureties shall covenant and agree "that in case the plaintiff recover judgment in an action the defendant will, on demand, redeliver the attached property," etc., and the undertaking contained the covenant required by that section, but no demand on the defendant was alleged, and the complaint was properly held insufficient. No such demand is required by section 1254, Code Civil Proc. In some states it is held that the demand must be made upon the principal debtor in order to fix the guarantor's liability, as in the case of indorser, but, as stated before, the weight of authority is on the other side of the question; and, if there was any doubt as to the correct rule before the Code, it seems to us it has been removed by the provisions of sections 2806 and 2807, Civil Code, which, in the absence of anything in the contract calling for a demand, render the liability of the sureties absolute. See, also, sections 2831, 2837, 2840, and 2844, Civil Code. We think the judgment must be reversed, and it is so ordered.

We concur: SHARPSTEIN, J; MCFARLAND, J.

COBURN *v.* JOSSELYN *et al.* (No. 11,577.)

(*Supreme Court of California.* March 21, 1889.)

Department 1. Appeal from superior court, city and county of San Francisco.

PER CURIAM. On the authority of Coburn v. Brooks, No. 11,576, ante, 2, (this day filed,) the judgment is reversed.

SMITH *v.* SMITH. (No. 12,599.)

(*Supreme Court of California.* March 16, 1889.)

EJECTMENT—CONSOLIDATION OF ACTIONS—PLEADING—MORTGAGE.

1. Where plaintiff brought two actions of ejectment against defendant, to recover separate tracts of land in the same county, the court properly ordered them to be consolidated, (Code Civil Proc. Cal. § 1048,) as they could both have been united, under section 427.

2. Whatever may be the exact nature of the interest which a partner takes under a deed of land to the firm, he takes a sufficient interest to enable him to maintain ejectment against a mere intruder.

3. Where the evidence in ejectment shows that the deed, absolute on its face, under which plaintiff claims, was in fact given to secure a debt, and is therefore merely a mortgage, he has failed to show either title or right of possession.

4. Defendant set up in his answer that the deed under which plaintiff claimed was only a mortgage, and that the debt had been fully paid; but he did not ask for any affirmative relief from the mortgage. *Held*, that the answer was in effect only a denial of plaintiff's title; that whether the debt had been paid or not was immaterial; and that plaintiff was not entitled to proceed first with the trial of the question as to whether the deed was a mortgage, on the ground of an equitable defense.

5. Defendant testified in support of his claim of adverse possession that plaintiff "told me to go on the place, and live on it, and make it my home, and he would give it to me for to stay there permanently." Also, that the arrangement was that he was to take some of plaintiff's sheep on the place, and take care of them on shares. He admitted that he afterwards agreed to take a lease from plaintiff if one could be made to suit him. During a portion of the time of his possession he caused the land to be assessed to plaintiff. Defendant would not deny that he knew of an offer made by his wife during the time to purchase the land from plaintiff, or that he did not object thereto. *Held*, that the evidence failed to show adverse possession.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

J. K. Law and *E. Jackman*, for appellant. *E. A. Rogers*, *J. C. Cambell*, *Thos. Gardner* and *C. H. Clement*, for respondent.

HAYNE, C. The plaintiff brought two actions of ejectment against the defendant,—one for a tract of 280 acres, and the other for a tract of 1,320 acres. The land was all in one county, and the actions were pending in the same court. Upon motion of the defendant the court ordered the cases to be consolidated. We think this was proper. The causes of action might have been united, (Code Civil Proc. § 427; Boles v. Cohen, 15 Cal. 151;) and, this being so, the court could order a consolidation, (Code Civil Proc. § 1048.) The trial of the consolidated action resulted in a judgment for the defendant, and the plaintiff appeals.

1. Prior to 1874 the plaintiff and one D. G Smith, his brother, were partners in the business of raising sheep. The title to most of the property stood in the name of D. G. Smith, having been conveyed to him by United States patent. For part of it a patent had not been issued, but D. G. Smith held a certificate of purchase therefor. In 1874 he bought out the interest of the plaintiff in the concern, agreeing to pay him

therefor the sum of $60,000. A portion of this sum was to be paid at or soon after the execution of the agreement; and promissory notes, each for the sum of $5,000, payable at intervals extending up to 1878, were given for the remainder. After the dissolution D. G. Smith carried on the business alone, but became involved in financial difficulties, and was unable to pay his debts, among which was the indebtedness represented by said promissory notes. In 1876 he made a deed to the plaintiff of the property in controversy, and at the same time made other deeds to plaintiff of lands in other counties, and bills of sale of certain sheep and other personal property. The business of sheep raising was thereafter conducted in the name of the plaintiff. This condition of affairs continued to the death of D. G. Smith, in 1883. During all this time and up to the commencement of the actions in 1885, the defendant, who was another brother, lived upon the property with his family, and his position is that he acquired a title by adverse possession.

One of the main questions litigated at the trial was whether the deed of 1876 from D. G. Smith to the plaintiff was absolute in fact as well as in form, or was a mere mortgage. And as to the greater portion of the land we think that the decision upon appeal must turn upon this question. For reasons given below we do not think that the possession of the defendant was sufficient to give him a title under the statute of limitations. But the plaintiff must recover, if at all, upon the strength of his own title, and not upon the weakness of that of his adversary; and if the deed of 1876 was a mere mortgage it did not give him a title to, or right of possession of, the property. It is the settled rule in this state that if a deed, absolute in form, was made merely to secure an indebtedness, it is a mere mortgage, and does not pass the title. Taylor v. McLain, 64 Cal. 514, 2 Pac. Rep. 399; Healy v. O'Brien, 66 Cal. 519, 6 Pac. Rep. 386; Raynor v. Drew, 72 Cal. 309, 13 Pac. Rep. 866; Booth v. Hoskins, 17 Pac. Rep. 225. We understand this rule to mean that (except with reference to subsequent purchasers without notice) such a deed gives a mere lien upon the property, just as if the parties had put their agreement in the form of a mortgage; and consequently that it does not give a right of possession of the property. Civil Code, § 2927; Raynor v. Drew, 72 Cal. 309, 13 Pac. Rep. 866. In reference to this question the jury found that the deed was intended merely to secure an indebtedness, and the verdict was incorporated by the court in findings of its own. The plaintiff contends that this finding is not supported by the evidence. But, after a careful examination of the evidence, we do not think that the finding can be set aside upon this ground. D. G. Smith, at the time of the execution of the instrument, was in San Francisco, trying to raise money upon the property to satisfy the claims of the plaintiff and other creditors who were pressing for payment. The final negotiation was conducted by one P. B. Smith, who was another brother. He swears positively that D. G. Smith refused to give an absolute deed, and that the transaction was merely to secure the indebtedness, and to enable plaintiff to raise money to satisfy the other creditors. The testimony of this witness was somewhat weakened on cross-examination, but was not destroyed, and the jury were entitled to give credence to it if they saw fit to do so. There was also evidence of certain declarations made by the plaintiff to third persons, which are inconsistent with the idea that he was the absolute owner of the property. In addition to this, the evidence of the plaintiff himself is in some respects unsatisfactory. He admits that he retained possession of some of the notes, and said they were to be paid as they became due, which seems inconsistent with the theory that the indebtedness was to be canceled by the deed itself. Taking everything together, we think that the case comes fairly within the rule as to conflicting evidence.

Some question is made as to whether P. B. Smith had authority from the plaintiff to take a mortgage, instead of an absolute deed. But he swears that he informed the plaintiff of what had been done, and that plaintiff approved of it. And, even if this was not done, it is perfectly clear that if the arrangement which was in fact made was merely to secure an indebtedness, the plaintiff cannot repudiate a part of it, and claim under the remaining part.

It results that the deed of 1876 does not give the plaintiff the right to maintain the actions.

There was a subsequent deed from D. G. Smith to the plaintiff for a portion of the land described in the deed of 1876. The title to this portion had not been obtained from the government at the time of the arrangement in question. D. G. Smith held a certificate of purchase of it. When the title was obtained from the government he executed the second deed above referred to. This deed was without additional consideration, and was evidently to carry out whatever arrangement was made at the time of the first deed. Counsel do not base any claim upon this deed, and we therefore dismiss it from further consideration.

So far as this part of the case is concerned it is immaterial whether the indebtedness secured by the deed of 1876 was ever paid or not. And it is also immaterial whether the defendant had acquired a title by adverse possession. We perceive no prejudicial error in relation to this branch of the case.

2. But as to some of the land, viz., the N. W. ¼ of section 13, township 2 S., range 13 E., the plaintiff occupies a different position. The title to this portion was derived from one Yates, and the deed was to the plaintiff and D. G. Smith, while they were partners. As to this portion, therefore, the plaintiff had a title independent of the instrument ex

ecuted by D. G. Smith. And whatever may be the precise nature of the interest which one partner takes under a deed made to the members of the firm, (see generally Duryea v. Burt, 28 Cal. 580,) we think it clear that he has a sufficient interest to enable him to maintain ejectment for the whole tract against a mere intruder. The question, therefore, arises whether the defendant acquired a title by adverse possession. The finding is that he did. But we think that this finding is not supported by the evidence. The defendant's account of the matter is that D. G. Smith "told me to go on the place, and live on it, and make it my home, and he would give it to me for to stay there permanently." This is somewhat ambiguous, but is not necessarily inconsistent with the idea of a holding under the true owners. And we do not think that the evidence shows that defendant held adversely to them. According to his own statement, the arrangement was that he was to take some of the firm's sheep on the place, and take care of them on shares; and it is to be inferred from other testimony that he was to do something in the way of improvements and to pay some of the taxes. He went upon the property, planted a few shade trees, put up some buildings and some fences, —although the latter were put up as late as 1882 or 1883,—cultivated bits of the land, and grazed some sheep on it,—at first those which he had on shares, and afterwards some of his own. Aside from some vague statements as to what he "always claimed," we see nothing to show that he held adversely to his brothers. On the contrary, during a portion of the time he caused the property to be assessed to the plaintiff. His wife, who, he says, conducted all the correspondence, wrote to the plaintiff a letter in which she said: "If we ever buy this place it must be done now." And defendant would not say that he did not know of an offer by his wife to purchase the property from the plaintiff, or that he made any objection thereto. And we do not think that this can be disposed of by saying that it was an offer to compromise. After the commencement of the actions he refused to take a lease from the plaintiff, but at one time he seems to have been willing to do so. For (referring to the time at which the fences were erected) he was asked: "Didn't you state at that time that you would sign a lease if one was made to suit you?" And his answer was: "I may have stated it. There was considerable cheap talk there that day." D. G. Smith seems to have considered the property as his own, as is manifest from his making a deed of it to the plaintiff. Defendant heard of this deed, but made no comments thereon to either of his brothers. Upon the whole evidence, we think that it appears, without substantial conflict, that the possession of the defendant was not adverse to the owners of the property.

3. The plaintiff contends that his motion to proceed first with the trial of the affirmative defense set up by the answer should have been granted for the reason that it was an equitable defense, and that the whole judgment should be reversed upon this ground. The affirmative defense was, in substance, that the deed of 1876 was a mortgage, and that the debt secured thereby had been fully paid. But the allegation that the deed was a mortgage was merely another way of saying that the plaintiff had no title, which was fully covered by the denial of the plaintiff's ownership. And so far as the plaintiff's right of possession was concerned, it was immaterial whether the debt had been paid or not. And while it may be possible that if the defendant had a title he would have been entitled to some affirmative relief in the nature of the removal of a cloud, yet he did not ask for such relief in terms, and no affirmative relief of any kind was awarded to him by the judgment. If, therefore, it be assumed for the purposes of this opinion that there was an irregularity, it is not one of which the plaintiff can complain.

The other matters do not require special notice. We therefore advise that the judgment and order appealed from be reversed as to the N. W. ¼ of section 13, township 2 S., range 13 E., and the cause remanded for a new trial as to said property, and that said judgment and order be affirmed in all other respects, the appellant to recover one-half of the costs on appeal.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed as to the N. W. ¼ of section 13, township 2 S., range 13 E., and the cause remanded for a new trial as to said property, and said judgment and order are in all other respects affirmed, the appellant to recover one-half of the costs on appeal.

(78 Cal. 407)

GLOSTER v. WADE. (No. 12,461.)

(*Supreme Court of California.* March 16, 1889.)

HIGHWAYS—PRESCRIPTION.

Pol. Code Cal. § 2619, providing that all roads used as such for a period of more than five years are highways, was amended by act March 30, 1874, so as to provide that all roads laid out and recorded by the board of supervisors should be highways, and also all turnpikes, toll-roads, etc., where the companies are dissolved or have expired by limitation. Section 38 of the act provided that it should apply only to certain counties, among which Modoc county was not named. *Held*, that section 2619 remained as to Modoc county unaffected by the amendment, so that a road used continuously in that county for more than five years would become a public highway.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. HARRIS, Judge.

Ewing & Claflin, for appellant. *Goodwin & Jenks*, for respondent.

FOOTE, C. According to the allegations of the complaint in this action, Wade had torn down the fence on the land of Gloster, which the latter had replaced, and the former was threatening again to tear it down at a certain point, and travel aross the plaintiff's land, in violation of his rights and to his damage. An injunction restraining the defendant from doing the injuries threatened, and for the recovery of damages for the alleged trespass already committed, were prayed for. The defendant denied all the material allegations of the complaint, and set up by way of justification and defense for his alleged acts that they were done in accordance with law, in pursuance of an order from the board of supervisors of the county, he being a road overseer, and that the land alleged to have been intruded upon by him had become, and was by dedication, a public road and highway. The cause came on to be tried before a jury, which was discharged during the progress of the trial by the court for sufficient reasons. That tribunal then proceeded to hear the cause, made its findings of fact, and rendered judgment for the plaintiff as prayed for, except for damages, which were expressly waived; from which, and an order denying a new trial, defendant appeals. The whole matter turns upon the point as to whether or not there had been, for some 12 years immediately prior to the trespass complained of, any law upon the statute book applicable to the county of Modoc, by which the public could by user acquire a right to a highway as such. The court below held no such law to exist or to have existed within that time. The appellant's contention is that such a law did exist and was operative in this cause, by means of which the public, by the use of the land in question continuously for more than five years, had acquired it as a public road and highway in Modoc county; that the dedication of it as a highway was complete. In section 2619 of the Political Code (as it existed up to the passage of the act of March 30, 1874, which latter act is found at page 116 of Amendments to the Codes 1873 and 1874) it is provided, among other things, that "all roads used as such for a period of more than five years are highways." The section was amended by the act, supra, to read as follows: "Sec. 2619. Roads laid out and recorded as highways by order of the board of supervisors are highways. Whenever any corporation owning a toll-bridge or a turnpike, plank, or common wagon road is dissolved, or has expired by limitation or nonuser, the bridge or road becomes a highway." Section 38, (p. 129,) of the same act, provides: "This act shall apply only to the following-named counties: Calaveras, Santa Barbara, San Luis Obispo, Ventura, Fresno, Kern, Tehama, Contra Costa, Marin, Lake, Sierra, Plumas, Sacramento, Sutter, Mendocino, Mariposa, Alameda, and Larsen: provided, that this act shall not be in force and effect in Solano, Los Angeles, San Joaquin, and Yuba counties until the first Monday of March, eighteen hundred and seventy-six, (1876.)"

The effect of these provisions of law, taken together, is, as we think, that section 2619 supra, remained, for the purpose of this action, unaffected by the act, supra, so far as concerned Modoc county. In that county during the 12 years immediately prior to the trespass complained of a highway might have become such to all intents and purposes by user on the part of the public for more than five years continuously. This, among other questions, seems to have been involved in the case of Bolger v. Foss, 65 Cal. 251, 3 Pac. Rep. 871, where the dedication by user of a highway in Humboldt county was under consideration, which county occupied the same position with relation to section 38 of the act, supra, as did Modoc county, where the highway now in hand is located. Although the point was not directly adverted to, the appellate court appears to have taken the view of the matter which we do. The defendant ought, therefore, to have been permitted to introduce his proffered evidence that the land in dispute had been used continuously and uninterruptedly as a highway by the traveling public for the "last past twelve years." The matter was clearly within the issues raised by the pleadings, after the amendment had been made to the defendant's answer. For the error committed in not admitting the evidence as offered the judgment and order should be reversed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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78 Cal. 427

In re LOWENTHAL. (No. 20,490.)

(*Supreme Court of California.* March 21, 1889.)

MISCONDUCT OF ATTORNEY—LIMITATION OF ACTIONS.

1. The petition for the disbarment of an attorney alleged, as grounds, failure to maintain the respect due the court, defending an unjust cause, employing means of defense inconsistent with truth, and misleading the court by artifice and falsehood. The facts were set out in narrative form, without allegations connecting them with one or the other general charges of misconduct. *Held* good on demurrer.

2. Such charges are not barred by the statute of limitations.

In bank. Application for the disbarment of an attorney.

John H. Boalt, *Ralph C. Harrison*, and *Edward R. Taylor*, for relator. *W. W. Cope* and *P. F. Dunne*, for respondent.

WORKS, J. This is an accusation for the disbarment of the respondent, an attorney of this court. The accusation charges generally "that heretofore, to-wit, at the several times hereinafter mentioned, said Lowenthal violated the said oath taken by him as such attorney and counselor at law, by—*First*, not maintaining the respect due to the courts of justice and judicial officers of this state; *second*, by counseling and maintaining a defense to an action which did not appear to him legal or just; *third*, by employing means in defense of an action which were inconsistent with truth; *fourth*, by misleading in an action in this state the judge of the court by artifice and by false statement of fact and law. Following this is a full narrative statement of the acts and conduct of the respondent claimed to constitute the misconduct above charged.

There is a demurrer to the accusation, which raises the only question to be determined. The demurrer is upon the general ground that the accusation does not state facts sufficient to constitute any offense or violation of the oath of said Lowenthal, as attorney and counselor at law, or any cause for disbarment. The demurrer also goes to that part of the accusation setting out the facts relied upon, upon the same ground. The further ground of demurrer is that the offenses charged are barred by the statute of limitations. The specific objection made to the allegation of facts urged at the argument is that the facts set out are not attempted to be applied to any of the specifications alleged, but are stated generally, leaving it for the respondent and the court to apply them as best they may. We must say that the accusation is not a model pleading in this respect. The facts stated, as we have said, are set out in narrative form, without any allegations connecting them with one or the other of the general charges of misconduct, and are unnecessarily long, but we think they are such as to show misconduct on the part of the respondent, as an attorney of this court, sufficient to put him upon his trial. As these facts will necessarily have to be more fully considered upon the final hearing, we do not set them out here in full, or comment upon them.

As to the objection made that the offenses charged are barred by the statute of limitations, it appears that the acts complained of were committed some three years since. We do not understand that a charge of this kind can be barred by the statute of limitations, or that it should be, under any circumstances. The fullest opportunity should be given to investigate the conduct of an attorney who is charged with a violation of his duties as such, and while this court might not be willing to disbar or suspend an attorney if it appeared that there had been unreasonable delay in the presentation of the charges, so that a fair opportunity could not be had for procuring the witnesses and meeting the accusation, we are not prepared to say, as a matter of law upon this demurrer, that the accusation is barred either by the express terms of the statute of limitations or by analogy. For the reasons stated the demurrer to the accusation is overruled, and the respondent is allowed 20 days within which to prepare and file his answer.

We concur: BEATTY, C. J.; PATERSON, J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

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78 Cal. 477

In re SOHER'S ESTATE. (No. 12,747.)

(*Supreme Court of California.* March 23, 1889.)

WILLS—OLOGRAPHIC WILLS—REVOCATION.

1. A codicil, written entirely by testator, and signed by him, is a valid olographic codicil, though also signed by one person only, as a witness, without any formal attestation clause, as such witnessing does not indicate an incomplete execution of what was intended as an attested codicil.

2. An attested will, not written by testator, may be revoked by such an olographic codicil, though the latter refers to the former, without which it cannot be understood, as the will does not by such reference become such a part of the codicil that the latter is not "entirely written, dated, and signed by the hand of testator himself."

Department 2. Commissioners' decision. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Chas. E. Wilson and *Wm. A. Plunkett*, for appellants. *George A. Knight* and *J. A. Hosmer*, for respondent.

HAYNE, C. Lewis Soher executed before two witnesses, in the form prescribed by statute, a will which was in the handwriting of another. Subsequently he attached to said will the following codicil: "Owing to the conduct of my son, Adolph, toward my wife and myself since this will was made, I hereby affirm the foregoing will, except in the ninth article of bequests, where Adolph is included with my wife, and other children, which bequest to Adolph I hereby revoke. Witness my hand this 29th day of April, 1886. Lewis Soher." Underneath were the words: "Witness: GEORGE PENLINGTON, 123 O'Farrell street." All except these latter words is in the handwriting of the testator. The court below admitted the will to probate, but refused to admit the codicil. Two points are made by the respondent in support of the action of the court with reference to the codicil:

1. It is argued that the fact that the codicil was attested by one witness shows that it was not the intention of the testator to make an olographic codicil; that it must be presumed that he intended to make an attested codicil, and left the execution incomplete. We see no force in the argument. It will be observed that there is no attestation clause, such as is usual in attested wills and codicils; no statement that the testator signed the will in the presence of the witness, and declared, at the time of signing, that the instrument was his will. If there had been such a clause, signed by only one witness, or unsigned by anybody, there might be more force in the position, although we do not desire to be understood as expressing or intimating any opinion upon such a case. Here are simply the words, "Witness: George Penlington, 123 O'Farrell street." These words do not seem to us to indicate an intention to make an attested will or codicil. It may be that the testator caused them to be placed there for the purpose of supplying proof of his own handwriting, or, in other words, proof that the codicil was olographic. Many testators execute their wills long before death, and they

may be persons who are not well known in the community. It may therefore be difficult to prove the handwriting of a document purporting to be a will, found among their papers after death. In view of this, it would be a natural and proper precaution to furnish means of making the required proof. And it seems to us that courts should presume that the intention of the testator was that of a reasonable and prudent man, under the circumstances, and should not adopt a somewhat strained construction to defeat what there is every reason to believe was the desire of the testator. The witness clause is not, under the circumstances, to be considered as a portion of the will, which is no more affected by it than any other document which does not require attestation, such as a deed or contract would be. The case of Power v. Davis, 3 MacArthur, 162, is not in point. There the testator appended a formal attestation clause in his own handwriting, but left such clause unsigned by anybody. There is no room here for the argument made in that case.

2. It is contended that an attested will cannot be revoked by an olographic codicil. The position of the respondent is based upon the fact that the olographic document refers to the other. The argument is that the olographic codicil cannot be understood without referring to the attested will; that the latter is, in contemplation of law, "a part" of the former; and that therefore it does not come within the definition of an olographic will, which is a will "entirely written, dated, and signed by the hand of the testator himself." This argument, if allowed to prevail, would have far-reaching consequences. It would exclude all reference to any document which was not entirely written, dated, and signed by the testator himself. For example, an olographic will which devised all the right, title, and interest of the testator under a will of his ancestor, or under a marriage settlement or other contract drawn by another hand, would be invalid. Pushed to its logical conclusion the argument would exclude all reference to deeds or other documents for descriptions of property, etc. A similar objection was at one time made to references in attested wills to documents which were not attested. Wills have always been required to be executed with formalities of some kind or other; and it was argued that documents which were not executed with these formalities could not be referred to. But considerations of practical convenience prevailed over technical reasoning; and it became well settled that an attested will could refer to documents which were not attested. See Newton v. Society, 130 Mass. 91; Baker's Appeal, 107 Pa. St. 381; Brown v. Clark, 77 N. Y. 377; Fickle v. Snepp, 97 Ind. 291; Fesler v. Simpson, 58 Ind. 87; Gerrish v. Gerrish, 8 Or. 351. And see Estate of Shillaber, 74 Cal. 144, 15 Pac. Rep. 453. Now, if an attested will can refer to a document which is not attested, we see no good reason why an olographic will may not refer to a document which is not in the handwriting of the testator. The only difference between an olographic and an attested will is in the form of the execution. The statute has prescribed two forms in which written wills may be executed. In each case the instrument must be signed by the testator. But the formality of witnesses is dispensed with if the instrument is all in the handwriting of the testator himself. One form is the precise equivalent of the other. Whatever would be good as an attested will or codicil is good as an olographic one, if written, dated, and signed by the hand of the testator. And whatever may be done in or by the one, may be done in or by the other. Therefore, if the formalities of attestation are not required in a document referred to by an attested will or codicil, the corresponding formalities are not required in a document referred to by an olographic will or codicil.

The argument made for the respondent rests upon the proposition that a document referred to by a will or contract is, in contemplation of law, "a part" of the document making the reference. And if this be granted in the sense in which it is asserted, a very plausible argument can be built upon it. But as has been said in other connections, it is not true, as a matter of physical fact, that the two documents are one and the same. The law for some purposes—mainly of construction—regards one as a part of the other; but this fiction ought not to be extended to absurd or unjust consequences. See City of Napa v. Easterby, 18 Pac. Rep. 255; Bull v. Coe, Id. 809. And we think it should not be extended so as to cover the present case. The will which the statute requires to be attested by witnesses in the one case and written by the testator in the other, is the document signed by him. The documents referred to are for the purpose of explaining the meaning of the will, and aiding in its construction.

The conclusion which we have reached is sustained by authority. The decision in Estate of Shillaber, 74 Cal. 144, 15 Pac. Rep. 453, does not quite cover the case; for although the language of the opinion sanctions the reference, the decision was that the document referred to could be rejected as unnecessary, and the will left to stand without it. But Estate of Skerrett, 67 Cal. 587, 8 Pac. Rep. 181, goes further than is required here. In that case the deceased in his life-time signed a deed purporting to convey certain property to his sister. This deed was never delivered, and therefore did not convey the property. It could not take effect as a will because it was not witnessed as such, and was not in the handwriting of the deceased. But a copy of the deed was found after the death, in an envelope, with a letter addressed to the sister, and written, dated, and signed by the deceased himself. This letter was insufficient standing by itself, as a will. But it referred to the deed, and stated, in substance, that said deed was intended to be a provision for the sister in case of the death of the writer. The court held that, although neither document, taken by itself, was sufficient as a will, yet both, taken together, should be admitted to probate as such. The point is not reasoned out at length, but the opinion is clear, and the decision proceeds upon the principle above discussed. The courts of Louisiana, which are governed by a similar statute, seem to act upon the same theory. See Miller v. Miller, 32 La. Ann. 441. And we think that the rule is a sound and salutary one. If testators are to be encouraged by a statute like ours to draw their own wills, the courts should not adopt upon purely technical reasoning a construction which would result in invalidating such wills in half the cases. We therefore advise that the judgment and order appealed from be reversed, with directions to admit the codicil to probate in connection with the will.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, with directions to admit the codicil to probate in connection with the will.

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78 Cal. 424

HASKELL *v.* DOTY. (No. 12,772.)

(*Supreme Court of California.* March 21, 1889.)

SPECIFIC PERFORMANCE—APPEAL.

1. Where a bill for specific performance alleges that the parties entered into an agreement whereby the plaintiff agreed to buy, and defendant to sell, and the answer alleges that at "the time of entering into the agreement aforesaid" the contract was deposited with one G., to hold for 30 days, until plaintiff made a payment, in default of which "the trade should be considered off," and "that said agreement never was delivered to plaintiff," but that he obtained "possession thereof forcibly," the question of non-delivery is raised by the answer.

2. Where the evidence as to the delivery of a contract is conflicting, the finding of the court will not be disturbed.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Brousseau & Hatch and *Houghton, Silent & Campbell*, for appellant. *Wells, Van Dyke & Lee*, for respondent.

HAYNE, C. Suit for specific performance of a contract to convey certain real property. Judgment for defendant. Plaintiff appeals. The question upon which the case turns is whether the contract was delivered. The court below found that it was not. The findings set forth facts which show that the contract was delivered by the parties to one Green in escrow, the condition being that plaintiff should pay the sum of $2,200 within 30 days; that he failed to do so, and did not tender the money for more than six months thereafter; that Green, "understanding that the trade between the plaintiff and the defendant was off," returned the papers to the defendant; and that the plaintiff obtained possession of the contract from defendant by asking to be allowed to look at it, and, upon its being handed to him for the purposes of inspection, making off with it against the will of the defendant. It is contended for the plaintiff, in the first place, that the findings are contrary to admissions in the pleadings. The argument is that the complaint alleges that the parties "entered into an agreement under their hands and seals, whereby the plaintiff agreed to buy and the defendant agreed to sell," etc.; that this allegation was not denied; and that it imports a delivery of the paper, inasmuch as there can be no agreement without a delivery. But, assuming in favor of the appellant that such is the construction to be put upon the allegation, we think that the answer sufficiently puts the delivery in issue. It avers that, "at the time of entering into the agreement aforesaid," the agreement was by the parties deposited with said Green upon the understanding that he should hold the same, and that plaintiff should pay the amount above mentioned within 30 days, and that if he should fail to do so "said trade should be considered off." This is not a very scientific way of pleading the non-delivery. But we think it will pass, especially in view of the fact that no objection to its sufficiency was made at the trial. But, in addition to the foregoing, the answer avers in a separate defense "that said agreement was never delivered to said plaintiff, and that he never had a right to the same, but obtained possession thereof in a forcible and surreptitious manner as aforesaid." And we think it would be straining this language to say that it refers only to "the manner in which the appellant possessed himself manually of the paper upon that occasion, and has no reference to the delivery thereof at the time of its execution."

It is contended, in the next place, that the evidence does not justify the findings. We think, however, that it very clearly appears that both parties did deposit the papers with Green at the time of their execution; that after a time Green returned them to the defendant; and that they were not subsequently delivered by the defendant to plaintiff, but that plaintiff obtained them against the will of the defendant in an improper and reprehensible way. The only point which, in our judgment, is open to doubt is as to why or on what conditions the papers were deposited with Green. Green does not recollect that anything was said to him by the parties or much about the transaction. The defendant's testimony is in substance as found by the court. He does not express himself with much formality, but he says: "Mr. Haskell and I went in there and made arrangements that Mr. Green should hold the contract for thirty days. At the expiration of thirty days Haskell was to pay $2,200 on the contract at that time, and he was to have possession of the place after the thirty days." "He was to pay the money to P. M. Green. He was the man who had the contract. There was an understanding that he was to hold the contract until Mr. Haskell had settled it." And there was evidence of a declaration by the plaintiff to a third party to the effect that "the whole thing was off," which could not have been true if there had been an absolute delivery to the plaintiff. The fact that the defendant offered in his answer to return the sum of $300 which he claimed was forfeited does not seem to us of much significance. Upon the whole case we think that the finding of the court as to the understanding upon which the papers were left with Green is within the protection of the rule as to conflicting evidence. The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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78 Cal. 509

MILLER *et al. v.* THOMAS *et al.* (No. 11,960.)

(*Supreme Court of California.* March 27, 1889.)

Department 1. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

S. O. Houghton and *John Reynolds*, for appellants. *Wm. Matthews*, *S. F. Leib*, *T. H. Laine*, and *J. C. Black*, for respondents.

PATERSON, J. We are unable to determine precisely from the record herein what is the nature of the action, who appeared as parties in the court below, or who were served with summons, or upon how many of those who did appear the notice of appeal was served. There is no judgment roll before us; no complaint, summons, answer, findings, or judgment. There is a document purporting to contain part of the findings relating to the matter of expenditures and costs, and another document purporting to be a portion of the final judgment relating to costs, but what matters are contained in other findings and other portions of the judgment not before us we cannot determine. It is asserted by counsel for certain respondents that there were 400 defendants in the court below. If this be true, there are over a hundred parties to the record whose names do not appear in the notice of appeal, and there is nothing to show that all of those named in the notice were served. The notice of appeal states that the appeal is "from that part of the final judgment made and entered in the above-entitled action on the 19th day of June, 1886, fixing the amount of costs, in so far as it refuses or fails to include therein counsel fees paid and incurred by the plaintiffs for the benefit of all the tenants in common, who are charged in said judgment with the payment of the costs of partition." But it is impossible to tell from the scrap of the decree designated in the transcript as "portions of the final judgment relating to allowance of costs, and to the question involved on this appeal," whether the court, in fixing the amount of costs, refused or failed "to include therein counsel fees paid and incurred by the plaintiffs for the benefit of all the tenants in common," etc. There are other objections to the transcript, but we have pointed out a sufficient number to show beyond all question, we think, that it would be useless to attempt an examination of the case on its merits. The appeal is therefore dismissed.

We concur: BEATTY, C. J.; WORKS, J.

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78 Cal. 454

LEARNED *et al. v.* CASTLE *et al.* (No. 12,244.)

(*Supreme Court of California.* March 22, 1889.)

NUISANCE—REMEDIES—FINDINGS—DAMAGES.

1. In an action for a nuisance for diverting water on plaintiffs' land, there was a finding that defendants' acts were not an obstruction of the free use of plaintiffs' property, but there were other findings that none of the waters diverted by defendants' works would flow on plaintiffs' land if allowed to take their natural course; that the waters diverted flowed on plaintiffs' land; and that defendants' embankment caused water to flow there, which would not do so were the embankment removed. *Held* that, the findings being thus contradictory, a judgment for defendants could not stand.

2. Where it appears that plaintiffs were largely and seriously damaged by water flowing on their land, a large part of which was caused to flow there by defendants, though a larger part of it came from other sources, a finding that plaintiffs' damage from the acts of defendants was but one dollar, cannot be sustained.

3. But, in such case, the object of the action being to declare a nuisance, to prevent its continuance by mandatory injunction, the amount of damage is immaterial.

4. The acquiescence of plaintiffs' grantor in the acts of defendant is no defense to the action for an injunction.

5. Defendants having removed an embankment erected by plaintiffs to keep the water off, defendants cannot allege with respect thereto that they are not maintaining it, or keeping it up. It is an injury which keeps itself up.

THORNTON, J., dissenting.

In bank. On rehearing. 18 Pac. Rep. 872.

Garber & Bishop, *W. L. Dudley*, and *D. S. Terry*, for appellants. *J. B. Hall* and *J. C. Campbell*, (*A. P. Catlin*, of counsel,) for respondents.

MCFARLAND, J. This is an action for damages for an alleged nuisance, and for a mandatory injunction to prevent its continuance. The nuisance or nuisances charged consist in this: North-east of plaintiffs' lands there is a stream or slough called "Stone Slough" or "Bear River," and between that stream and plaintiffs' lands there are other (smaller) natural sloughs. Stone slough and the other said sloughs run in a south-westerly direction. Stone slough, at a point about three miles from plaintiffs' lands, is tapped by a canal, constructed by defendant Christian and others, which carries its waters westerly to and across the said other sloughs, in which obstructions were placed by defendants in order that the water might be prevented from flowing down the sloughs, and forced to follow the canal. It is averred in the complaint that, if the said obstructions were not placed in the said sloughs, the water brought there by the canal would flow naturally down the sloughs, and away from plaintiffs' land; and that by reason of said obstructions and canal the water was caused to flow onto plaintiffs' land, to their great injury. Plaintiffs also aver that they (plaintiffs) put an embankment across said canal at a point on a road called the "Davis Road," which was sufficient to protect their land from said water, and that defendants wrongfully entered upon said embankment and removed it, and thus allowed said water to run on their land, to their damage, etc. At the trial some issues were presented to, and passed upon by, a jury. These findings were adopted by the court. Other findings were then made by the court, and judgment was given for defendants. Plaintiffs appeal from the judgment, and from an order denying their motion for a new trial.

The cause was heard here in department 2, and an opinion was delivered, affirming the judgment. We adopt that opinion so far as it determines that the complaint was sufficient, and that the alleged acquiescence of plaintiffs' grantor, Yolland, did not constitute a defense to plaintiffs' cause of action for an injunction. The action was not barred by the statute of limitations. But upon a more thorough consideration of the case, after argument on rehearing, we are satisfied that the findings are fatally conflicting and contradictory; that they do not support the judgment; and that, in a material respect, they are not supported by the evidence.

The action was commenced in August, 1878; and the first main damage to plaintiffs' land, by the said alleged turning of the water upon it, is averred to have taken place in January and February of that year. There is no doubt that in those months a very large quantity of water was caused by said acts of defendants to flow upon plaintiffs' land. It happened, however, that at that time, owing to unusual floods, other large quantities of water also flowed upon plaintiffs' land from natural sources; and this coincidence seems to have been the cause of much of the confusion and conflict which appear in the findings of the court, and the answers of the jury to the issues presented to them. It seems to have been thought that, as the water which flooded the land from other sources would probably, or certainly, have caused the damage averred in the complaint if the water caused to flow there by the acts of defendants had not been mingled with it, therefore the latter should not be considered as having added much to the injury. (It may be remarked, however, that it is difficult to find the principle upon which damage done by commingled water, coming from two sources, can be attributed to one of the original sources, rather than the other.) The thirteenth finding of the court is as follows: "That the said obstruction in the natural sloughs is not an obstruction to the free use of plaintiffs' property, and does not interfere with the enjoyment thereof; and that the removal of said embankment across said canal in the Davis road does not prevent said plaintiffs from the free use and enjoyment of their said property." But in the tenth finding the court finds "that none of the waters diverted by the canal would have flowed upon the plaintiffs' land, if allowed without interruption to take their natural south-west course and direction to the river; and the embankment on the south side of the canal, on Christian's and other lands, cause waters to flow upon plaintiffs' land which would not flow there if the embankments were removed." In the eighth finding it is found that in 1878 some of the waters of Stone slough flowed through the canal onto plaintiffs' land.

The jury, whose findings were adopted by the court, found, among other things, as follows: "(7) *Question*. What is the natural direction of the waters of Stone and the other sloughs east of the road, as they flow to the river? *Answer*. South-west. (8) *Q*. Would any of the waters which are diverted by the canal flow upon plaintiffs' land if allowed, without interruption, to take their natural courses to the river? *A*. No. (9) *Q*. Do any of the waters diverted by the canal flow upon the lands of plaintiffs? *A*. Yes." "(13) *Q*. Were the waters diverted by the canal in 1878 the predominant and proximate cause of damages sustained by the plaintiffs from the water in 1877-78? *A*. No. (14) *Q*. Did other waters, or other causes other than the waters of the canal, materially contribute as causes of the damages claimed by plaintiffs? *A*. Yes. (15) *Q*. If the jury answer 'Yes' to the last question, and find that the damages claimed by plaintiffs were caused by the joint action of waters from the canal and waters from other sources, then the jury will answer, if possible, how much damage was caused by the waters of the canal. *A*. $1." "(18) *Q*. Do the embankments on the south side of the ditch on Christian's and other lands east of the road cause any waters to flow upon plaintiffs' lands which would not flow there if the embankments were removed? *A*. Yes." The court also further found (finding 9) that plaintiffs were not damaged by the said acts of defendants "to any extent greater than in the sum of $1."

It is apparent, we think, that the findings above quoted are inconsistent and contradictory; and that the contradiction thus presented is not merely formal, and about things not essential,—such as frequently creep into findings inadvertently. The contradiction is, in our opinion, important, material, and fatal to the judgment. For instance, how can the thirteenth finding, (upon which the judgment rests,) that the results of the acts of defendants are "not an obstruction to the free use of plaintiffs' property," and do "not interfere with the enjoyment thereof," etc., be reconciled with the other findings? And how can it stand if the other findings be true? In the other findings it is declared that the natural course of the sloughs east of plaintiffs' lands is to the south-west; that none of the waters of said sloughs, diverted by the canal, would flow upon said lands if allowed to take their natural courses to the river; that the waters diverted by the canal do flow upon said lands; and that the embankments on the south side of the canal do cause waters to flow upon plaintiffs' lands "which would not flow there if the embankments were removed." These findings cannot be true if it be also true that there was no interference with the "free use and enjoyment" of plaintiffs' property. There can be no more marked interference with a man's free enjoyment of his property than to wrongfully cause water to flow onto his land which would not flow there naturally. And how can we take one of these findings as true, and disregard others which are directly contradictory of it? The rule on this subject may safely be said to go this far, at least: that where there are contradictory findings about matters material to the merits of the case, and the determination of which, one way or the other, is essential to the correctness of the judgment, there the judgment cannot stand. If one part of the contradictory findings would support the judgment, and another part would necessarily upset it, then the judgment must be reversed. Kerns v. McKean, 65 Cal. 411, 4 Pac. Rep. 404; Randall v. Hunter, 66 Cal. 512, 6 Pac. Rep. 331; Gilman v. Curtis, 66 Cal. 116, 4 Pac. Rep. 1094; Sloss v. Allman, 64 Cal. 47; Richards v. Dower, Id. 62; Carman v. Ross, Id. 249; Reese v. Corcoran, 52 Cal. 495.

The finding that the damage done to plaintiffs' land in 1878 by the water which defendants caused to flow there was only one dollar, does not affect the merits of the case. In the first place, we do not see how that finding can be held to be supported by the evidence. It clearly appears in the evidence that at that time plaintiffs were largely and seriously damaged by water flowing onto and over their land, and that a very large part of that water was caused to flow there by the acts of defendants. It is true that, when the damage was done at that time, the water from the canal was mingled with water from other sources, which (it may be admitted) was of a larger volume than that of the water brought there by defendants; and it may have been difficult to separate the mingled elements of mischief, and calculate with any great exactness the proportionate amount of damage done by each. But surely there was no warrant for finding that all the damage was done by the other water, and none (practically) by the water poured onto the plaintiffs' land by the canal. A wrongdoer who contributes to a damage cannot escape entirely because his proportional contribution to the result cannot be accurately measured. (In a case like the one at bar it would be at least as near justice to hold him for all the damage as to hold him for none.) And we think the evidence did not warrant the finding that the damage caused by the acts of defendants was to the extent only of one dollar. But the amount of the damage, estimated in money, was immaterial. That finding was only as to the damage done in 1878, when there was water on the land from other sources. The findings show that the waters diverted by the canal "flow" upon plaintiffs' land, which would not flow there if allowed to take their natural course; and that the embankments erected by defendants "cause" such artificial flowing. And to thus wrongfully cause water to flow upon another's land, which would not flow there naturally, is to create a nuisance *per se*. It is an injury to the right, and it cannot be continued because other persons (whether jurors or not) might have a low estimate of the damage which it causes. And especially is this so when the continuance of the wrongful act might ripen into a right in the nature of an easement or servitude. Richards v. Dower, 64 Cal. 64, and cases there cited; Tootle v. Clifton, 22 Ohio St. 247; Casebeer v. Mowry, 55 Pa. St. 419; Wood, Nuis. (2d Ed.) 639. The right to an injunction, therefore, in such a case does not depend upon the extent of the damage measured by a money standard. The maxim *de minimis* does not apply. The main object of the action is to declare a nuisance, and to prevent the continuance by a mandatory injunction. There is nothing in the point that, with respect to the removal of the embankment across the canal, the defendants are not maintaining or keeping it up. "It is an injury which keeps itself up." Our opinion, therefore, is that for the reasons above given the judgment should be reversed. Judgment and order appealed from reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.

PATERSON, J., did not participate in the decision of the above cause.

THORNTON, J.,(*dissenting.*) I dissent from the conclusion reached in the foregoing opinion, and from the opinion, except that portion of it which agrees with the opinion formerly drawn up by me in this cause. I see no cause to change the views expressed by me in the opinion just referred to, and adopt it as my opinion herein I will add that in my view the contradictory findings referred to in the opinion of Justice McFARLAND relate to matters which are not material to a proper decision of the cause.

78 Cal. 450

COOPER v. CHAMBERLAIN, Tax Collector.

(No. 11,800.)

(*Supreme Court of California.* March 22, 1889.)

DURESS—LEVY OF VOID TAX.

Where a tax assessment upon land is void, because the property has not been described in the assessment roll, the tax collector's levy and threat to sell to satisfy the tax do not constitute duress.[1]

Department 2. Appeal from superior court, Monterey county; J. K. ALEXANDER, Judge.

Wm. Matthews, for appellant. *R. M. F. Soto, J. A. Wall*, and *W. H. Webb*, (*Hermann & Soto*, of counsel,) for respondent.

SHARPSTEIN, J. This action is to recover $2,742.99, paid by plaintiff to defendant, tax collector of Monterey county, for what plaintiff claims to have been unlawfully demanded for delinquent taxes. The plaintiff alleges that he was the owner of certain tracts of land in said county, all of which are described in the complaint by metes and bounds and proper designation. For the fiscal year 1883–84 the assessor of said county undertook to assess and to list, and in form listed and set down, said land in an assessment book, and valued the same in gross at $141,402.02. Said assessor undertook to levy against and did in form charge said property with a tax of $2,601.98. Afterwards the board of supervisors of said county, sitting as a board of equalization, attempted to increase the valuation of said property, and did in form increase the same by the sum of $20,972.98, making the total valuation thereof $162,393, and added to said pretended taxes the sum of $361, making the total of said alleged tax the said sum of $2,742.99. It is alleged that said tax was illegal, because said property was not described in the assessment roll, as required by law, by township, range, section, or fractional section, of any congressional or other subdivision, or by metes and bounds, or other description sufficient to identify it, and the said order of the board of equalization was illegal, because the same was made without legal notice to the plaintiff. The defendant seized said property, advertised in a public journal that he would sell so much thereof as would be necessary to pay said tax and 5 per cent. thereon, together with costs and charges, unless plaintiff, before the day fixed for said sale, paid said tax, percentage, charges, and costs. To prevent said sale plaintiff paid said sum of $2,742.99, first filing his protest with defendant, in which he set forth that the whole of said tax was unlawfully assessed and levied, because said land was not described in the assessment roll as the law requires, or other description sufficient to identify it, and that the increase of said assessment by the board as aforesaid was made without legal notice to the plaintiff, and he, at the same time, notified defendant that suit would be brought against him for said sum of money, unless the same was refunded. No part of said sum has been paid to plaintiff. Defendant demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained, plaintiff declined to amend, and judgment was entered against him. The appeal is from the judgment. The case, as presented by the complaint, is, as we understand it, that the defendant levied upon and advertised property for sale for a delinquent tax which had not been validly assessed, and that, to prevent a sale, plaintiff paid the amount of the tax demanded under protest, and brings this action to recover it back. The question is whether the facts alleged sufficiently show that the sum paid was paid under duress. If not, the demurrer was properly sustained. According to the allegations of the complaint, the plaintiff's property was not assessed. It could not be assessed without being described, and the allegations of the complaint show that it was not described. Not being assessed, all the proceedings of the defendant in the premises were void, and his threat to sell constituted no duress. Wills v. Austin, 53 Cal. 152; Bucknall v. Story, 46 Cal. 589; De Baker v. Carillo, 52 Cal. 473; Brumagim v. Tillinghast, 18 Cal. 265. On the authority of these cases, the demurrer was properly sustained, and the judgment must be affirmed.

I concur: THORNTON, J.

McFARLAND, J. I concur in the judgment solely upon the authority of former decisions of this court.

78 Cal. 468

McCORMACK v. NORTH BRITISH INS. CO.

(No. 12, 577.)

(*Supreme Court of California.* March 22, 1889.)

INSURANCE—PROOF OF LOSS.

In an action on a fire insurance policy containing the usual condition as to making preliminary proofs of loss, and providing that the amount shall be paid 60 days after proofs shall have been made and received, and the loss shall have been ascertained and proved according to the provisions of the policy, a nonsuit is proper where there is no evidence that the proofs have been given or waived.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Action by H. McCormack against the North British Insurance Company. Plaintiff appeals.

E. R. Bush and *R. Clark*, for appellant. *Van Ness & Roche*, for respondent.

WORKS, J. Action upon a fire insurance policy. Trial by the court. Motion for nonsuit on the ground, among others, that there was a failure to prove a compliance with the conditions of the policy relative to the making of the preliminary proofs of loss subsequent to the fire, and that the action was prematurely commenced, in that it had been commenced before proofs of loss were made. The court below granted the nonsuit, and the plaintiff appeals. The policy contained the usual condition as to the making of preliminary proof of loss, and provided that the amount to be paid under the policy should be paid "sixty days after the proofs shall have been made by the assured and received at their office, and the loss shall have been ascertained and proved in accordance with the terms and provisions of the policy." Where such preliminary proof is required by the policy, the assured must allege and prove that the proof has been made, or that the requirement has been waived. Doyle v. Insurance Co., 44 Cal. 264; May, Ins. § 465. There was no evidence that the necessary proof of loss had been given, nor was it shown that such proof had been waived. The nonsuit was therefore properly granted. Judgment affirmed.

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[1] In general, as to what constitutes duress, see Lomerson v. Johnson, (N. J.) 13 Atl. Rep. 8, and note; Avery v. Layton, (Pa.) Id. 528; Shoro v. Shoro, (Vt.) 14 Atl. Rep. 177; Adams v. Schiffer, (Colo.) 17 Pac. Rep. 21.

We concur: PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

MCFARLAND, J. I dissent. I think there was evidence that the proof was waived.

BEATTY, C. J., being disqualified, did not participate in the decision.

(78 Cal. 449)

MCINTYRE *v.* TRAUTNER. (No. 11,469.)

(*Supreme Court of California.* March 22, 1889.)

MECHANICS' LIENS—COSTS.

By Code Civil Proc. Cal. § 1195, on foreclosure of a mechanic's lien the court must allow, as part of the costs, reasonable attorney's fees in the superior and supreme courts, such costs and attorney's fee to be allowed to each lien claimant whose lien is established. Plaintiff, in an action to foreclose such a lien, was nonsuited, and on appeal the judgment was reversed. *Held*, that the attorney's fees are not part of the costs, but are incident to the foreclosure, and plaintiff, having failed on the merits on the second trial, was not entitled to an attorney's fee on the appeal.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by William McIntyre against Chas. Trautner. Plaintiff appeals. Code Civil Proc. Cal. § 1195, relating to liens of mechanics and others, as it stood when the case was decided by the superior court, provided that "the court may also allow, as part of the costs, the moneys paid for filing and recording the lien, and reasonable atttorney's fee in the superior and supreme courts."

William H. H. Hart, for appellant. *Henry H. Reid*, for respondent.

WORKS, J. The appellant brought this action against the respondent to foreclose a mechanic's lien for plumbing work. The court rendered judgment of nonsuit against him. He appealed to this court, and the case was reversed and remanded for a new trial. 63 Cal. 429. Upon the return of the case to the court below he filed his cost-bill, including as one of the items of costs the sum of $200 for his attorney's fees in the supreme court. The court, on motion of the respondent, made an order striking out and disallowing this item of costs. Subsequently the case proceeded, and there was finding and judgment in favor of the respondent on the merits. This appeal is from the order striking out the item of costs above mentioned. The appellant contends that as he was successful in this court he was entitled to his attorney's fees for services rendered here, and in support of this contention cites Rapp v. Gold Co., 74 Cal. 532, 16 Pac. Rep. 325. The case relied upon holds, and, we think, correctly, that the attorney's fees are not a part of the costs, but are, under the Code, an incident to the foreclosure of the lien. This being the case, there can be no recovery for attorney's fees unless the plaintiff succeeds in his foreclosure proceeding. The court below having found against him on the merits, the lien, which is the basis upon which the right to recover the attorney's fees must rest, is gone, and the right to such attorney's fees must go with it. The fact that he was successful in the supreme court cannot affect the question. The final determination that the appellant had no lien was an adjudication of the controlling question, and was decisive of the point made on this appeal. Order affirmed.

We concur: BEATTY, C. J.; PATERSON, J.

(83 Cal. 344)

SMITH *et al.* *v.* BISCAILUZ *et al.* (No. 12,827.)

(*Supreme Court of California.* March 21, 1889.)

GUARDIAN AND WARD.

1. Under Code Civil Proc. Cal. § 1747, relating to the appointment of a guardian for an infant under 14 years of age, and providing that "such appointment may be made on the petition of a relative or other person on behalf of the minor," and that "before making such appointment the court must cause such notice as such court deems reasonable to be given to any person having the care of the minor, and to such relatives of the minor, residing in the county, as the court may deem proper," the appearance by petition of the mother of the minor, in whose care the minor was, and of all the relatives to whom notice would be requisite, by their written consent filed in the cause, is proof that they all had notice of what was in progress, and waived any more formal notice.

2. Code Civil Proc. Cal. § 1537, applicable to sales of infants' real estate, provides that a failure to set forth in the petition the facts showing the sale to be necessary, as required by section 1781, will not invalidate the proceeding, if the defect be supplied at the hearing, "and the general facts, showing such necessity, be stated in the decree." A decree of sale recited that "on such hearing the said guardian was examined on oath, and, it appearing to this court that it would be for the benefit of said minor that said real estate be sold, and the proceeds of said sale be placed at interest, the

said real estate being now unproductive, and liable to heavy taxes," etc. *Held* a sufficient finding and statement of the "general facts" showing the necessity for sale.

3. A recital in the decree that before making said sale said guardian duly executed an additional bond, as required by Code Civil Proc. § 1788, is, in effect, a recital that the bond was delivered before sale to the judge, without which delivery it could not have been "duly executed;" and such delivery and approval by the judge are a sufficient filing.

4. Where it is apparent that the appraisement was substantially filed in court before the confirmation of the sale, the marking it "Filed" by the clerk was not essential.

5. As to the question whether the appraisement in the form made gave sufficient information to the court to enable it to exercise its prerogative in rendering judgment, the court had, by virtue of the petition exhibited to it, jurisdiction to determine the sufficiency of the evidence, and its judgment cannot be collaterally questioned.

6. A decree of distribution was of all the estate remaining in the hands of the executor, "which estate is hereinafter particularly described, and other property not now known or discovered, which may belong to the said" deceased. Then followed a description, from which one tract owned by the estate in fee was omitted. *Held*, that the decree passed title to that tract also.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

F. H. Howard, Bicknell & White, R. Dunnigan, and *Smith & Patton*, for appellants. *Chapman & Hendricks* and *W. J. Foley*, for respondents.

FOOTE, C. Action to quiet title under section 381, Code Civil Proc. Judgments passed for the defendants, from which and an order refusing a new trial this appeal is taken. The plaintiffs deraigned their title to the lands in dispute from one P. Beaudry for the purpose of establishing their own source of title to certain lots in the city of Los Angeles, amounting in the aggregate to about 350 acres of land. All parties deraign their title from one A. Z. Jordan, in whom they stipulate the title to the lands in controversy was vested on the 26th day of June, 1873. Upon that day Jordan conveyed an undivided half of the lands, except one subdivision, to Catalina Batz. Afterwards, on the 28th day of July following, Jordan died, still seised of the remaining interest in the lands. He left as his sole heirs his widow, Mary, and two children, the defendant Victoria Jordan, and her sister, who died pending the administration of his estate. Under his will, and by inheritance from the deceased child, the widow became the owner of five-eighths, and the child Victoria of three-eighths, of an undivided half of certain lands involved in this controversy, which interests were allowed to them by a decree of distribution. It is admitted by all that Beaudry acquired the interest of the widow of Jordan and that of Catalina Batz, and, except as to the interests of the plaintiffs Gay and Miller, there seems to be no contention except as to the title to the land originally vested in Victoria Jordan by the decree of distribution. Beaudry purchased the interests of all the plaintiffs here, except those of Gay and Miller, at a guardian sale, made on behalf of the ward, Victoria, an order for which was made by the judge of the probate court of Los Angeles county, and conveyances executed to him by the guardian of the minor, on the 14th day of August, 1876. The ward, after coming of age, just before the institution of this suit, deeded the property to one Biscailuz, who defends this action joined with her; (1) It is claimed by the respondents that the order of the probate court appointing the guardian for Victoria was void for the want of notice (2) that the petition for the sale of the lands of the minor was insufficient to give the court ordering the sale jurisdiction to do so; (3) that the additional bond required by the statute on the sale of real estate was not filed until after the confirmation of the sale; (4) that the inventory and appraisement of the ward's estate, ordered by the court, was not filed until after the confirmation of the sale of the ward's real estate, and that the description of the land was insufficient, as contained in the inventory.

1. That part of section 1747 of the Code of Civil Procedure which prescribes the notice required for the appointment of a guardian of a minor under 14 years of age, such as the one here concerned, is as follows: "Such appointment may be made on the petition of a relative or other person on behalf of the minor. * * * Before making such appointment, the court must cause such notice as such court deems reasonable to be given to any person having the care of the minor, and to such relatives of the minor residing in the county as the court may deem proper." In the present instance, the mother of the minor, under 14 years of age, having the care of her, preferred the petition for the appointment of the guardian, Joseph Jordan, the uncle of the minor, and her only other relatives residing in the county, two cousins, Joseph P. Jordan and Anton Jordan, filed in the court their written consent to the appointment of the uncle, Joseph, to be the guardian; after which, and upon the same day, the court appointed him guardian in accordance with the petition and consent thus filed. Conceding, without deciding, that the language, "the court must cause such notice as such court deems reasonable to be given to any person having the care of the minor, and to such relatives of the minor residing in the county as the court may deem proper," required the court to have some proper notice given to the person having the care of the minor, and to such of her relatives, residing in the county, as the court may deem proper, as a prerequisite to a valid appointment of her guardian, nevertheless the appearance by petition of the mother of the minor, under whose care she was, and of the other necessary parties, to whom notice was requisite, by their written consent filed in the cause, was proof that they all had notice of what was in progress before the court, and had waived any more formal notice. To have ordered and given any such, under the

existing state of facts, would have been an idle and useless ceremony, which the law does not impose upon courts of justice. The minor being of tender years, and not supposed to be able fully to protect her rights, the law provides notice to be given in some proper way to certain persons who may appear and do what is just in her interests. It is not required that any notice be given to the minor, and if the persons to whom the notice is intended to give the opportunity to defend the minor's rights appear in court, and, by petition and written consent, ask that tribunal to appoint the guardian whom it does appoint, we cannot perceive how any harm can come to the minor, or how the law, in its substance, is violated. The case of Burroughs v. De Couts, 70 Cal. 373, 11 Pac. Rep. 734, seems to concur in the view of the statute we have thus taken, and to go further and hold that where there is a collateral attack, such as is here made, upon the action of the court appointing a guardian, and the record affords sufficient evidence that all the near relatives of a minor residing in the county are consenting to the appointment, it is sufficient to warrant the presumption of the existence of the jurisdiction of the court and the validity of its acts, so far as the statutory notice to such parties is concerned. Brodribb v. Tibbits, 63 Cal. 80. The order appointing the guardian, in this matter, showing that all the near relatives of the minor residing in the county were the mother, the uncle appointed guardian, and the two cousins of the minor; that the mother filed the petition, and the cousins filed their consent to the request for the appointment of the uncle as guardian,—it would seem, both upon reason and authority, that such appointment was valid.

2. Conceding, under the decision of the appellate court in Fitch v. Miller, 20 Cal. 352, that the petition for the sale of the minor's real estate was defective in not "setting forth the condition of the estate of his ward, and the facts and circumstances on which his petition is founded, tending to show the necessity or expediency of a sale," as prescribed by section 1781 of the Code of Civil Procedure, which was in force in all its substantial features at the date of the order of sale in controversy, it becomes a material question whether or not the provisions of section 1537, which was also in force at the date of the order of sale, validate the decree made in this instance. Sections 1789 and 1808 of the Code of Civil Procedure make that last section applicable to guardian sales. The clause of section 1537, material to the matter under consideration, is: "If any of the matters enumerated cannot be ascertained, it must be so stated in the petition; but a failure to set forth the facts showing the sale to be necessary will not invalidate the proceeding if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree." The decree of sale in the case in hand contains this statement: "On such hearing, the said guardian was examined on oath, and after a full examination, it appearing to this court that it would be for the benefit of said minor that said real estate be sold, and the proceeds of said sale be placed at interest, the said real estate being now unproductive and liable to heavy taxes." According to the statute and the opinion of the appellate court in Fitch v. Miller, supra, the necessity for a sale exists when it is expedient, or, what is the same thing, can be made with propriety. It must be presumed on this collateral attack, from the decree just recited, that the court determined upon sufficient proof that the condition of the estate, and the facts and circumstances surrounding it, are such as render a sale necessary or expedient. When the statute with reference to what the decree must contain in order to validate the sale (notwithstanding the failure of the petition to state the condition of the estate, and the facts and circumstances going to show a sale to be necessary or expedient) provides that a failure to set out those facts and circumstances in the petition shall not invalidate the sale if the decree contains a recital of "general facts" showing such necessity, it means to declare that neither the failure to set out the special facts and circumstances which, taken together, show the necessity or expediency of the sale, nor the failure to state the condition, (which appears of necessity from, and is a part of, the special facts and circumstances showing the necessity or expediency of a sale,) shall invalidate the sale if the decree shall recite the "general facts" above stated. Therefore it becomes pertinent to inquire and determine what is meant by the words "general facts" showing the necessity or expediency of a sale, as used in section 1537, supra. An examination of sections 1777, 1778, 1781, Code Civil Proc., which are the same in language as the sections in the same Code at the time this sale was made, shows that sections 1777, 1778, prescribed certain ultimate facts or contingencies under which the real estate of the minor may be sold by the guardian, and which must appear in some form in the petition therefor to give the court jurisdiction. An inspection of section 1781, supra, shows that by it certain special facts and circumstances showing the condition of the estate, and tending to show the necessity or expediency of the sale of the whole or a part of the minor's real estate, must be set out in the petition. In the last clause of section 1537, supra, it is plain that a different meaning is given to the word "facts," where it is said, "but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings," from that which is given to the words "general facts," where it is said, "if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree." What construction is to be given to the language of that clause, when taken in its entirety, in order that the

whole clause may be intelligible, and convey a plain and consistent meaning? It would seem that "general facts" must be held to mean those ultimate facts showing a contingency, as prescribed in sections 1777 and 1778, supra, and that the words "the facts showing the sale to be necessary" must refer to those more explicit facts and circumstances set out in section 1781, from a statement of which also would necessarily appear the condition of the estate. In no other way can the language of all the sections supra be made to harmonize. The decree of sale does, as we have seen, state the "general facts" showing a necessity for the sale of the real estate of the minor in almost the exact language of section 1778, supra, showing the existence of one of the contingencies provided for in that section. And on this attack we must presume that at the hearing the court had all the necessary proofs before it. The decree of sale was therefore valid and binding.

3. The appellants further contend that the sale was void because the bond to be given under section 1788, to the probate judge, before the sale of the land, although approved and executed before, was not filed until after the sale.

4. That it was void, also, because the appraisement of the property, although made within a year of the time of the making of the sale, as required by section 1550 of the Code of Civil Procedure, was not marked "Filed" before the confirmation of the sale, and that there was no sufficient description in it of the property to be sold. According to the recitals of the decree of sale, "before making said sale said guardian, as required in and by said order of sale, duly executed an additional bond to the state of California," etc. The bond could not have been "duly executed" unless it had been delivered to the judge, and all other acts performed which the statute required. Joseph v. Dougherty, 60 Cal. 360. If delivered to the judge, and approved, as the stipulation shows it was, before the sale, that was a sufficient filing. A paper is filed when delivered to the proper officer, and indorsing it with the time of filing is not a part of the filing. Tregambo v. Mining Co., 57 Cal. 506. It therefore must be conceded that a bond in accordance with law was executed, approved, and filed before the sale, which is all that is required under the section of the Code Civil Procedure supra.

5. The affidavit attached to the inventory and appraisement shows that it was sworn to before the confirmation of the order of sale before the clerk of the court. The decree of the court, after describing the real estate sold, recites, "The said real estate was appraised within one year of the time of such sale, and that the sum aforesaid," that is, the amount of purchase money at the sale, which was previously set out in the decree, "was at least 90 per cent. of the appraised value thereof." In addition, the stipulation shows that "the appraisers were appointed on July 29, 1876," before the sale; "their appointment was made out by the clerk on the same day; and that upon that day, also, they took the oath of office." The oath of the appraisers to their bills for services, and their certificate of appraisement, also bore the same date. It is apparent, therefore, that the appraisement had been substantially filed in the court before the confirmation of the sale, and the marking it "Filed" by the clerk was not essential to its validity.

6. As to the question whether the appraisement in the form made gave sufficient information to the court to enable it to exercise its prerogative in rendering judgment, it may be said that in a collateral attack the court (being, as in this case, for such proceedings, of general jurisdiction) had, by virtue of the petition filed and exhibited to it, jurisdiction to determine the sufficiency of the evidence upon the matter in hand, and its judgment in the premises cannot here be controverted. Dennis v. Winter, 63 Cal. 17. This disposes of the case as affecting the defendants, and all of the plaintiffs who have appealed, except Miller and Gay.

7. Miller obtained an undivided one-half, or eight-sixteenths, of his lot, through Jordan, Batz, and Beaudry. He obtained five-sixteenths through the decree of distribution to the widow of Jordan. The other three-sixteenths of the lot belonged, under the decree of distribution, to the minor Victoria Jordan, and now, by her deed, to Biscailuz. Her interest in this lot was not sold at the guardian sale; so that the judgment as to Miller is correct, and upon his part no points or authorities have been filed.

8. As to the interest of Gay, it appears that Jordan, the father of Victoria, died seised and possessed of the whole of the tract which Gay now claims. The latter obtained from Beaudry title to the interest of the widow, which she received under the decree of distribution, if that decree is not void for the want of sufficient description of the land which Gay claims. The minor's interest was never sold, so that the question here is whether or not Gay can look to the decree of distribution, as fixing his title. The decree recites, among other things: "It is hereby adjudged, ordered, and decreed * * * that the residue of the estate of said A. Z. Jordan, deceased, now remaining in the hands of such executor, which estate is hereinafter particularly described, and other property not now known or discovered, which may belong to the said A. Z. Jordan, deceased, or in which the said estate may have an interest, be, and the same is hereby, distributed as follows, to-wit: An undivided five-eighths part is hereby assigned, transferred, set over, and delivered and distributed to the said Mary Jordan, now Mary Huarte, the said widow of the said A. Z. Jordan, deceased. And the other undivided three-eighths to Victoria, the minor child of the said A. Z. Jordan, deceased. * * * The

following is the personal property, and a particular description of the real estate remaining in the hands of the said executor, belonging to the estate of the said A. Z. Jordan, deceased, being the residue of the said estate referred to in this order, and of which distribution is ordered, adjudged, and decreed, as aforesaid." Here follows the particular description of certain lands, in which that of Gay is not mentioned. It was evidently the intention of the judge, in making the decree, to distribute to the widow an undivided five-eighths, and to Victoria Jordan three-eighths, of any lands in which the estate of the decedent had an interest. Is this description sufficient upon a collateral attack to include the land of Gay? It is clear that the estate did have an interest in this land, for it is admitted that by deed Jordan had acquired it, and he had never parted with it. Is the decree to be pronounced "a nullity for uncertainty of description," "because" the court can see that "nothing is described?" Is it one where the description is so defective that "the purchaser," relying "upon the description," and applying the ordinary rules of evidence to such a matter, can find nothing? If not, then the decree on a collateral attack, such as this, is not void. Sepulveda v. Baugh, 16 Pac. Rep. 226. It is conceded here upon all sides that Jordan purchased the property for a valuable consideration, and the description in the decree, under the test of the application of the ordinary rules of evidence to the subject, can readily be shown to represent a specific and certain piece of land, the property of the decedent at the date of his death. The decree of distribution is not, therefore, void upon this attack for want of a description of the land in which Gay claims an interest. As he claimed none of the interest of Victoria Jordan in the property, the court was correct in deciding that he was seised in fee-simple of an undivided five-eighths of the lot. We therefore advise that the judgment and order be reversed as to all the parties who appeal, except Miller and Gay, and that as to them the same be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed as to all the parties who appeal, except Miller and Gay, and as to them the judgment and order are affirmed.

78 Cal. 525

BYAM *v.* CASHMAN *et al.* (No. 12,835.)

(*Supreme Court of California.* March 29, 1889.)

INJUNCTION—BOND.

Upon the commencement of a suit the bill praying for an injunction pending the hearing, which on final hearing should be made perpetual, the court granted an order to show cause why the temporary injunction should not be granted as prayed for, and also ordered that the defendants be restrained from committing the acts until the decision upon said motion; said preliminary order to take effect upon the execution of a bond conditioned to pay such damages as defendants might sustain by reason of said restraining order. A bond was executed reciting the filing of the complaint, conditioned as follows: "In consideration of the premises, and of the issuing of said writ of injunction," the parties promise "that, in case said writ shall issue," they will pay damages, etc. Upon the motion to show cause the bill was dismissed for want of jurisdiction. *Held*, that the injunction for which the bond was given was not the writ directed to be issued by the preliminary order, and that no action could be maintained on the bond.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Action by Byam against Cashman and others on an injunction bond. Verdict and judgment for plaintiff, and defendants appeal.

Beatty & Denson and *Robert T. Devlin*, for appellants. *McKune & George*, for respondent.

THORNTON, J. On the 16th of September, 1885, Cashman commenced a suit in equity in the circuit court of the United States for the Ninth circuit, district of California, against Byam and others, defendants, and in his bill prayed for a writ of injunction, pending the hearing of said suit against the defendants, enjoining and restraining them from the commission of certain acts set forth in the bill, and that on the final hearing the writ be made perpetual. Upon an application to the judge of the circuit court, the Hon. LORENZO SAWYER, for the writ prayed for, the judge made an order that the defendants in the action, and each of them, show cause on the 2d day of November, 1885, why a temporary injunction, as prayed for in the bill, should not be issued, and that the defendants, and each of them, be and are enjoined and restrained until the decision upon said motion from committing or suffering any of the acts sought to be enjoined by the said bill of complaint, said preliminary restraining order to issue and take effect upon filing in this cause, approved as directed by the order, a bond in the sum of $10,000, payable to the defendants, conditioned that plaintiff will pay the defendants such damages, not exceeding the sum above mentioned, as said defendants, or each of them, may sustain by reason of said restraining order, if said court shall finally decide that the complainant was not entitled thereto. This order was made on the 12th of September, 1885, and on the same day the bond on which this action was brought, was filed. This action is brought against Cashman and two of the sureties on the bond.

The bond has, as a caption, the title of the court and cause, following which it is recited therein that whereas the complainant above named has commenced an action in the court above named against certain defendants, (giving their names,) and in his prayer for relief has asked for a writ of injunction pending the hearing of said action against said defendants, and enjoining and restraining them from the commission of certain acts, as in the bill of complaint filed in said action are more particularly set forth and described. Then follows the condition of the bond, which is in these words: "Now, therefore, we the undersigned, George Cashman, as principal, C. W. Pierce, Frederick Cox, H. C. Wilson, and N. D. Rideout, as sureties, in consideration of the premises, (and of the issuing of said writ of injunction,) do jointly and severally undertake in the sum of ten thousand dollars, ($10,000,) lawful money of the United States of America, and promise to the effect that, in case said injunction shall issue, the said complainant will pay to said defendants, the said parties enjoined, such damages, not exceeding the sum of ten thousand dollars ($10,000) lawful money of the United States of America, as said defendants, or either of them, may sustain by reason of the said injunction, if said circuit court shall finally decide that such complainant was not entitled thereto." On the hearing of the order to show cause the court dismissed the bill for want of jurisdiction. On the trial of this action a verdict and judgment were rendered against the defendants, and this appeal is prosecuted by them from the judgment and an order denying their motion for a new trial.

Appellants' contention is that the bond which was executed was not the bond ordered by the order of the 12th of September, 1885; that the parties by the instrument executed agreed to become liable only in case the temporary writ of injunction prayed for in the bill should issue; that such writ was never ordered to be issued, and never did issue, and therefore the defendants never became liable on the bond which was executed. It clearly appears from the foregoing that the bond executed was not such a bond as was directed by the order of the 12th of September, 1885. This is apparent in the recital and in the condition of the bond given. The recital is of a writ of injunction pending the hearing of the action. The condition refers to the recital. The parties to the bond, "in consideration of the premises, and of the issuing of the said writ of injunction," do undertake, etc. There is here a double reference to the recital, one in the word "premises," and the other in the words "said writ of injunction,"—said writ referring directly to the writ of injunction mentioned in the preceding recital, which was a writ which would be of force "pending the hearing of the action;" that is to say, during the pendency of the action. It is manifest that the writ of injunction just above mentioned was not the writ directed to be issued by the order of the 12th of September. The writ then ordered was one to be of force until the hearing of the motion to show cause why the preliminary injunction prayed for in the bill should not issue.

We think it follows from the foregoing that the defendants, having executed a bond which was never authorized to be executed by any order of the court, never assumed any responsibility to the plaintiff which he could enforce by action. It is further manifest that the writ of injunction on the issuance of which the parties to the bond in suit agreed to make themselves responsible was never issued, for, on the hearing of the order to show cause, the court not only refused to order the writ to issue, but dismissed the cause for want of jurisdiction. As this conclusion disposes of the action, it is unnecessary to pass on the other points made. The judgment and order are reversed, and the cause remanded, to be proceeded with according to the views expressed in this opinion. So ordered.

We concur: **Paterson, J.**; **Sharpstein, J.**; **Works, J.**

(78 Cal. 430)

Magee *v.* North Pac. C. R. Co. (No. 11,730.)

(*Supreme Court of California.* March 21, 1889.)

Master and Servant—Pleading.

1. Plaintiff, a brakeman on defendant's train, was injured in an accident caused by a bull on the track. *Held*, that even if plaintiff knew that the engine was without a cow-catcher, and the fences along the track were defective, the question of his recovery for the injuries was for the jury.

2. A complaint for such injuries need not state that the defects causing the accident were unknown to plaintiff, as such fact is matter of defense.

3. Allegations in the answer that plaintiff's injuries were caused by his own negligence, and that but for his negligence he would not have been injured, authorize plaintiff to testify on his own behalf that the defects causing the accident were unknown to him.

In bank. Appeal from superior court, Marin county; J. F. Sullivan, Judge.

On rehearing. Former decision, 20 Pac. Rep. 709, reversed.

W. H. L. Barnes, for appellant. *Hepburn Wilkins*, for respondent.

Sharpstein, J. This appeal is from a judgment and order denying a motion for a new trial. The first ground upon which appellant's counsel insists that the judgment should be reversed is that the complaint does not state facts sufficient to constitute a cause of action. The plaintiff alleges that he was in the employ of the defendant as brakeman and baggage-master, and was seriously injured by the train being thrown from the track by a bull which had intruded upon it. He further alleges that the fences inclosing the track were insufficient to prevent the intrusion of cattle thereon, and that the cow-catcher was not in a position to remove obstacles from the track; that the defendant knew of the defects in the fence, and the improper position of the cow-catcher. But he does not allege that he was ignorant of the defects in the fence, or of the improper position of the cow-catcher. And the omission so to allege constitutes, as appellant contends, a failure to state facts sufficient to constitute a cause of action.

In McGlynn v. Brodie, 31 Cal. 376, it is said, *arguendo*, that the pleader in that case had not "overlooked the necessity of averring in his complaint the essential fact 'that plaintiff had no knowledge that the same [cupola] was insecure.'" While it is sufficiently clear that the court then thought such an averment in a complaint necessary to constitute a cause of action in cases like the one then before it and the one now before us, the expression of an opinion upon a question not before the court for decision is not entitled to the same consideration as it would be entitled to if such a question had been involved in the case. In Robinson v. Railroad Co., 48 Cal. 409, it was held that in actions based on the negligence of defendants "the complaint need not allege that the injury was done without fault of the plaintiff." In McQuilken v. Railroad Co., 50 Cal. 7, the case of Robinson v. Railroad Co., supra, is cited on this point approvingly. In Railroad Co. v. Klein, 11 Ind. 38, which was an action by an employé of a railroad company against the company to recover damages for an injury received while in the employ of the company as a brakeman, there was a demurrer to the complaint. In passing upon it the court said: "It is objected to this complaint that there is no averment of a want of knowledge by the plaintiff of the defects complained of. In other words, it is insisted that the plaintiff should in his complaint negative a knowledge or notice by him of the condition of the road and machinery. We do not think such averment necessary. It was a matter of defense, which would more properly appear in the answer." In Crane v. Railroad Co., 87 Mo. 588, the court says: "It has been settled in this state since the case of Thompson v. Railroad Co., 51 Mo. 191, that contributory negligence is a matter of defense, and that the *onus* of establishing it is on the defendant, and the rule has been reiterated in the late case of Stephens v. City of Macon, 83 Mo. 345. If the *onus* of proving contributory negligence or of knowledge on the part of the plaintiff of defective machinery rests on the defendant, it would be a singular rule of pleading to require a plaintiff to aver negatively that he was not guilty of contributory negligence, or did not have knowledge of defective machinery, neither one of which he would be required to prove to make out his case, but which the defendant would be required to prove to make out his defense." In Hackford v. Railroad Co., 6 Lans. 386, the court said: "No precedent of a common-law declaration in case for negligence can be found, I think, in which the plaintiff asserts that he was free from negligence, nor any decision that he is bound to make such proof." This seems to accord with the rule that "it is not necessary to state matter which would come more properly from the other side;" the meaning of which is "that it is not necessary to anticipate the answer of the adversary, which, according to HALE, C. J., is 'like leaping before one comes to the stile.'" Steph. Pl. 350. In Lee v. Gas-Light Co., 98 N. Y. 115, the court says: "In the multitude of cases of this general character, we know of none which requires of the pleader any independent or explicit allegation that the plaintiff himself was without fault." Our conclusion is that the demurrer was properly overruled.

On the trial, while the plaintiff was testifying as a witness in his own behalf, he was asked by his counsel, "Did you ever know of any defect in the fence?" Defendant's counsel objected to the question "as incompetent and inadmissible under the pleadings;" it being "nowhere alleged in the complaint that there was any defect in the structure of the fence that was unknown to plaintiff." The objection was overruled, and, before the witness answered the question, counsel for plaintiff put the question in the following form: "If there were any defects in the fence along the right of way, were any such defects known to you up to the 17th day of April, 1882,—that is, the time when this suit was commenced?" The witness answered, "No, sir. *Counsel*. They were not? *Witness*. They were not." It does not appear that counsel for defendant renewed his objection to the question as it was finally put and answered, but we think he should nevertheless have the benefit of his objection and exception, as the change in the form of the question was one of phraseology only. If the question was irrelevant, the objection was improperly overruled; otherwise not. We think it was relevant; for while, as has already been shown, the complaint contained no allegation of plaintiff's ignorance of the defects in the fence, the answer "alleges and charges the fact to be that whatever injuries were sustained by said plaintiff were caused solely and wholly by his own carelessness and negligence, and that, but for his own carelessness and negligence, he would not have been injured." This allegation must be deemed denied by plaintiff, and it raised an issue to which the evidence was applicable, and if so such evidence was not irrelevant or incompetent. We perceive no error in that ruling.

After the plaintiff rested, defendant's counsel moved for a nonsuit, on the grounds —*First*, that there was no evidence that the train was not properly run, or that plaintiff did not know the manner in which it was run,—that is, with no cow-catcher in front; *second*, that the evidence shows that plaintiff knew of the condition of the fence.

Conceding that the evidence shows that plaintiff knew of the preposterous manner in which the train upon which he was injured was operated, and knew that cattle had previously intruded upon the track, it does not, in our opinion, follow that a nonsuit should have been granted. The right of a servant to recover on account of the master's negligence is not affected by notice of any defects other than such as the servant ought in the exercise of ordinary prudence to have foreseen might endanger his safety. 1 Shear. & R. Neg. § 214; Dale v. Railroad Co., 63 Mo. 455; Mehan v. Railroad Corp., 73 N. Y. 585. It has been expressly held that mere continuance of a servant in his work in the face of a known danger only raises a question for the jury. McMahon v. Iron Co., 24 Hun, 48; Hawley v. Railroad Co, 17 Hun, 115, 82 N. Y. 370. In fact, judgments for damages have been sustained in many cases where the servant had knowledge of the particular defect or danger which resulted in his injury. Clarke v. Holmes, reported in 2 Seymour, Neg. 953; Fairbank v. Haentzsche, 73 Ill. 236; Dorsey v. Phillips, 42 Wis. 583. In Clarke v. Holmes, supra, COCKBURN, C. J., said: "But the question whether the injury of which plaintiff complains is to be ascribed wholly to the negligence of the defendant, or whether the plaintiff had any share in bringing it about, is one wholly for the jury." The motion for nonsuit was properly overruled.

Consistently with the views above expressed, we cannot disturb the order denying the motion for a new trial. There is no evidence that the plaintiff knew of the particular defect or danger which resulted in his injury. He knew that cattle had previously been on the track, but he did not know that effective measures had not been taken before the occurrence of which he complains to prevent their coming on. We think he had a right to assume that such measures had been taken as would prevent the recurrence of that danger. At least there was evidence to justify the jury in finding that he had no knowledge of the particular defect or danger which resulted in his injury. In Trask v. Railroad Co., 63 Cal. 96, where a train hand was injured and the court found that the injury was caused by the unskillful, improper, and negligent manner in which the defendant constructed its road, it was held that "the plaintiff did not assume the risk arising from the unskillful, improper, and negligent manner in which defendant's road was constructed." "It has been often said that the master is not liable for defects in such things to a servant whose means of knowledge thereof were equal to those of the master. But this is an erroneous statement. The master has no right to assume that the servant will use such means of knowledge, because it is not part of the duty of the servant to inquire into the sufficiency of these things. The servant has a right to rely upon the master's inquiry, because it is the master's duty so to inquire; and the servant may justly assume that all these things are fit and suitable for the use which he is directed to make of them. The true definition is that, when circumstances make it the duty of the servant to inquire, it is contributory negligence on his part not to inquire. A servant is chargeable with actual notice as to matters concerning which it was his duty to inquire, and especially should this rule be applied where the servant's action is founded upon the assumption that the master ought to have known of something which he did not actually know." 1 Shear. & R. Neg. § 217. We think that rule fairly deducible from a majority of the cases in which the question was involved. There are cases, however, to the contrary, at least, seemingly so, among which is Sweeney v. Railroad Co., 57 Cal. 15, in which it was held that a new trial was properly granted on the ground of insufficiency of the evidence to justify the verdict; because "from the testimony of the plaintiff's witnesses, and as the case stood when plaintiff rested, it would hardly be rational to deny that the deceased had known for months, indeed years, before the accident which caused his death, that the road at and for miles each side of the point where the collision occurred was not protected by fences and cattle-guards; and being an intelligent, reasonable human being, and engaged constantly as a locomotive engineer over this particular portion of the road, he must be deemed to have known that cattle were likely to intrude upon the track, and that thereby there was danger of just such an accident as resulted in his death." In that case the motion for a new trial was granted; in this case it was denied. In that case it does not appear that the road had ever been fenced,—a fact of which an employe might more reasonably be supposed to take notice than of the fact that there was a defect in an existing fence. And a very large discretion has been accorded to trial courts in the matter of granting or refusing new trials in this state. But we will not attempt to parry the force of that decision by suggesting a distinction which is not obvious. The principle upon which the court proceeded in that case is not, in our opinion, supported by the weight of authority, and does not commend itself to our favorable consideration. We think the question of the plaintiff's knowledge of the danger to which he was exposed by reason of the omission to fence the road was one for the jury. In this case we are satisfied that the verdict of the jury ought not to be disturbed on the ground that it was not justified by the evidence. It appears to us that the questions discussed were fairly submitted to the jury by the court in its instructions. Judgment and order affirmed.

We concur: BEATTY, C. J.; THORNTON, J.; WORKS, J.

(78 Cal. 470)

TYRRELL *v.* BALDWIN. (No. 11,408.)

(*Supreme Court of California.* March 23, 1889.)

HOMESTEAD—RIGHTS OF SURVIVOR—APPEAL.

1. The right of homestead and exemption is the creature of the legislature, and can be limited according to the legislative will in any respect and at any time; and the law in force at the time of the death of husband or wife, and not the law in force at the time the homestead was created, controls as to the rights of the survivor.

2. Civil Code Cal. § 1265, vests the homestead absolutely in the survivor upon the death of one of the spouses, but declares that it shall in no case be liable for the debts of the owner except as therein provided. *Held*, that it was not subject to forced sale for the subsequent debts of the survivor.

3. A second motion to dismiss an appeal, based on the same facts as the former motion, which was denied without leave to renew it, will be denied.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

A. L. Rhodes and *Wm. Leviston*, for appellant. *Wm. Royal*, (*E. W. McGraw*, of counsel,) for respondent.

PATERSON, J. Action to quiet title. The appeal is from the judgment, the only question being as to the sufficiency of the findings to support the judgment of the court below in favor of the plaintiff. Two years ago the respondent moved to dismiss the appeal herein, and the motion was denied. 72 Cal. 192, 13 Pac. Rep. 475. At the hearing of the appeal on its merits the motion was renewed. It is based on the same facts, and as leave was not granted in the former order to renew the motion there is nothing to commend it to the discretion of the court. It is therefore denied. Ford v. Doyle, 44 Cal. 637.

As to the merits. On August 13, 1867, M. Tyrrell and his wife, by a declaration duly executed and recorded, selected the land in controversy as a homestead from their community property. On August 22, 1874, Mrs. Tyrrell died. She left surviving her a daughter, then aged seven years, who has ever since been dependent upon her father for support, and has lived with him. In April, 1877, one Porter commenced an action against M. Tyrrell, and in March, 1880, he recovered a judgment against him for the possession of the property sued for, and if a return could not be had, then for the recovery of $250, the value thereof, together with costs taxed at $150. The property sued for was a house that had stood on the premises in controversy, but had been removed therefrom prior to the commencement of the action. In October, 1877, Porter made, executed, and delivered to Baldwin a deed of the land in controversy, and thereupon Baldwin entered into possession of the land, and has ever since held the same. On February 8, 1883, Porter procured an execution upon his judgment against Tyrrell, which was levied upon all the interest Tyrrell had in the premises on March 24, 1880. Under this execution and levy the sheriff duly sold the land to defendant Baldwin on April 11, 1883, for $540. Defendant paid the money over to the sheriff, and, no redemption having been made, a deed in due form passed from the sheriff to defendant on November 21, 1883. Since the trial of the action M. Tyrrell died, and his daughter, administratrix, has been substituted as plaintiff.

The main question before us is whether the sale under the execution issued in Porter v. Tyrrell was valid or void. Plaintiff claims that it was void; that the land was subject to the declaration of homestead as well after the death of Tyrrell's wife as before; that it continued to be a homestead,—the homestead of Tyrrell and his daughter; and could not be taken from them on forced sale under an execution issued on a money judgment recovered against Tyrrell after the death of his wife. Defendant claims that the premises did not constitute a homestead at the time of the levy of the execution and the sale thereunder, and that they were not exempt from sale under the execution. At the time the declaration of homestead was filed for record the homestead act of 1862 was in force and effect. St. 1862, p. 519. Section 4 of that act reads as follows: "The homestead property selected by the husband and wife, or either of them, according to the provisions of said act, shall, upon the death of the husband or wife, vest absolutely in the survivor, and be held by the survivor as fully and amply as the same was held by them, or either of them, immediately preceding the death of the deceased, and shall not be subject to the payment of any debt or liability contracted by or existing against the said husband and wife, or either of them, previous to or at the time of the death of such husband or wife, except such debt or liability as the homestead was subject to at the time of the death of such husband or wife." There is no doubt that under this section the survivor would take the entire title, (that both spouses held immediately preceding the death of the deceased spouse,) but such title could not vest in the survivor until the death of the other spouse. That is the clear intent and plain letter of the statute. There can be no survivorship until a death has occurred. It follows logically, we think, that the law in force at the time the title vested should prevail as to the descent. The right of homestead and exemption is not beyond legislative control, but is the creature of the legislature, and can be limited according to the legislative will in any respect and at any time; and the law in force at the time of the death we think controls on the subject of homesteads and rights of survivors. Estate of Delaney, 37 Cal. 176; Rich v. Tubbs, 41 Cal. 34; Johnston v. Savings Union, 16 Pac. Rep. 753; Smyth, Homest. §§ 28, 30, 38. "The homestead, in fact, of the deceased husband was the homestead subsisting according to the law in force at the date of his death." Section 543, Thomp. Homest. & Ex.

If the rights of the parties herein depended upon the proper construction of section 4 of the act of 1862, quoted above, we should doubtless follow the construction given to it in Watson v. His Creditors, 58 Cal. 556. The decision in that matter is based upon the act referred to. The court seems to have assumed that the act of 1862 determined the rights of the parties. That act left the homestead to the survivor, subject to forced sale for debts accruing after the death of the other spouse. Under it the homestead was not "subject to the payment of any debts * * * existing * * * previous to or at the time of the death." Presumably it was subject to all others. But that act was amended in 1874, to take effect July 1, 1874, and it is now provided (section 1265, Civil Code,) that the title "vests in the survivor, subject to no other liability than such as exists or has been created under the provisions of this title. * * * In no case shall it be held liable for the debts of the owner, except as provided in this title." It is not claimed that the debt due from Tyrrell to Porter is one of the debts for which the homestead could be taken on forced sale under this section. Section 1241, Id. Graham v. Stewart, 68 Cal. 376, 9 Pac. Rep. 555, and Herrold v. Reen, 58 Cal. 446, cited by appellant, were cases arising under the provisions of the act of 1862. It does not follow that, because the survivor can mortgage the property after the title vests in him, it is subject to sale under execution, or that, because the title vests absolutely in the survivor, the homestead is subject to forced sale. Such title is entirely consistent with the law of exemptions. Estate of Headen, 52 Cal. 294. The homestead is subject to sale under a judgment of foreclosure of mortgage executed and acknowledged by the husband and wife, yet is exempt from forced sale under execution on a money judgment like the judgment under which the property in controversy was sold. The question before us in this case is one of exemption, rather than one of title under the homestead laws. "It was not intended by the homestead enactments to create a new estate, but simply an exemption to protect the homestead within the statutory or constitutional limit from forced sale. * * * The right of homestead is the creature of statute, unknown to the common law. But it seems to partake of an interest or right in the home, indeterminate in its duration, which may continue for the joint lives of the possessor and his wife, and in some cases until the majority of their children." Smyth, Homest. §§ 55, 69; Bowman v. Norton, 16 Cal. 219. In Gee v. Moore, 14 Cal. 472, Chief Justice FIELD said: "The wife, if surviving her husband, takes the homestead, not by virtue of any right of survivorship, arising from the alleged joint tenancy, but as property set apart by law from her husband's estate for her benefit and that of his children, if there be any. In the same way, other property exempt from forced sale is set apart to her."

The main object of the homestead laws is to protect the home of the wife and her children,—to provide a refuge for them which cannot be invaded. This is the beneficent feature, the humane character, of all laws on the subject, and the courts have held uniformly that they should receive as liberal construction as can fairly be given to them in favor of those for whose benefit the exemption was intended. "The death of one of the spouses does not alter in any way the estate or title of the homestead. * * * The statute of Texas (similar to section 1465, Code Civil Proc.) provides that all property exempt from execution (including the homestead) shall be set apart for the use of the widow and children. * * * Even if the probate court had not been by any law invested with authority to designate for the use of the widow of the deceased the property which in his life-time had been exempt from execution, yet such property would in the possession of the widow be exempt from execution or forced sale. During the existence of the marriage the husband was the head of the family, but on its dissolution by death the surviving wife was placed in that position, and in such position she has all the incidents, rights, and privileges. The same of the husband on the death of the wife. The right of either as the head of the family to retain the property exempt from execution is perfect, and the right of one is entirely equivalent to that of the other, and is neither of a higher or lower, or different, but of the same, grade, nature, and force. * * * They are co-equals in life, and at death the survivor, whether husband or wife, remains the head of the family." Smyth, Homest. § 331; Wood v. Wheeler, 7 Tex. 21.

Under section 1465 of the Code of Civil Procedure the court has no discretion. It must set aside the homestead selected from the community property. Estate of Ballentine, 45 Cal. 696. This provision seems to support the theory that the homestead is preserved for the benefit of the surviving spouse and the children, stamped with the same quality that characterized it during the life-time of the deceased spouse. That section provides that "the court may [shall] of its own motion, or on petition therefor, set apart for the use of the surviving husband or wife, or, in case of his or her death, to the minor children of the decedent, all the property exempt from execution, including the homestead selected, designated, and recorded," etc. Here the quality of the exemption is clearly impressed upon the homestead set aside. It would not be a homestead, it would be wanting in the main feature which recommends it to favor, if, upon the death of the head of the family, it were no longer protected by the law of exemption. There is greater necessity for such protection after the death of one of the spouses than before. Thomp. Homest. & Ex. § 541.

Upon principle and authority we think the sale of the land in controversy, under the execution issued in Porter v. Tyrrell, was void.

The court did not find whether Tyrrell and wife resided on the land up to the time of the death of the latter, unless the finding that they resided thereon at the time the declaration was filed establishes the fact by presumption. The findings, however, are as broad as the issues, and there is no finding of abandonment, either before or after the death of the wife. Judgment and order affirmed.

We concur: Beatty, C. J.; Works, J.

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78 Cal. 493

Potter *v.* Fowzer, County Treasurer.

(No. 11,768.)

(*Supreme Court of California.* March 25, 1889.)

Highways—Taxes and Assessments—Authority of County Board.

Pol. Code Cal. § 2645, provides that road overseers must take charge of highways in their respective districts. Section 2 51 provides that the board of supervisors may establish a general county road fund out of all the road tax collected, from which they may assist weak districts, but shall not create a debt on such districts in excess of the estimated receipts therefrom for the current year, and renders void all contracts in violation of the Code. Section 2652 provides for levying an annual poll-tax, part of which shall be apportioned to the general road fund. Section 2653 provides for levying a highway property tax, which must not exceed a certain percentage. Section 2712 authorizes the board of supervisors to pay a portion of the cost of constructing bridges out of the county general fund. *Held*, that the board of supervisors had no authority to order a claim of a road overseer, for labor done and money expended for his district, paid out of the county general fund, where it was not alleged that the claim was for building bridges, and the entire legal highway taxes for the year had been collected and exhausted, though the county government act, § 25, subd. 20, authorizes the board of supervisors to "transfer moneys from one fund to another, as the public interest may require." Thornton, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

Petition for *mandamus* by E. R. Potter against James Fowzer, county treasurer. Writ granted, and defendant appeals.

A. Yell and *J. A. Cooper*, for appellant. *T. L. Carothers*, for respondent.

Belcher, C. C. This is an appeal from a judgment awarding the petitioner a peremptory writ of mandate. The facts stated in the petition are as follows: There was due to the petitioner, as road overseer of Round Valley road-district, in Mendocino county, the sum of $2,045.23 for work and labor done, and for money expended by him for the district during the quarter year ending June 30, 1886. There was no money in the road-district fund, and only $494.61 in the general road fund of the county. A tax of 40 cents on each $100 of taxable property in the county was duly levied for the fiscal year ending June 30, 1886, but that money had all been exhausted for road purposes. On the 9th of July, 1886, the board of supervisors of the county, at a regular session, made an order that the county treasurer transfer from the surplus remaining in the general fund of the county for the fiscal year ending June 30, 1886, to the Round Valley road-district fund the sum of $1,552.62, for the purpose of paying the said indebtedness due the petitioner. Demand was made that the treasurer obey the order of the board, and transfer the money, but he refused, and has ever since refused, to do so. This proceeding was then commenced to enforce obedience to the order. The defendant demurred to the petition on the ground that it did not state facts sufficient to show that petitioner was entitled to the relief demanded, or to any relief. The court overruled the demurrer, and thereupon, the defendant declining to answer, the judgment appealed from was entered. It is contended on behalf of appellant that, under the provisions of the Political Code, the board of supervisors had no power to make the order transferring the money, and that their action was therefore void. On the other hand, it is argued for respondent that subdivision 20, § 25 of the county government act (St. 1883, p. 299) fully authorized the action of the board, and is controlling in the matter.

Section 2645 of the Political Code provides that road overseers, pursuant to orders of the board of supervisors, must take charge of the highways within their respective districts, keep them clear from obstructions and in good repair, cause banks to be graded, bridges and causeways to be made where necessary, keep the same in good repair, and renew them when destroyed. Section 2651 provides that the board of supervisors may anually set apart from the property road tax, collected from all sources, a sum not exceeding 35 per cent. of the aggregate, for general county road purposes, to be known as the "general road fund of the county;" that from this fund, besides general road work for the county, the board may assist weak or impoverished districts, but shall have no power to create a debt on any district in excess of the estimated amount of receipts from said district for the current year. The section further provides that all contracts, authorizations, and liabilities made in violation of the provisions of the Code shall be absolutely void. Section 2652 provides for the annual levy on certain persons of $3 as a road poll-tax, and authorizes the board to apportion 35 per cent. of the amount collected to the general road fund. Section 2653 provides that the board of supervisors must each year, when they levy taxes for county purposes, also levy a property tax for highway purposes, "provided that said property tax for highway purposes shall not exceed the sum of 40 cents upon each $100 of assessable property in any one year." And section 2712 provides that "whenever it appears to the board of supervisors that any road-district is or would be unreasonably burdened by the expense of constructing, or of the maintenance and repair of any bridge, or the purchase of toll-roads, they may, in their discretion, cause a portion of the aggregate cost or expense to be paid out of the general road fund of the county; or by vote of two-thirds of the board of supervisors said board may, in their discretion, order a portion of the cost of construction of bridges only to be paid out of the county general fund, as well as the general road fund." By subdivision 20, § 25, of the county government act, boards of supervisors are given the power, under such limitations and restrictions as are prescribed by law, "to establish a salary fund, and also such other county funds as they may deem necessary for the proper transaction of the business of the county, and to transfer moneys from one fund to another as the public interest may require."

It is clear from the foregoing provisions of the Code that all the money which can be used for road purposes, with a single exception, must come from the road poll-tax and a property tax of 40 cents on each $100 of assessable property, and that all contracts made and liabilities incurred in excess of the estimated receipts are void. In the excepted instance the supervisors are permitted by a two-thirds vote to order a portion of the cost of constructing bridges to be paid out of the county general fund. But this case does not come within the exception. It is not alleged that any of the labor performed or money expended by the petitioner was for the construction of bridges, and, pleadings being construed most strongly against the pleader, it must be assumed that the alleged indebtedness was created in some other way. This being so, and, assuming the petitioner's claim to be valid, it is clear that the board of supervisors had no authority to pay it with money taken from the general fund, the rule being that public moneys can be used only for the purposes and in the manner prescribed by law. The only question then is, did the provision of the county government act relied upon by respondent authorize the board to transfer the money temporarily from the general fund to the road-district fund? We do not think it did. We see no conflict or inconsistency between that provision and the sections of the Code cited. They do not relate to the same subject. Under that provision the supervisors may establish county funds, and may transfer money from one fund to another, when required by the public interest; but it cannot be construed to authorize the transfer to a fund established by law, and expressly limited in the amount of its receipts. We therefore advise that the judgment be reversed and the cause remanded, with directions to dismiss the petition.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to dismiss the petition.

THORNTON, J., dissents.

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78 Cal. 498

FINNEY v. CURTIS. (No. 12,207.)

(*Supreme Court of California*. March 26, 1889.)

ANIMAL—VICIOUS HORSE—ACTION FOR INJURIES—INSTRUCTIONS.

In an action for personal injuries, plaintiff alleging that defendant, knowing his horse to be vicious, induced plaintiff to assist him in hitching the horse to a wagon by falsely stating that the horse was gentle, the court charged that if the defendant represented the horse to be gentle, and thus induced plaintiff to take hold of him, and if the horse was not gentle, and if plaintiff was injured without negligence on his part, then defendant was responsible for the injuries sustained by the vice of the horse. *Held* error, in making defendant liable without reference to his knowledge of the viciousness of the horse, or to the intent with which the representation was made, and also as practically assuming that the horse was vicious.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by Michael Finney against Forrest D. Curtis for personal injuries. Judgment for plaintiff, and defendant appeals.

Geo. M. Gill and *S. D. Woods*, for appellant. *J. C. Campbell* and *Terry, Campbell & Terry*, for respondent.

WORKS, J. Action for damages for personal injuries done the plaintiff by defendant's horse. Trial by jury; verdict for plaintiff for $3,500; judgment accordingly; motion for new trial overruled; defendant appeals. The gist of the complaint is that the defendant, knowing his horse to be vicious, induced the plaintiff to assist him in an attempt to hitch the horse to a wagon by falsely stating to him that the horse was gentle; that plaintiff did attempt to assist him, whereupon the horse became unmanageable, knocked the plaintiff down and trampled upon him, breaking his leg, so that amputation became necessary. There was a demurrer to the complaint, which was properly overruled. The answer denied all of the material allegations of the complaint. Some questions are raised upon rulings relating to the admission and exclusion of evidence, but we have found no material errors in any of these rulings. The court, at the request of the plaintiff, gave the following instruction: "The court instructs the jury that if they believe from the evidence that the defendant, Forrest Curtis, represented the horse which he had harnessed to be gentle, and by such representations induced the plaintiff to approach and take hold of the horse, and if they believed that the horse was not gentle, and the plaintiff was, without negligence on his part, injured by said horse, then the defendant is responsible for the injury sustained by the vice of the horse." The giving of this instruction is assigned as error. The question is elaborately discussed in the briefs. There appears to be some doubt in the mind of counsel whether the action is founded on fraud or negligence, and the elementary principles relating to each are learnedly discussed, and numerous authorities cited and quoted from at length. The appellant favors us with 23 printed pages on this question alone in his original brief, and his reply contains 14 additional pages on the same subject. We desire to give to the arguments of counsel a full and careful reading, but such a brief as this is wholly unnecessary and burdensome. What we need for the proper consideration of a case is a clear, brief statement of the points made, with a citation of authorities bearing directly upon them. Long quotations from authorities are unnecessary. We can read the original quite as conveniently Where the quotation contains a brief statement of the point relied upon it is proper, but not otherwise. We call attention here to what seems to be the growing tendency of attorneys to overburden us with long briefs to no purpose but to delay us in our work, and to weaken the presentation of their cases. The instruction is erroneous. It makes the defendant liable without reference to his knowledge of the vicious nature of the horse. The rule is well settled that the owner of an animal, not naturally vicious, is not liable for an injury done by such animal, unless it is affirmatively shown, not only that it was vicious, but that such owner had knowledge of the fact. Shear. & R. Neg. §§ 187, 188; 3 Suth. Dam. 53. This case differs from ordinary cases, in that the plaintiff was induced to put himself in a place of danger by the representation of the defendant that the horse was gentle. The defendant being the owner of the horse, he had a right to rely upon this statement, and act upon it. But the instruction was erroneous for another reason. It makes the defendant liable without reference to the question whether he had knowledge that the horse was vicious or not. The fact that the plaintiff was injured by the horse does not prove that the horse was vicious. The instruction practically assumes this by the closing words: "Then the defendant is responsible for the injury sustained by the vice of the horse." The instruction is also objectionable for the reason that it makes the defendant liable for the representation that the horse was gentle without any reference to the intent with which it was made. The defendant testifies that he told plaintiff the horse was gentle, and he did not need his assistance to hook him to the wagon.

The only other question necessary for us to determine is as to the sufficiency of the evidence to sustain the verdict. As to its insufficiency we entertain no doubt. In order to support a verdict for the plaintiff it was necessary to show, either that the horse was of a vicious disposition, or that he was so negligently handled by the defendant as to cause the injury. Neither is shown. There is nothing in the evidence even tending to show that the horse had ever shown an evil disposition before the time of the injury, or that he had ever done so since up to the time of the trial. It appears that the horse was young, and not broken to harness, which was known to plaintiff as well as defendant; that plaintiff attempted to assist the defendant to put him to a wagon with another horse; that while plaintiff was at his head he plunged, struck the plaintiff down, and trampled him under foot, breaking and mangling his leg, so that it had to be amputated soon after. It does not appear that the injury resulted from the negligence of either the plaintiff or the defendant. The mere fact that the horse became unmanageable on the occasion of the injury does not show that he was vicious or generally unsafe, nor does it prove that the statement of the defendant that the horse was gentle was untrue. Kennedy v. Mayor, 73 N. Y. 365. So far as the evidence shows the statement made by the defendant that the horse was gentle may have been entirely true. If so, there is no ground upon which the verdict can be upheld. There are other questions argued in the briefs, but the conclusion we have reached renders it unnecessary to consider them. Judgment and order denying a new trial reversed, and cause remanded.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

THORNTON, J., (*concurring.*) I concur in the judgment on the ground that the court below erred in giving the instruction quoted and commented on in the opinion of Justice WORKS. The instruction makes the defendant responsible if to his knowledge the horse was gentle and free from vice, provided the jury find that the horse was not gentle. This is equivalent to holding that the defendant guarantied that the horse was gentle, and was therefore bound to indemnify the plaintiff for any damage which he suffered by the vicious act of the horse. If the defendant knew that the horse was not gentle, and represented to the plaintiff that he was, and the plaintiff, relying on such representation, and induced by it, assisted defendant in hitching him, and while rendering this assistance suffered from the vicious conduct of the horse, he (the defendant) would be responsible. The defendant would also be responsible, if in ignorance of the fact whether the horse, which was an unbroken colt, was gentle or not, he carelessly represented to plaintiff that he was gentle, and the plaintiff relied on such representation and, acting on it, received an injury. I find no other error in the record.

BEATTY, C. J., (*concurring.*) I concur in the judgment on the ground that the instruction commented upon was not sufficiently guarded. The jury should not have been told that the defendant was responsible if he induced the plaintiff to take hold of the horse by representing him as gentle, when, in fact, he was not gentle. The defendant was not liable unless, in addition to his representation contrary to the fact, he either knew the representation to be false, or had no reasonable ground for believing it to be true. Nor was the defendant liable, in my opinion, unless the representation was made for the purpose of inducing the plaintiff to act as he did; and the evidence is conflicting as to whether the defendant, at the time he made the statement that the horse was gentle, told the plaintiff that he desired his assistance, or desired him to keep away.

FANNING *v.* LEVISTON *et al.* (No. 11,426.)

(*Supreme Court of California.* March 26, 1889.)

STREET ASSESSMENTS—EVIDENCE.

In an action to foreclose a street assessment, where the warrant, assessment, etc., have been introduced in evidence under St. Cal. 1871–72, p. 815, § 12, providing that the same shall be *prima facie* evidence of the regularity and correctness of the assessment and all prior proceedings, it appeared that a certain street had been graded about 20 years before, and that the difference between the official grade and the existing grade nowhere exceeded 1¾ feet. *Held*, that this was not sufficient to overcome the presumption under Code Civil Proc. § 1963, subd. 15, that official duty has been regularly performed.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by E. Fanning against William Leviston and F. G. Gilman, to recover on a street assessment. There was a judgment for defendants, and plaintiff appeals.

J. M. Wood, for appellant. *William Leviston*, for respondents.

WORKS, J. This is an action to recover upon a street assessment, and involves the same question that is decided in the case of Fanning v. Bohme, 18 Pac. Rep. 158. The evidence here is the same in all material respects as in the case cited, and relates to the same question. Therefore upon the authority of that case, the order denying a new trial is reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; PATERSON, J.

(78 Cal. 504)

SOUTHWICK *v.* DAVIS *et ux.* (No. 12,796.)

(*Supreme Court of California.* March 26, 1889.)

HOMESTEAD.

1. Under the California statute requiring the declaration of a homestead to contain a description of the premises, and "an estimate of their actual cash value," a declaration stating that the property claimed "does not exceed in value the sum of $5,000" is sufficient.

2. The failure of the county recorder to note the recordation of the declaration in his index of recorded instruments does not affect the validity of the homestead.

In bank. Appeal from superior court, Eldorado county; GEORGE E. WILLIAMS, Judge.

Action by Southwick against B. F. Davis

and wife to foreclose a mortgage. From a judgment for plaintiff defendants appeal.

Blanchard & Swisler, for appellants. *Irwin & Irwin*, for respondent.

MCFARLAND, J. This is an action to foreclose a mortgage on certain premises, executed to the plaintiff by the defendant B. F. Davis, on October 11, 1884. The defendant Mary S. Davis, wife of said B. F. Davis, answered, setting up that at and before the date of said mortgage the said premises were the homestead of her husband and herself. Defendant Jenks set up the same defense, alleging that after the execution of the mortgage said husband and wife conveyed the premises to him. The court below rendered judgment for plaintiff, and the said defendants who answered appeal from the judgment. The findings of the court show that on January 31, 1876, the said B. F. Davis and his said wife, Mary S. Davis, with several minor children, were residing on the premises, and that on said day the said B. F. Davis executed and filed for record with the county recorder a declaration of homestead upon said premises, and that the execution and recording of said declaration were perfectly valid, except in the particulars hereinafter mentioned.

1. It is found by the court, and argued by respondent, that the homestead was invalid because the statement in the declaration of the value of the property is that it "does not exceed in value the sum of $5,000;" the position being that the estimate of value should have been more specific, and that the consequence of this alleged defect is that the declaration is utterly void, and the whole structure of the homestead destroyed. We do not think that this position is tenable. The preservation of a homestead for the family is a marked feature of our law. It is enjoined by the state constitution itself. Of course it was necessary for the legislature to provide some manner by which one desiring to claim a homestead should make a public declaration of the fact, and designate the particular premises intended to be so claimed. But surely statutory provisions to that end should not be subjected to the rule of strict construction. Statutes for the purpose of carrying out the constitutional command are remedial, and should be liberally, or at least fairly and reasonably, construed. The homestead right is not one to be industriously pinched and circumscribed and circumvented and beaten back. If the facts of an honest homestead claim be present, a substantial compliance with statutory provisions about making the claim public should be deemed sufficient.

The Code provides, among other things, that the declaration must contain a description of the premises claimed, and "an estimate of their actual cash value." It is difficult to imagine the precise purpose of this provision. It is admitted on all hands that the correctness or incorrectness of the estimate has no effect whatever upon the validity of the claim. If the estimate were 10 times more than the actual value, or only one-tenth as much, the claim would not be bad on that account. There is, however, a difference in some respects between a homestead on land worth more than $5,000, and one on land not worth more than that amount, and it may be that the legislature merely intended to have an estimate with respect to that particular value. If so, then, of course, the estimate in the case at bar was sufficient. At all events, the provision is a very loose one,—too loose to have applied to it the rule of strict construction, even if that rule were not inapplicable for other reasons. In ordinary affairs, out of court, if a man were asked his estimate of the value of a certain piece of property, and he should answer "Not exceeding $5,000," the common inference would be that he thought it worth in the neighborhood of, but not more than, $5,000. Could it be fairly said that he had made no "estimate" at all? And so, in the case at bar, considering all the circumstances above alluded to, we do not think, to say the very least, that the language used in the declaration was such a total failure to comply with the statute as made the homestead void.

The authorities cited by respondent do not establish the law against the views above stated, while the very latest decision of this court upon the point seems to be exactly in accordance with those views. In Scuyler v. Broughton, 18 Pac. Rep. 437, where the opinion written by SEARLS, C. J., was concurred in by all the justices, (except one who was absent,) the language of the declaration of homestead was this: "And we do place the value of said land at a sum not to exceed sixteen hundred dollars." That language, for the purpose of the point at issue, cannot be distinguished from the language used in the case at bar; and yet in that case the language was held to be a sufficient compliance with the Code. The court, among other things, say: "The statute in reference to homesteads is a remedial measure, and, as such, is to be liberally construed. * * * Where these several acts have been substantially performed, and where the declaration contains the essence of the statutory requirements, the construction should be so liberal as to advance the object of the constitution and statute. By use of the language adopted by the declarants in this case we think it may be fairly inferred they estimated the value of the premises to be about $1,600. The phrase used, [repeating it,] though not precise, is such as is frequently used to convey the impression that the figures mentioned approximate the judgment of the speaker."

2. The court below held the homestead to be invalid solely upon the ground above stated. We shall not, therefore, discuss at length the other points made by respondent in support of the judgment. The failure of the county recorder to note the recordation of the declaration in his index of recorded instruments could not affect the validity of the

homestead. We think that the form of the certificate of acknowledgment of the declaration was sufficient, and that the official character of the officer taking the acknowledgment sufficiently appears. Judgment reversed, with directions to the court below to enter judgment for the defendants who answered.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.

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78 Cal. 511

PEABODY *v.* PRINCE. (No. 11,922.)

(*Supreme Court of California.* March 28, 1889.)

PUBLIC LANDS—PATENTS—PLEADING—JUDGMENT.

1. In ejectment, plaintiff claiming under a patent from the state, and defendant contending that the patent was void, and asking that plaintiff be decreed to hold the legal title, and be required to convey to defendant, the validity of the patent need not be considered, as if it is valid defendant has no rights, and if invalid a conveyance to defendant would give no title.

2. A cross-complaint alleging that before defendant applied to purchase the land a third person applied, and he and plaintiff settled the contest between them in fraud of defendant, the third person receiving money from plaintiff, and withdrawing from the contest, must also allege, to entitle defendant to recover on the ground of fraud, that the application of the third person was invalid, and that defendant possesses the qualifications necessary to entitle him to become a purchaser.

3. The validity of a judgment in a contest between two applicants for purchase of public lands cannot be attacked by the defendant in ejectment brought by the applicant in whose favor the judgment was rendered.

Department 1. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Ejectment by one Peabody against one Prince. A demurrer to the cross-complaint was sustained, and defendant appeals.

S. O. Houghton, for appellant. *J. M. Lesser* and *J. H. Logan*, for respondent.

WORKS, J. The complaint is ejectment in the usual form. The defendant pleaded, by way of cross-complaint, in substance, that the lands in controversy were properly listed, and on or about March 1, 1869, relinquished, and certified over to the state of California by the United States as lieu lands; that on the 21st day of March, 1870, the plaintiff made application to purchase the same from the state, which application was approved by the surveyor general, February 12, 1872; that plaintiff paid to the county treasurer of the proper county the amount required by law to be paid on the land, but did not pay the three dollars required to be paid for the certificate of purchase; that the surveyor general had no authority to accept any application for the purchase of said lands, because there was no law then in force authorizing the sale thereof; that on the 14th day of May, 1878, one Benjamin made application to purchase said land, and his application was approved July 27, 1878; that on the 30th of June, 1879, the plaintiff filed his protest and demanded that the contest between Benjamin and himself be certified to the proper court for trial, which was done on said day; that on August 28, 1879, the plaintiff brought his action against Benjamin to have said contest adjudicated and determined, to which action Benjamin appeared and answered. The cross-complaint then proceeds to allege such facts as were necessary to show that said lands were vacant and open to settlement and purchase; that on the 10th day of August, 1882, the defendant made and filed his application to purchase the land, stating therein the facts required by law; that on the 27th day of October, 1882, he filed in the office of the surveyor general the necessary proof that he was an actual settler, in good faith, on said land, and had resided thereon continuously; that in said month of October he filed his protest against any evidence of title being issued to either the plaintiff or said Benjamin, which protest the surveyor general refused to recognize, and refused to certify his said protest to any court. It is further alleged that the plaintiff, well knowing that his application was invalid, fraudulently confederated with said Benjamin, with the intent to defraud the defendant out of his rights, and in pursuance of that object paid to said Benjamin a sum of money, in consideration of which Benjamin executed to him a conveyance of said land, and withdrew his answer in the contest pending between them, and stipulated that plaintiff should be allowed to proceed in said action without any defense thereto; that plaintiff failed to record said deed, and concealed the same; that on the 12th day of April, 1884, the plaintiff presented said stipulation to the court, and procured a judgment by default, and, without offering any proof, procured a judgment entitling him to a patent for the land upon payment of the balance of the purchase money, and thereafter procured a patent vesting the legal title to said property in him; that neither the plaintiff nor Benjamin were ever in possession of said real estate, or any part of it; that plaintiff was not entitled to judgment in his favor in said contest under the allegations of his complaint, and only procured the same through said fraud and conspiracy; and that by said fraud the defendant was prevented from exercising the right given him by law of purchasing and acquiring the legal title to said land. The prayer of the complaint is that it be decreed that plaintiff holds the legal title to said land in trust for the defendant, and that he be required to convey to him.

The court below sustained the demurrer to this cross-complaint, and, the defendant declining to amend, judgment was rendered against him on the demurrer, and he appeals. The cross-complaint, so far as it attacks the plaintiff's patent, is based upon two grounds: (1) That the same was wholly void for want of authority in the surveyor general to accept any application for the purchase of lieu lands at the time the plaintiff made his application; (2) that the plaintiff procured the patent by a fraudulent arrangement with Benjamin, by which the latter withdrew from the contest, and allowed the plaintiff to take judgment by default.

1. As to the first of these we need not stop to inquire whether the surveyor general had authority to accept the application or not. The appellant contends that the patent was absolutely void for this reason. Conceding this to be true, it is fatal to the remedy sought to be enforced by the cross-complaint, the prayer of which is that it be declared that the plaintiff holds the legal title in trust for the defendant, and that he be required to convey to him. If the patent was void, as claimed, the plaintiff had no legal title to hold or convey, and certainly a trust cannot be founded upon a void patent from the state. Treating the patent as valid, the defendant, as we shall show in passing upon the second ground for relief, shows no right in the property to be enforced.

2. In order to recover on the ground of fraud, the defendant must show some interest in the property of which he was deprived by reason of the fraud. If he fails to do this, he shows no injury, and therefore no ground of complaint. In our judgment the cross-complaint wholly fails to show any right in the defendant. It will be seen, from the foregoing summary of the allegations of the cross-complaint, that the defendant made his application to purchase long after those of both the plaintiff and Benjamin. Conceding all that is claimed, as against the right of the plaintiff to purchase, it is neither alleged nor claimed that Benjamin's application, which stood in the way of the defendant's right to purchase, was not valid. If it was, the defendant's application gave him no vested right in the property as against the plaintiff or any one else. But, laying aside this impediment to his right to make application, he fails to show any right to purchase, or that any right could have vested in him by virtue of such application. The Code requires that in order to entitle a party to purchase he shall make affidavit to certain qualifications necessary to entitle him to become such purchaser. Pol. Code, § 3495. And it is held by this court that when he attempts to assert his right to the land, under an application to purchase the same, he must affirmatively allege and prove that he possesses the necessary qualifications. Burrell v. Haw, 40 Cal. 373; Christman v. Brainard, 51 Cal. 534; Wright v. Laugenour, 55 Cal. 280. If this is necessary in a contest between the parties, it must also be necessary where one of the parties has already procured the patent, as in this case. The cross-complaint does not allege these facts. It alleges that an application was made containing the facts, but this is not enough. It presents no issue as to the truth of the facts stated in the application, but only as to the fact of making it.

We do not regard the complaint as sufficiently alleging fraud. The only act averred is the purchase of Benjamin's interest in the property. If Benjamin's claim was valid, the defendant could not have been injured by its abandonment, as it stood directly in the way of his right to acquire the land. If invalid, its removal from the contest was unnecessary to the success of the plaintiff, and therefore the defendant could not be injured.

As to the claim that the judgment in plaintiff's favor in the contest was rendered without any evidence being given to support it, the judgment cannot be attacked for that reason in this collateral way. Burrell v. Haw, 48 Cal. 222. Again, conceding for the cross-complaint all that it is claimed for it, in other respects, the patent having issued, and being valid on its face, its validity could not be attacked by the defendant on any such ground. The right to set aside the patent rested in the state alone. People v. Stratton, 25 Cal. 242.

Other grounds might be stated in justification of the ruling of the court below, but it would extend this opinion unnecessarily. Judgment affirmed.

We concur: Beatty, C. J.; Paterson, J.

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78 Cal. 517

Taylor *v.* Baldwin. (No. 11,639.)

(*Supreme Court of California.* March 29, 1889.)

Master and Servant—Injuries to Servant.

1. Plaintiff was employed as the superintendent of private gas-works owned by defendant, and operated only to supply his buildings. Plaintiff had sole charge and authority over the works, and no one else had power to direct their management. He had been employed by the contractor in their construction, and understood their arrangement; the defendant having no practical knowledge of the business. The works were well constructed. The gas ceasing to flow by an obstruction in the pipes, plaintiff, at the request of defendant's employé, undertook to remedy it. He was advised by the contractor (who had, however, ceased his connection with the works) to remove certain weights from the balance tub of the tank or receiver, in order to increase the pressure. He did so, knowing it to be dangerous, removing so much of the weight that the receiver overturned, causing an escape of gas, from which an explosion resulted, severely injuring plaintiff. *Held*, that plaintiff was not acting under the orders of his employer, but on his own responsibility, knowing the danger, and could not recover damages for his injuries.

2. The *gravamen* of the complaint being the stoppage of the pipe through defendant's alleged negligence, and the consequent resistance of the gas against the gasometer, whereby the explosion resulted, while the evidence shows that the resistance could not have produced the accident, and that the only effect the stoppage had was to cause the trial of the injudicious experiment of removing the weights, the complaint is not sustained, the stoppage not being a proximate cause of the injury.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

Action by John H. Taylor against E. J. Baldwin, to recover for personal injuries alleged to result from defendant's negligence. Judgment for $1,500, and defendant appeals.

Lloyd & Wood, for appellant. *Hall & Rodgers*, for respondent.

PATERSON, J. The defendant constructed gas-works in the city of San Francisco, and laid pipes therefrom to his hotel, theater, and market, to supply the same with gas. Everything worked well for a few weeks, but gradually the flow of gas decreased, and at the end of two months had almost entirely ceased. It was thought that the pressure was not sufficient, and plaintiff, who was superintendent of the works, acting upon the suggestions of others, was attempting to increase the pressure by taking the weights out of the buckets attached to the gasometer, when the latter tilted up on one side, allowing the gas confined within it to escape. The escaping gas, as soon as it reached the furnace, ignited, and, communicating with that in the gasometer, the whole exploded with great force and violence, throwing the plaintiff out of the building, and across the street, against the fence, burning his hands, face, neck, and other portions of his body in the most deplorable manner. Plaintiff seeks in this action to recover damages in the sum of $10,000 for the injuries sustained by him, alleging that in consequence of the explosion he was disabled from attending to any business for about nine weeks; that his hands and face have been permanently scarred and disfigured, the joints of his fingers permanently stiffened, and that his nerves have become permanently weakened in consequence of the shock. The *gravamen* of the complaint is that the defendant carelessly and negligently constructed and maintained the gas-works; that he negligently permitted a gunny sack to remain in one of the gas-pipes leading to the hotel, causing a stoppage of the flow of gas, and a consequent resistance against the gasometer, resulting in the explosion. It is also claimed in the complaint that the gasometer was not properly weighted, ballasted, or supported by timbers.

It is established by the evidence beyond all controversy that the accident was caused by taking the weights out of the bucket, thus removing the balance from the receiver, and permitting it to tip over. There is no evidence whatever to the contrary. One of the witnesses said: "The sack in the pipe would have no effect at all upon the holder. If you were to put a valve on the pipe, and shut the gas off absolutely, it would have no effect upon the holder. There is no such thing as a back pressure on the holder. * * * You cannot press anything back into the pipes and raise the holder. There is no back pressure to the gasometer, whether the pipe is stopped or whether it is open. It does not make any difference in the pressure of the gas. * * * If the outlet pipe is stopped, and the gas continues flowing into the receiver, it rises. * * * The fact that the gas receiver tipped up at the side where the outlet pipe is, was not the cause of any reaction from the outlet pipe. It is a matter of physical impossibility for the gas to come back through the outlet pipe." This evidence is nowhere contradicted. The evidence is equally conclusive in support of appellant's contention that the utmost care and caution was used by the defendant in the construction of the works. Nothing was spared to make them perfect in every respect. The defendant did not claim to know anything about the proper construction of the works, but it is undisputed that he employed the best mechanics and engineers and adopted the most approved methods.

The evidence does not show how the gunny sack came to be in the gas-pipe. The defendant claimed that it was put there by some enemy, maliciously to injure him. (There was great opposition to the construction of the works.) Plaintiff claimed that it was left there by the workmen who laid the pipe, it being the custom to stop up the open end of the pipe in the evening as the work progressed to prevent obstructions from entering it. But it is unnecessary to a determination of the rights of the parties here to inquire how it came in the pipe, it being clear, we think, that the stoppage of the pipe was not the proximate cause of the accident. A proximate cause must be one without which the accident would not have occurred, and, as shown by the uncontradicted evidence, the accident could not have occurred by the resistance of the gas upon the gasometer from the outlet pipe. The only sense in which it can be said the gunny sack caused the accident is that it led to the experiment which resulted in the accident. It simply led to a belief that a greater pressure was needed. If reasonable skill and care had been exercised in the attempt to secure a greater pressure, the accident would not have occurred, notwithstanding the presence in the pipe of the gunny sack.

But it is claimed by respondent that the plaintiff was merely obeying the orders of his superior in taking the weights out; that he (plaintiff) was acting under the directions of Condict, the engineer who built the works for defendant, and McAbee, to whom the defendant had referred the plaintiff, and who was Baldwin's representative; but there are two answers to this contention: (1) Plaintiff had sole charge and control of the works as superintendent,—no one had authority to order or direct him as to the manner of running the works; and (2) the plaintiff was fully aware of the danger attendant upon the removal of the weights from the balance tub.

The plaintiff was employed by Condict, the contractor, to assist in constructing the works and placing the machinery. He remained until the job was finished, and the works turned over to, and accepted by, Baldwin, in August, 1881, at which time Condict's connection with Baldwin ceased. Condict testified (and his testimony is not contradicted:) "I have nothing to do with Taylor or Mr. Baldwin after that. What I said to Mr. Taylor was a suggestion; it was merely advisory.

I had no power to discharge Mr. Taylor. I had nothing whatever to do with the works at the time. It was simply a matter of friendly advice. Because I put up the works, it was supposed I knew more about them. He was simply seeking information from me in relation to what suggestions I would make, and I made the suggestion to Mr. Taylor." The defendant testified that, after the works were turned over to him, Condict had nothing to do with them; that he never employed him after that, or authorized him to make any suggestions about the pressure on the gas. McAbee, according to plaintiff's own testimony, had authority simply to furnish him (plaintiff) anything which was "required to run the works." The evidence shows that McAbee was a general utility man about the hotel. He testified that all he had to do was simply to buy fuel and oil, or anything there was to buy when Mr. Taylor wanted it. He certainly had no power to hire or discharge the plaintiff. The plaintiff himself testified that he was turned over to Baldwin by Condict as superintendent to run the works. He testified: "I manufactured gas for Baldwin. I had sole charge of the building at the time, in the day-time only. I know how I was employed by Baldwin for that purpose. Mr. Condict turned me over to Mr. Baldwin when he turned the works over, as I understood, to run the works. * * * I never had any conversation about my qualities to take charge of the works. I knew Mr. Condict had turned the works over to him because he told me so, and he told me I was to continue on the same as I was, but in the employment of Mr. Baldwin, and in charge of the gas-works. * * * I continued as superintendent of the works regularly along down to the time of the explosion. I was not superintendent at night." The defendant testified that the plaintiff was turned over to him as a first-class man and engineer, capable of taking charge of the works, and that he paid him for that, and gave him full charge of the works during the day. He further testified that McAbee had no authority beyond the purchase of coal and oil and other materials whenever Mr. Taylor needed them as supplies for the gas-works.

That plaintiff was fully aware of the danger attendant upon the removal of the weights from the balance tub is apparent from his own testimony, wherein he says that he assisted in constructing the works, and that he took items as the works went up. He said: "I did not assist in putting in the tank or receiver. I saw the men putting the ropes on them, balancing them. It was balanced by the bucket or tub. The guys or ropes they put on ran through the pulleys under the cross-beams and attached to the tub. * * * I saw the men balancing it. They put the weights in the tub for the purpose of taking some of the pressure off the holder. The weights balanced the holder. * * * They put it up five or six sheets when it upset. * * * It could not tilt on either side when it was swung up by the guys. It could not swing either way when the guys were on it. If it did tilt, I would take up one of the guys. * * * I knew there was no supports around the holder, and that it was balanced by the guy-ropes. I knew it was balanced by the ropes and the weights in the tub. If the weights were taken out of the bucket or tub, the receiver would tip over. I had charge of them."

It is claimed by counsel for respondent that the witness, in making these statements, was speaking from information acquired after the accident occurred. It does not appear so from the language as printed in the transcript. On the contrary, it appears quite plain, we think, that the plaintiff was speaking of his knowledge of the workings of the gasometer and its attachments at the time the accident occurred; and we could not, without placing a strained construction upon the testimony, sustain the respondent in his contention. If we are right in our view of the evidence, the verdict of the jury is against the evidence, and contrary to the instructions of the court. As the case is presented to us, it appears that the plaintiff has no one to blame for the injuries he has sustained but himself. He took charge of the works knowing the dangers of the employment, and that the defendant relied upon his skill and knowledge in the business. He acted upon the suggestions of Condict and McAbee at his peril. They had no authority from the defendant to direct him in his work, and the defendant cannot be held responsible for the result of their conference with plaintiff.

Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; MCFARLAND, J.

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78 Cal. 529

BRECKINRIDGE *v.* CROCKER. (No. 12,583.)

(*Supreme Court of California.* March 29, 1889.)

STATUTE OF FRAUDS—LANDS.

1. Defendant owned a tract of several hundred acres of land, on which a town was laid off. A map was made of the town, a portion of it contain-

ing 100 blocks, being specially designated on the map by a red line drawn round it. This map was not recorded, but a map of the 100 blocks was recorded, and portions of this smaller territory were sold, and the town built thereon, the tract outside of the red lines being used principally for farming. Plaintiff proposed to defendant's agent to buy the unsold property, whereupon the latter telegraphed to defendant that he was offered a certain sum for the "balance of the M. town property," on certain terms mentioned. Defendant replied, accepting the offer for the "M. property," and the agent telegraphed to plaintiff a copy of defendant's dispatch. *Held* that, it being impossible to determine from the telegrams just what property was intended to be included in the proposition and acceptance, plaintiff alleging that it referred to the unsold residue of the whole tract, while defendant insisted that it related only to the residue of the smaller tract, the contract was void under the statute of frauds.[1]

2. There being nothing in the telegrams showing by whom the offer was made, the contract was for that reason also incomplete and invalid.

Beatty, C. J., and Thornton, J., dissent.

In bank. Commissioners' decision. Appeal from superior court, Merced county; Charles H. Marks, Judge.

Action by J. W. Breckinridge against Charles Crocker for damages for breach of a contract to convey land. The plaintiff was nonsuited, and appeals.

D. M. Delmas, *C. J. Swift*, and *J. K. Law*, for appellant. *P. D. Wiggington* and *L. D. McKisick*, for respondent.

Belcher, C. C. This is an action to recover damages for the breach of an alleged contract to convey certain real property. In the court below a nonsuit was granted, and the appeal is from the judgment thereupon entered. It appears from the record that in 1871 the Contract & Finance Company, a corporation, was the owner of a tract of land in Merced county containing several hundred acres. On this tract a town was laid out called the town of "Merced," and a lithographic map of the town was made, showing the land to be divided into blocks and lots. On the map a red line was drawn around an oblong portion of the land, containing 100 blocks, and of this 100 blocks another map was made and recorded in the county recorder's office. The larger map was never recorded. Lots and blocks within the red line were sold from time to time, and on these lots has grown up the town of Merced. The land outside the red line has been used chiefly for farming purposes. In 1875 all of the property not then sold was conveyed to Charles Crocker, and he thereafter held the title for himself and as trustee for others. In 1883 the property was assessed to Crocker for $96,360. In due time he appeared by H. B. Underhill, his agent, before the county board of equalization, and asked to have the assessment reduced to $65,000. Underhill stated before the board that the property was not worth more than $65,000, and that Crocker had authorized him to offer it for sale at that sum to any one who desired to purchase it. This offer was heard by plaintiff, and after the adjournment of the board he informed Underhill that he would take the property at that figure if he could have time to make the payment. Underhill replied that his orders were to sell for cash. After some discussion plaintiff finally offered $70,000 for the property,—$5,000 payable the next Tuesday, and the balance in 30 days. It was then agreed that Underhill should telegraph Crocker for instructions, and upon receipt thereof should communicate with plaintiff by telegraph. Underhill thereupon sent to Crocker, at San Francisco, the following telegram: "July 19, 1883. Charles Crocker, San Francisco, Cal.: I am offered seventy thousand for balance of Merced town property,—five thousand on Tuesday next; balance in thirty days. This is according to your proposition. Telegraph me at Fresno your answer. H. B. Underhill." On the same day Crocker answered as follows: "San Francisco, July 19th. To H. B. Underhill: Accept the seventy thousand dollars offer for Merced property. Charles Crocker." On the next day Underhill sent to plaintiff the following telegram: "Fresno, July 20, 1883. J. W. Breckinridge: Mr. Crocker has telegraphed me as follows: Accept the seventy thousand dollars offered for the Merced town property. H. B. Underhill." On the Tuesday following plaintiff called at the office of Mr. Crocker, in San Francisco, and he relates what there transpired, as follows: "I walked into the office and spoke to Mr. Crocker, and told him that I had come down to make the first payment on this Merced property, and he replied: 'Go and see Judge Underhill about it. He is authorized to act for me in the matter;' and then I said, 'I suppose, Mr. Crocker, this is all a friendly business relation,—a business matter.' And he said, 'No; there has been a mistake. Judge Underhill will explain it. He will act for me in this matter;' and he directed me to Judge Underhill." Plaintiff then went away, but returned during the same afternoon with $5,000 in gold coin. When he returned, neither Mr. Crocker nor Judge Underhill was in the building, and plaintiff did not see either of them again that day. On the next day plaintiff went to Judge Underhill's office, and told him he had come to make the first payment on the contract for the Merced town property, and he thereupon tendered to him $5,000 in gold coin as and for such first payment. Underhill replied that he could not receive the money, and that he had been instructed by Mr. Crocker to decline any tender, on the grounds—*First*, that there was no contract; and, *second*, that the tender was not made in time. All negotiations then ceased, and thereafter plaintiff brought this action, claiming that he had a contract for the sale of all the land owned by Crocker, and represented on the larger map, and asked damages in the sum of $200,000.

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[1] In general, as to what is a sufficient memorandum of an agreement relating to land to satisfy the statute of frauds, see Mellon v. Davison, (Pa.) 16 Atl. Rep. 431, and note; Johnston v. Jones, (Ala.) 4 South. Rep. 748, and note; Clampet v. Bells, (Minn.) 39 N. W. Rep. 495, and note.

The Code provides that "no agreement for the sale of real property, or of any interest therein, is valid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent thereunto authorized in writing." Civil Code, § 1741; and see Code Civil Proc. §§ 1971–1973. In order to take a contract for the sale of land out of the statute of frauds, it is not necessary that there be a formal contract, drawn up with technical exactness. A memorandum of the agreement is sufficient, and it may be found in one or more papers, some or all of which may be telegrams. But the memorandum must contain all the material elements of the contract; that is, it must show who is the seller, and who is the buyer, what the price is, and when it is to be paid, and must so describe the land that it can be identified. The law upon this subject is declared in Grafton v. Cummings, 99 U. S. 106, by Mr. Justice MILLER, as follows: "In an agreement of sale there can be no contract without both a vendor and vendee. There can be no purchaser without a seller. There must be a sufficient description of the thing sold, and of the price to be paid for it. It is therefore an essential element of a contract in writing that it shall contain within itself a description of the thing sold by which it can be known or identified, of the price to be paid for it, of the party who sells it, and the party who buys it." If the seller refuses to perform his contract, the buyer has two remedies,—he may bring an action for a specific performance of the contract, or for damages. In the latter case the rule as to the measure of damages is declared by the Civil Code as follows: "Sec. 3306. The detriment caused by the breach of an agreement to convey an estate in real property is deemed to be the price paid and the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon; but adding thereto, in case of bad faith, the difference between the price agreed to be paid and the value of the estate agreed to be conveyed, at the time of the breach, and the expenses properly incurred in preparing to enter upon the land." But, to whatever form of action resort may be had, the burden is upon the plaintiff to show by the writings that a contract definite and certain in its terms was entered into between the parties, and, failing to do that, he must fail to obtain any relief.

In Association v. Phillips, 56 Cal. 546, it is said: "A court of equity will not specifically enforce any contract unless it be complete and certain. This rule applies as well to parties as to price, subject-matter, etc. Nor can the aid of a court of equity be had to specifically enforce that which is only the basis of an agreement, and not the agreement or contract itself." In Magee v. McManus, 70 Cal. 556, 12 Pac. Rep. 451, it is said that "the thing agreed to be done must be definite and certain in its terms and in itself, and the party who claims performance must make out by clear and satisfactory proof the existence of the contract as he alleges it." And see Burnett v. Kullak, 18 Pac. Rep. 401. In this case the only evidence of any contract between the parties is found in the three telegrams above quoted, and the question is, do they show such a contract as can be enforced by the courts? The court below thought they did not, and, in our opinion, its conclusions in this respect were warranted, and must be sustained, for two reasons.

1. It cannot be ascertained from the telegrams who the buyer was. There was an offer of $70,000, but by whom was it made? The third telegram was sent to the plaintiff, but that fact comes far short of indicating with definiteness and certainty that he was the man. It might have been sent for the information of some one else. Looking at all the papers, the answer to the question can rest only in conjecture, and that is not sufficient.

2. "A contract is an agreement to do or not to do a certain thing," (Civil Code, § 1549,) and, in order to constitute a valid contract, the minds of the contracting parties must meet, and agree to the same thing. "It is essential to the validity of a contract that the parties should have consented to the same subject-matter, in the same sense. They must have contracted *ad idem*." Utley v. Donaldson, 94 U. S. 48. "Where there is a misunderstanding as to the terms of a contract, neither party is liable in law or equity. Where a contract is a unit, and left uncertain in one particular, the whole will be regarded as only inchoate, because the parties have not been *ad idem*, and therefore neither is bound. A proposal to accept, or acceptance upon terms varying from those offered, is a rejection of the offer." Bank v. Hall, 101 U. S. 49. What was the subject-matter of the supposed contract here? The offer was for "balance of Merced town property," and the acceptance was of the "offer for Merced property." Mr. Crocker was in San Francisco, and had no knowledge of what had been said or done before the board of equalization at Merced. There were therefore no surrounding circumstances to be shown by parol. There were two maps of property at Merced. The large and unrecorded one was headed, "Town of Merced." The small one of 100 blocks was headed, "Official Map, Town of Merced, Merced County, Cal." A witness who had been county assessor since 1880 was called, and, pointing to the blocks surrounded by a red line on the large map, said: "Those I understood to constitute the official recorded plat of the town of Merced." Another witness, who was the county recorder, looking at the same map, said: "The portion delineated by the red line is the recorded map of the town of Merced. The map within the red lines is the only map recorded,—the only map of record in my office." It was also proved at the

time the offer was made the value of the land owned by Mr. Crocker within the red lines was greater than the sum offered, and that the value of the land owned by him outside of the red lines was more than twice the sum offered. Now, in view of all these facts, what did Mr. Crocker understand the words "balance of Merced town property" to mean, and what did he intend to sell? If he understood the words to mean the balance of unsold property as shown by the recorded map, then it is clear that the minds of the parties never met; for the plaintiff claims that his offer and Mr. Crocker's acceptance was for the whole property as shown on the large map. It looks to us as if there might have been, and probably was, a misunderstanding as to what was the subject-matter of the proposed purchase and sale. Certainly the contract was left uncertain in this particular, and, being so, must be regarded as only inchoate. We, therefore, advise that the judgment be affirmed.

I concur: HAYNE, C.

FOOTE, C., took no part herein.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

BEATTY, C. J. I dissent. The three telegrams undoubtedly constitute a sufficient note or memorandum to satisfy the policy and letter of the statute of frauds; if taken together, they contain the necessary elements of a contract of sale. It is said that they do not designate the purchaser, or define the subject-matter of the sale. But I think there is abundant authority for holding that the communication of Crocker's acceptance of the $70,000 offer to Breckinbridge is sufficient to designate him as the purchaser, and, as to the subject-matter, that is clearly defined to be the balance of Merced town property, *i. e.*, Crocker's remaining interest in the town of Merced. Whether there was any well-known and clearly defined tract of land answering to those terms of description was a question depending, as in all cases it must more or less depend, on evidence *aliunde*. The evidence introduced on the part of the plaintiff in this case certainly tended to show that there was a well-defined tract of land known as the "Town of Merced." It is true that there was some testimony tending to show that the name was applied to two different surveys,—a smaller one, and a larger one including the smaller. But this was not ground for a nonsuit, which is proper only where there is a total failure of proof on some material issue. The most that can be said is that there was a conflict of testimony as to whether "Town of Merced" was the name of one or two well-defined tracts of land. If the case had been tried by a jury instead of the court, it will scarcely be contended that under such circumstances a nonsuit would have been proper. It may be urged, however, that the decision of the whole matter resting with the court, the order sustaining the motion for nonsuit was the same thing in substance as a finding against the plaintiff upon one or more material issues, and that there is evidence to sustain such finding on the point under discussion. But the trouble with this position is that there are no findings, and we cannot know that the decision of the superior court was or would have been against the plaintiff on this point. We are asked to sustain, upon conflicting evidence, a finding that has not been made and must be implied. To do so is, in my opinion, to initiate a practice fraught with all the mischiefs which the statutory requirement of specific findings was designed to prevent. I think the judgment should be reversed, and cause remanded for a new trial.

THORNTON, J I concur in the above opinion of BEATTY, C. J.

78 Cal. 483

In re SHARP'S ESTATE. (No. 12,532.)

(*Supreme Court of California.* March 23, 1889.)

HOMESTEADS—CONSTRUCTION OF ACTS.

Under Code Civil Proc. Cal. § 1465, authorizing a homestead to be set apart for the surviving wife of a deceased husband out of their common property, if any, and, if not, out of the separate property of the latter, premises suitable and proper for a homestead may be so designated, though they were not, at the husband's death, or at any time afterwards, used for a dwelling, but were used in part for a store, an office, and for storage purposes.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Upon the petition of Honora Sharp, widow of George F. Sharp, deceased, a homestead was assigned to her from the estate of her husband. John Hunt, executor of said Sharp's last will, appealed. Code Civil Proc. Cal. provides that a homestead shall be set apart to the surviving husband or wife from the common property, if any, and, if not, from the separate estate of the deceased wife or husband.

Matt. I. Sullivan, for appellant. *Hall & Rodgers*, for respondent.

FOOTE, C. Appeal from an order setting aside a homestead to a widow, under section 1465, Code Civil Proc. The third specification made on the part of the appellant, why the evidence was insufficient to justify the decision and order, is that "the evidence fails to show that said premises so set aside as a homestead are now, or ever were, or can be, used as a dwelling-place." Conceding, without deciding, that the bill of exceptions contains any evidence upon the point involved, which it is permissible that the appellate court should consider on this appeal, nevertheless it is apparent that such evidence is insufficient to demand a reversal of the order.

Let it be admitted that the evidence shows the premises were not used as a dwelling-place at the time the homestead was set apart, and that they were used at the time of the death of the husband of the widow, and ever since had been used, as a store, in part as an office, and in part for storage purposes, and yet it may be that the premises were, as found by the court below, "suitable and proper for a homestead." If the premises, as we must presume them to have been, (there being no evidence to contradict the finding,) were suitable and proper for a homestead, they were properly set apart to the widow. In Re Bowman, 69 Cal. 245, 10 Pac. Rep. 412, which was a case where an insolvent had a homestead set apart to him, under the provisions of section 1465 of the Code of Civil Procedure, the appellate court said: "The appellant contends that the court below erred in so doing, because the premises set apart to the insolvent never constituted his residence. The statute regulating this matter does not require that they should ever have constituted the residence. The finding of the court is that the property set apart is suitable and proper for a homestead, and that was a sufficient basis for the order setting it apart." It would seem, therefore, that a homestead, such as the one here set apart, "may be carved out of any property left by the decedent which is capable of being made a homestead." In re Bowman, supra, citing Estate of Busse, 35 Cal. 310. We do not understand the case of In re Noah, 73 Cal. 590, 15 Pac. Rep. 290, (in which the opinion was written by the learned judge who concurred in what was said in Re Bowman, supra,) to be in conflict with what is here said. It was there decided that premises could be set apart as a homestead if there was a house or "edifice" thereon "which could be used as a dwelling-house," even if not occupied as such at the time the order setting it apart was made. It is there said, also, that it must be property "which could have been selected as a homestead during the continuance of the marriage." But there is nothing in this record to show but what the premises here involved could have been selected as a homestead during the marriage, and could have been used as a dwelling-house. The appellant has abandoned all other contentions, except the one discussed above. We advise that the order be affirmed.

I concur: BELCHER, C. C.

HAYNE, C., took no part in the decision.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

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78 Cal. 543

SOUTER *v.* MAGUIRE *et al.* (No. 12,646.)

(*Supreme Court of California.* March 30, 1889.)

MINES AND MINING—QUIETING TITLE.

1. In an action to quiet title to a mining claim it is sufficient for plaintiff to allege that he is "the owner" in terms, without setting out the facts showing him to be such.

2. A finding that plaintiff's claim is valid disposes of an affirmative defense setting up the elements of defendant's claim, as a subsequent location would be invalid, no matter how correct in form the proceedings.

3. The fact that a notice of location is not recorded is immaterial, in the absence of evidence of a local rule or custom requiring it.

Commissioners' decision. In bank. Appeal from superior court, Shasta county; AARON BELL, Judge.

Action by John Souter against William W. Maguire and W. B. Espey, to recover possession of a quartz mining claim, with damages, and to restrain defendants from interfering with it. Judgment for plaintiff, and defendants appeal.

James E. Isaacs and *J. Chadbourne*, for appellants. *Clay W. Taylor* and *Edward Sweeny*, (*McKune & George*, of counsel,) for respondent.

HAYNE, C. Action to quiet title to a mining claim, and for an injunction. The trial court gave judgment for the plaintiff, and the defendants appeal. The appellants make a number of points in regard to the pleadings and findings, which are based upon the idea that it is not sufficient in cases of this character for the plaintiff to allege that he is "the owner" of the property, but that he must set out the facts showing him to be such. But ever since the case of Payne v. Treadwell, 16 Cal. 242, it has been held that the ownership is the ultimate fact, and that, as a general rule, it is sufficient to allege it in terms. Garwood v. Hastings, 38 Cal. 217; Ferrer v. Insurance Co., 47 Cal. 431; Miller v. Brigham, 50 Cal. 615. And this is true in actions to quiet title to mining claims. Thompson v. Spray, 72 Cal. 534, 14 Pac. Rep. 182. The findings are more specific than the complaint. They set forth a number of secondary facts, from which it necessarily follows that the plaintiff's allegation as to ownership is true. It is well settled that this is proper. Coveny v. Hale, 49 Cal. 555; Water Co. v. Richardson, 72 Cal. 601, 14 Pac. Rep. 379. The appellants object that the findings do not dispose of certain issues raised by the pleadings. But the issue as to abandonment is sufficiently disposed of by the finding that when the claim was located the plaintiff "took possession of said claim, and constantly and continuously maintained such possession, and performed annually thereon the assessment work and labor required by law, to-wit, $100 per annum for each and every year down to and including the time of the commencement of this action." The affirmative defense, setting up the elements of the defendant's claim, is disposed of by the findings showing that the plaintiff's claim was valid; for if the plaintiff's claim was valid, a subsequent location by another, no matter how correct in form the proceedings may be, is invalid. Belk v. Meagher, 104 U. S. 284. And the issue as to damages is immaterial, because the judgment did not give plaintiff any damages. The pleadings and findings seem to us to be sufficient. The appellants contend, however, that the findings are not supported by the evidence. It is expressly admitted that it must be held that the plaintiff performed the required amount of work. The respects in which it is claimed that the evidence is insufficient are the following: (1) It is said that there is no evidence that the plaintiff discovered a vein or lode; but we think there was sufficient evidence on this point. (2) It is contended that the plaintiff never put up a notice of location; but we think that the evidence shows that he did. The fact that the notice was not recorded is immaterial, there being no evidence of a local rule or custom requiring it to be recorded. Thompson v. Spray, 72 Cal. 533, 14 Pac. Rep. 182. (3) It is urged that there was no evidence that the plaintiff marked off the location on the ground so that its boundaries could readily be traced; but the court finds that he did. And there is evidence that he marked the corners of the end lines, and placed a stake or blazed a tree at each corner of the claim, and in places "brushed out" the lines, so that a person could get through, and placed a notice in the center of the claim, defining its boundaries. This was sufficient under the circumstances. Cross Co. v. Europa Co., 15 Nev. 384; Du Prat v. James, 65 Cal. 558, 4 Pac. Rep. 562; Noonday Co. v. Orient Co., 6 Sawy. 310, 311, 1 Fed. Rep. 522. The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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78 Cal. 540

JEPSEN v. BECK. (No. 11,904.)

(*Supreme Court of California.* March 30, 1889.)

PARTNERSHIP—RIGHTS AND REMEDIES INTER SE.

1. Where, after the dissolution of a partnership, all its available assets were collected and applied to the payment of its debts, and plaintiff, one of the members, paid the balance of the indebtedness of the firm, he could maintain an action against the other member of the firm to charge him with his share of the indebtedness so paid, although no balance had been struck between them.

2. Evidence of what an agent of the plaintiff said to the wife of his copartner, on being sent to have the latter sign a notice of dissolution, was inadmissible to contradict the plaintiff.

Appeal from superior court, Monterey county; J K. ALEXANDER, Judge.

Action by J. Jepsen against George P. Beck. The parties had been copartners, and the exclusion of evidence of what Johnson, an agent of the plaintiff, had said to the wife of the defendant, on being sent to have the latter sign a notice of dissolution, was assigned as error. Judgment was given for plaintiff, and defendant appeals.

R. M. F. Soto, (*Herrman & Soto,* of counsel,) for appellant. *S. F. Geil* and *H. V. Morehouse,* for respondent.

SHARPSTEIN, J. From the 1st day of June, 1883, to the 26th day January, 1885, plaintiff and defendant were partners doing business at Salinas city, under the firm name of Jepsen & Beck. On the last-mentioned date said partnership was dissolved by mutual consent, and an accounting had between the parties of all their partnership dealings and transactions, and it was agreed between them that all the debts owing by the partnership should be equally paid by them, and that all moneys owing to the partnership should be paid to and collected by the plaintiff, and by him be applied to the payment of the debts of the partnership. The partnership at that time owed $1,848.73, and there was owing to it $1,027.97. Of the amount due the firm plaintiff collected $664.51, and the residue of the debts owing to the firm is worthless, and of no value whatever. Plaintiff has paid all the indebtedness of said firm, which is $1,154.27 more than the sum realized from the debts owing to the firm. Plaintiff claims that one-half of such excess should be paid by defendant, who refuses to pay it, although requested so to do. Wherefore plaintiff brings this action, and demands judgment for the sum of $546.84, together with interest thereon from the 26th day of March, 1885. The defendant demurred to the complaint, on the ground that it does not state facts sufficient to constitute a cause of action. The demurrer was overruled, and the defendant interposed a general denial of all the allegations of the complaint. The issues were tried by a jury, which rendered a verdict in favor of the plaintiff for the amount claimed in his complaint. Defendant moved for a new trial, which was denied, and from the judgment and said order this appeal is taken.

Appellant's contention here is that the court erred in overruling the demurrer and in denying a motion for a new trial. The objection urged against the complaint is that it does not show a complete settlement and accounting, and a balance struck between the parties. We think it does show a complete settlement and accounting, but does not show a balance struck between the parties. The rule is well settled that one partner cannot maintain an action against another, to recover an amount claimed by him by reason of partnership transactions, until there has been a final settlement of the affairs of the concern by discharging its liabilities, collecting its assets, and definitely ascertaining the surplus to a share of which he is entitled. Bates, Partn. 849. The reasons for this rule have been variously stated, but this case, as we view it, is not within any of them. The complaint shows that there are no outstanding demands against the partnership, and no outstanding debts to be collected, or that can be collected, so that the judgment to be rendered will be a final settlement between the partners. Under our system of procedure the defendant might have had in this action, had he desired, a discovery and accounting, which certainly obviates the principal objection to the maintenance of such an action in a case like this. The demurrer was properly overruled.

The evidence introduced by the plaintiff tended to prove all the material allegations of the complaint, and, although that of the defendant tended to disprove some of them, we cannot disturb the order denying the motion for a new trial, on the ground that the evidence is insufficient to justify the verdict. The objection to the question put to Mrs. Beck by defendant's attorney for the purpose of contradicting Jepsen, the plaintiff, as stated by said attorney, was properly sustained. Evidence of what Johnson told her was inadmissible for that purpose. Our conclusion is that the judgment and order should be affirmed. Judgment and order affirmed.

We concur: McFARLAND, J.; THORNTON, J.

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78 Cal. 486

SESLER *v.* MONTGOMERY. (No. 11,359.)

(*Supreme Court of California.* March 23, 1889.)

SLANDER—PUBLICATION—HUSBAND AND WIFE.

Words spoken by a husband to a wife, not in the presence of any other person, do not constitute a publication within the meaning of the law of slander.

In bank. On rehearing. For former opinion, see 19 Pac. Rep. 686.

Estee, Wilson & McCutchen, J. C. Martin, and *W. F. Goad,* for appellant. *W. W. Allen, A. R. Cotton,* and *W. H. H. Hart,* for respondent.

McFARLAND, J. Action for slander. Verdict and judgment for plaintiff. Defendant appeals from the judgment and from an order denying a new trial. The evidence shows that the alleged slanderous words were spoken (if at all) in the house of the defendant in a conversation addressed exclusively to his wife; and the question to be determined is this: Did the speaking of the words, under these circumstances, to his wife alone, constitute a "publication" within the meaning of that word as used in the definition of slander? (The plaintiff was eavesdropping, and claims to have heard the alleged slanderous words from a point outside of the door of the room in which defendant and his wife were talking.)

The Codes of this state provide how marriages may be entered into and how divorces may be obtained, and they also have certain provisions, different from the rules of the common law, about the property of the spouses, and, to a limited extent, about their power to make contracts, etc. But in the Codes there is no attempt made to change the essential nature of marriage, or to state its manifold incidents and consequences, or to establish new rules for the solution of the various questions which arise out of those incidents and consequences. Moreover, although the Codes define slander as a "false and unprivileged publication" of certain matters, they do not declare what shall constitute "publication." For the determination of these questions, therefore,—as there are no provisions about them in the Codes,—we must look to the common law, which is the basis of our jurisprudence. Pol. Code, § 4468; Van Maren v. Johnson, 15 Cal. 312. It is admitted to be the settled rule that there can be no publication within the meaning of the law of slander unless the words alleged to be slanderous are spoken to, and in the presence of, a third person; that is, a person other than the one who speaks and the one to whom the words are spoken. A man entirely alone cannot commit slander by talking aloud to himself. And the final question to be solved is whether a wife, when spoken to by her husband in the privacy of home, and not in the presence of others, is a "third person" within the meaning of the law under review, or whether, under those circumstances, there should be applied the doctrine that the husband and wife are, civilly, one person. There is no doubt of the general common-law rule that the civil existence of the wife is merged in that of her husband. Blackstone says that "by marriage the husband and wife are one person in law," and that "the legal existence of the woman is suspended during the marriage, or, at least, is incorporated and consolidated into that of the husband." Volume 1, p. 442. Upon this principle of the legal union of husbands and wives most of their rights, duties, and disabilities depended. They could not be witnesses for or against each other because of the maxims, *nemo in propria causa testis esse debet,* and *nemo tenetur se ipsum accusare.* And upon this ground it has been always held that no prosecution for conspiracy can be maintained against a husband and wife only; because the crime of conspiracy cannot be committed by one person alone, and a husband and wife are but one person in law. Hawk. P. C. p. 448, § 8; 2 Russ. Crimes, 690; People v. Richards, 67 Cal. 412, 7 Pac. Rep. 828. It is said that this rule was a legal fiction, and that in the course of modern legislation and judicial decisions it has been exploded. But it is no more a fiction than any other general principle of law, and we have seen no authentic account of the explosion. There always were some exceptions to the rule, from the earliest history of the common law, and modern legislation and decision have merely created additional exceptions. The general rule still obtains, save where an exception has been legally established, and we have been referred to no decision establishing an exception as to the point involved in the case at bar. Indeed, the only case in point cited at all is from an inferior court of New York, (Trumbull v. Gibbons, 3 City H. Rec. 97,) in which it was directly held that the delivery of a defamatory manuscript by a husband to a wife was not a publication. And every sound consideration of public policy, every just regard for the integrity and inviolability of the marriage relation,—the most confidential relation known to the law,—should restrain a court from establishing the exception upon which the judgment in the case at bar rests. When husbands and wives talk to each other alone, the conversation differs but little from the process of talking to one's self, or, as it is sometimes called, "thinking aloud." There is no intention that the conversation shall be repeated to others, and no presumption that it will be. It would be strange, indeed, if a husband or wife could not safely say anything to the other about their neighbors or acquaintances which he or she would not feel warranted in saying to the world. Such a rule would destroy all opportunity for confidential conference, advice, or suggestion. To a curious person asking what had occurred between a husband and wife in the seclusion of their home, the appropriate answer would be, *id est nullum tui negotii.* It has been held in another state that there was a sufficient publication of a libel where a letter was sent to a wife containing defamatory matter about her husband; and it is argued that the court making the decision must have held the wife to be a third person. Scheneck v. Scheneck, 20 N. J. Law, 208. Whether or not that decision was a correct exposition of the law, it is clear, at least, that another principle was involved. As the court say in that case: "Such a communication, made directly to the wife, is an attempt to poison the fountain of domestic peace, conjugal affection, and filial obligation at their very sources." There the exception which was allowed to the general rule was in support of the confidential relation of marriage, while in the case at bar the exception sought to be established would be destructive of that relation. Our conclusion is that a communication from a husband to a wife, not in the presence of any other person, does not constitute a publication within the meaning of the law of slander. It follows from this conclusion that the judgment in the case at bar was erroneous. Judgment and order appealed from reversed, and cause remanded.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J

78 Cal. 546

DURFEE *v.* GARVEY. (No. 12,771.)

(*Supreme Court of California.* March 30, 1889.)

EASEMENTS—DRAINAGE—SERVIENT ESTATE.

The easement of a ditch for drainage purposes over the pasture land of another does not impose upon the owner of the servient estate any liability for damage done to the ditch by his cattle in crossing over it, and in caving in its sides while feeding near it. The burden of keeping the ditch clear rests upon the owner of the easement.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. BRUNSON, Judge.

Action of trespass brought by James D. Durfee against Richard Garvey. Verdict and judgment for plaintiff, and defendant appeals.

Smith & Clark and *Shaw & Damron*, for appellant. *Bicknell & White* and *Barclay, Wilson & Redick*, for respondent.

BELCHER, C. C. The plaintiff and defendant are owners of adjacent tracts of land in Los Angeles county, the defendant's land lying to the south-west of the plaintiff's. Plaintiff's land is nearly level, and a large portion of it is swampy and unfit for cultivation without artificial drainage. It has a slight inclination towards the south-west, and commencing on defendant's land about six or seven hundred yards from plaintiff's line is a well-defined channel, called the "Arroyo Honda," which leads off to the south-west. From plaintiff's line to this arroyo was a slight depression, through which, about the year 1870, the then owner of a part of plaintiff's land, with the consent of the then owner of defendant's land, constructed a ditch some three feet deep and three feet wide at the top. Leading to this ditch other ditches were constructed around and through plaintiff's land, and when all of these ditches were clear and unobstructed the land was drained, so that it could be cultivated, and good crops raised upon it. Grasses and weeds grew up quickly in the ditch leading to the arroyo, and up to 1882 plaintiff was accustomed to clean out this ditch at least twice every year, no one objecting to his doing so. Prior to 1882, a part of defendant's land was cultivated, but in that year he ceased to cultivate it, and has since used it only for pasturing stock. He has kept on it horses, mules, and cattle, and these animals, by feeding along the ditch, and frequently passing over it, have broken in its sides, and have thereby filled it up and obstructed the flow of water through it. This obstruction interfered with the drainage of plaintiff's land, and prevented his cultivating 20 to 25 acres of it on which he could otherwise have raised good crops. In 1885, and again in 1886, defendant's cattle broke into plaintiff's inclosure and damaged his growing crops.

Plaintiff brought this action to recover damages for the alleged wrongs above recited, and in the first count of his complaint he asked damages in the sum of $400, and in the second in the sum of $600. Under the instructions of the court, the jury found that the plaintiff was damaged by the obstruction of his drainage in the sum of $150, and by the trespasses of defendant's cattle in the sum of $210, and for these aggregate sums judgment was entered. The defendant moved for a new trial, and has appealed from the judgment and order denying his motion.

1. The theory of plaintiff, developed at the trial, in reference to his first cause of action, was that he had acquired a prescriptive right to the use of the ditch leading from his lower line to the arroyo, and that defendant had no right to make any use of his land which would cause an obstruction of the ditch, and that if he did so he must keep it cleared out, or be liable for any damages caused by the obstruction. On the other hand, the theory of defendant was that plaintiff had acquired no prescriptive right to the use of the ditch, and that, if he had, defendant had a right to use his land for any legitimate and ordinary purpose, and if, while so using it, the ditch was injured or obstructed the burden was upon the plaintiff to remove the obstructions and keep it in repair. In accordance with plaintiff's theory, and at his request, the court instructed the jury as follows: "If you believe from the evidence that there was no natural channel over the lands of the defendant, or the lands occupied by him, at the place alleged in the complaint, except on the southwesterly side of the lower Garvey tract, but believe from the evidence that there was a natural depression there through which the plaintiff constructed a ditch for the purpose of carrying off the water from his own land, and did carry off said water through the same into a natural channel on defendant's land, and has used the same for such purpose openly, peaceably, continuously, notoriously, uninterruptedly, and adversely to the defendant and his predecessors for more than five years before the commencement of this action, and before the obstructions alleged in said complaint, you are instructed that the plaintiff thereby acquired a right to the use of such ditch, and the defendant is liable for any damages sustained by the plaintiff for the obstruction by defendant, or stock under his control, of said water-way." And the court refused to give to the jury the following instruction asked by defendant: "Even where one has, by adverse use, acquired a right to use a ditch over the land of another to carry water off of his own land he is bound to keep such ditch in repair himself. He has no right to call upon the land-owner to make any repairs unless such repairs are made necessary through the negligence of the land-owner. It is not negligence for the land-owner to use his land in the same manner and for the same purposes as similar land in the same vicinity is ordinarily used for, and for which it is naturally fitted. Any repairs made necessary by such ordinary use must be made by the ditch-owner, and not by the land-owner, and the land-owner is not liable for any damages caused by such ordinary use."

The question then presented for decision on this branch of the case, conceding that plaintiff had acquired an irrevocable right to have his ditch maintained over defendant's land, is, to what extent does that right interfere with and limit defendant's right to use his land? Must defendant, if he would use his land for the pasturage of stock, fence in the ditch, or cover it over so that the stock cannot tread down its sides? And, if he so uses it, is the burden cast upon him to keep the ditch clear and unobstructed, so that water will continuously flow through it? It must be admitted that the use of land for pasturage is a common and legitimate use of it, and there is no pretense that defendant did not exercise ordinary care over his stock. Plaintiff was a witness for himself, and testified: "I suppose that Garvey pastures the cattle in that field as people ordinarily pasture their cattle. He has a portion of the field fenced to the south-west, and I suppose he turns his cattle in there and lets them stay there, confined by the fence. I can't say that he has a herder; he has a man there to look after them; I don't know that he herds them. In order to keep the cattle from getting into that ditch he would have to protect it by fence, or build bridges across the ditch where those cattle go from one side to the other. Building bridges would prevent them from tramping the ditch to a great extent. The cattle feed along and up and down the ditch and cave it in. The soil is very soft, but the most serious damage is done in places where they cross. He would have to fence the ditch, or make a blind ditch, the same as I do, (cover it over,) in order to protect it from the cattle." Now, if the plaintiff's theory be correct, the defendant cannot use his land as a pasture, though that may be the best and perhaps only profitable use he can make of it, unless he employs men to patrol the ditch and keep the cattle away from it, or goes to the expense of fencing it in or covering it with bridges. It does not seem to us that the plaintiff's easement on the land can impose any such burden as that on the defendant. The general rule is that any man may use his own land in his own way, provided he does not use it negligently, so as to injure his neighbor; and the rule is, also, that, where one man has an easement over the land of another, the duty of keeping the easement in repair rests upon its owner, and when repairs are necessary he may enter on the servient tenement to make them. God. Easem. 285; Gale & W. Easem. 215; Prescott v. Williams, 5 Metc. 435. It does not appear that plaintiff was ever denied the privilege of making any repairs upon his ditch, and it would be going to an extreme and unwarranted length, as it seems to us, to hold that in a case like this defendant is made liable. In our opinion the court erred in giving the instruction above quoted for plaintiff and in refusing to give, without modification, that asked by defendant.

2. As to the second cause of action we see no error in the rulings of the court. There was testimony to sustain the verdict, and the judgment to the extent of $210 was proper. We advise that the judgment and order be reversed, and the cause remanded for a new trial, unless the plaintiff shall, within 30 days after the going down of the *remittitur*, file in the court below a release of $150, and his costs in that court, and if he does file such release that the judgment and order stand affirmed.

We concur: **Foote, C.**; **Hayne, C.**

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial, unless the plaintiff shall, within 30 days after the going down of the *remittitur*, file in the court below a release of $150, and his costs in that court, and if he does file such release that the judgment and order stand affirmed.

(78 Cal. 571)

STINSON *v.* CARPENTER. (No. 11,989.)

(*Supreme Court of California.* April 17, 1889.)

COSTS—FILING OF BOND.

Where, in an action for slander, no undertaking for costs is filed before the issuance of the summons, as required by act Cal. March 23, 1872, but a few days afterwards such an undertaking is filed, it is error to dismiss the complaint upon an objection being made, months after the filing of the undertaking, that it was not filed in time.

Department 2. Appeal from superior court, Lake county; Rodney J. Hudson, Judge.

E. W. Britt, for appellant. *R. W. Crump*, for respondent.

McFarland, J. This is an action to recover damages for alleged slander. The action was commenced August 27, 1886. No undertaking for costs was filed by plaintiff before the issuance of the summons, as provided in the act of March 23, 1872, (St. 1871–72, p. 533, § 1,) but four days later, on August 31, 1886, such a bond, in due form, was filed. Defendant appeared and demurred to the complaint. He afterwards withdrew the demurrer, and filed an answer. He once obtained a postponement of the trial on account of the illness of his counsel, and he consented that the trial be set for October 20, 1886. On October 20th, when a jury was in attendance for the trial of the case, defendant objected, for the first time, that an undertaking had not been filed in time, and moved to dismiss the action because the undertaking was not filed "for several days after filing the complaint and issuance and service of summons." Upon this ground the court granted the motion to dismiss the action, and entered judgment for defendant. Plaintiff appeals from the judgment.

Passing the question whether defendant had not waived any rights which he might have had in the premises, we think that the main question has been settled against him by this court in Dixon v. Allen, 69 Cal. 527, 11 Pac. Rep. 179. In that case the court, referring to the failure to file an undertaking at the commencement of the action in a case of libel or slander, say: "The statute (Acts 1871–72, p. 533, § 1) does not deprive the superior court of jurisdiction in case the undertaking is not filed. The object of the statute is accomplished if, when the objection is made, the undertaking is executed, and the defendant thus secured the costs and charges which may be awarded to him." In that case no undertaking was on file when the motion to dismiss was made; and the court held that it was proper to allow an undertaking to be then filed. In the case at bar an undertaking had been filed months before the objection was made. We think, therefore, that the court below erred in dismissing the action. This view of the case makes it unnecessary to examine the question whether the $100 counsel fee allowed by the statute to the prevailing party in a libel or slander suit should be put into the verified cost bill. Judgment reversed, with directions to the court below to deny the motion to dismiss the action.

We concur. **Thornton, J.**; **Sharpstein, J.**

(78 Cal. 552)

UPPER SAN JOAQUIN CANAL CO. *v* ROACH. (No. 11,708.)

(*Supreme Court of California.* April 16, 1889.)

FRAUDULENT REPRESENTATIONS—RELEASE AND DISCHARGE.

1. In an action on a note given by the defendant to the plaintiff, a canal company, for some of its stock, alleged misrepresentations made by the plaintiff with regard to the amount of money required for the completion of the canal are not available to the defendant, where he has not elected to rescind the contract for the sale of stock, and has not set up any counter-claim for damages on account of such misrepresentations.

2. In such case, a resolution passed by the plaintiff's board of directors that they regarded the note as worthless, and that they would not take any proceedings to collect it, was held not to operate as a release of the obligation, because there was no consideration for it, and because it did not purport to be a release, within the meaning of Civil Code Cal. § 1541, which provides that an obligation is extinguished by a release thereof given to the debtor by the creditor in writing, with or without a new consideration.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Chas. J. Swift and *Wright & McCormack*, for appellant. *Page & Eells*, for respondent.

Hayne, C. Action upon a promissory note. Judgment for plaintiff. Defendant appeals. The material facts are as follows: The plaintiff, being in need of money to complete its canal, sent its president to New

York to sell some of its stock. He sold some stock to the defendant's intestate, and took the note sued on in payment. It is claimed that at the time of the sale the president represented to the vendee that the canal could be completed for $50,000, when, as a matter of fact, more than $300,000 was required to complete it. The evidence shows that some sort of representation was made to the vendee. The president (whose testimony is relied on by the defendant to make out his case) so states. But he says in one place: "I expressed to him that in my opinion it would not cost over $50,000. I did not bind myself that it would not, and it was with the understanding that it would not cost $50,000 that he went into the enterprise." In another place he says: "We said it would cost probably less than $50,000." The representation was made in perfect good faith. Everybody supposed at that time that the canal could be completed for the sum mentioned. The increased cost resulted from unforeseen difficulties, arising from the nature of the soil. The position is that there was a misrepresentation as to a material matter. But if it be assumed in favor of the defendant, for the purposes of this opinion only, that there was such a misrepresentation as entitled the vendee to some relief, such relief could consist only in damages for the misrepresentation, or in the rescission of the contract. No question as to such damages arises in the case, because no counter-claim was set up. We do not intend by this to say that the relief could be had by way of counter-claim. It is sufficient for present purposes that nothing of the kind was attempted. And the vendee did not elect to rescind. He kept the stock after being informed of the true state of the case, and after it was sold for assessments his administrator brought an action to recover its value from the company, which action was pending at the time of the trial herein. It is perfectly clear that a misrepresentation does not enable the vendee to keep the thing sold, and avoid paying what he agreed to pay for it. If he wishes to avoid paying, he must rescind the contract, and return the property (if it have any value) within a reasonable time after becoming aware of the truth. Gifford v. Carvill, 29 Cal. 589; Fitz v. Bynum, 55 Cal. 459. It is contended, in the next place, that the plaintiff gave to the defendant a release of the obligation. What is claimed to constitute a release consists in the following: At a meeting of the plaintiff's board of directors the following resolution was passed, viz.: "Resolved, that in the opinion of this board the note of William Schley is worthless, and that no proceeding to collect the same by law shall be commenced or authorized by this company against the said Schley, and that he be notified of this action by the board." Upon the passage of this resolution, the secretary of the company sent the following telegram to Schley: "We got possession of the board yesterday, and passed resolution that no proceedings should be taken against you on your note. All trouble originated from Perrin refusing to betray you. Party leaves this week to look at Alta, Holland, and Pool mines. [Signed] B. B. MINOR." The argument is that the foregoing amounts to an agreement not to sue, and that an agreement not to sue operates as a release; but, assuming in favor of the defendant that the resolution is not the mere expression of the company's intention, but contains words of promise or obligation, it cannot operate as an agreement not to sue, because there was no consideration for it. The want of consideration is not obviated by section 1541 of the Civil Code. That section provides that "an obligation is extinguished by a release therefrom given to the debtor by the creditor, upon a new consideration, or in writing, with or without new consideration." We think that this provision applies to express releases, given with intent to extinguish the obligation, and not to things which might have that result in a roundabout way. In dispensing with a consideration, the legislature dispensed with the substance of the transaction, and we do not think it ought to be assumed, in the absence of language to that effect, that the intention was to dispense with both form and substance. The resolution, therefore, cannot operate as a release within the meaning of the section, because it does not purport to be a release, and, as above stated, it cannot operate as a covenant not to sue, because there was no consideration. The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order denying a new trial are affirmed.

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78 Cal. 573

WASHBURN *v.* HUNTINGTON *et al.* (No. 12,666.)

(*Supreme Court of California.* April 17, 1889.)

INSOLVENCY—RIGHTS OF ASSIGNEE.

1. The California insolvent act of 1880, § 55, which provides that if a transfer of property by a debtor is not made in the usual course of business it shall be *prima facie* evidence of fraud, means fraud on the provisions of the insolvent act; and where a debtor transfers property out of the usual and ordinary course of business it is *prima facie* evidence that the transferee had reasonable cause to believe that the transfer was made by the debtor with a view to prevent his property from coming to his assignee in insolvency, and to prevent it from being distributed ratably among his creditors.

2. In an action brought under Code Civil Proc. Cal. § 667, providing that in an action brought to recover the possession of personal property, judgment for the plaintiff may be for the possession of the property, or the value thereof, in case a delivery cannot be had, an omission to find whether or not plaintiff is entitled to recover the property sued for, and a judgment simply awarding the

plaintiff the value of the property, constitute cause for reversal.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Albert M. Johnson, for appellants. *W. J. Herrin*, for respondent.

THORNTON, J. This action is brought by the plaintiff, as assignee in insolvency of one Jones, to recover certain book-accounts transferred by Jones to the defendants on the 27th of July, 1886. The transfer was made by orders drawn by Jones on his debtors in favor of defendants. Within less than one month after the transfer, viz., on the 23d day of August, 1886, Jones filed his petition in insolvency, and on the same day was declared an insolvent. The ground on which a recovery in the action was urged is that the defendants, when they received and accepted the transfer above mentioned, had reasonable cause to believe that the transferrer was insolvent, and that such transfer was made with a view to prevent the property of the transferrer from coming to his assignee in insolvency, or from being distributed ratably among the creditors of the transferrer, and to defeat the object of, and hinder, impede, and delay the operation and to evade the provisions of, the act of insolvency of April 18, 1880, by preventing the property of the assignor from being subjected to the payment of the debts of the transferrer other than the debt due to the defendants.

It is urged that the evidence is insufficient to show that Jones was insolvent on the 27th of July, 1886. We do not think this contention maintainable. The evidence of the witnesses of Jones, Sheets and Hinkle, all tended to show that Jones was then insolvent, and justify the court in so finding. We will remark here in relation to the evidence of Hinkle, which attorneys for defendants (appellants here) contend was improperly admitted in the court below, that in our view it was admissible as relevant to the issue of Jones' insolvency on the 27th of July, 1886. It is further contended that the evidence is insufficient to justify the finding that the defendants had reasonable cause to believe Jones insolvent on the 27th of July, 1886, or that they had any cause to believe that the assignment was made with a view to prevent the property of Jones from coming into the hands of the plaintiff as assignee, or to evade any of the provisions of the insolvent act, or to impede its provisions. We think that the facts deposed to by Jones and Sheets were sufficient to put defendants on inquiry as to Jones' solvency, which inquiry, if prosecuted by defendants, would have disclosed to them that Jones was, when he made the transfer above mentioned, unable to pay his debts from his own means as they became due. When this is the condition of a debtor, he is, within the meaning of the act of 1880, insolvent. The definition of insolvency, given above, is that stated in the title of the Civil Code in regard to assignments for the benefit of creditors, (Civil Code, § 3450,) and we can see no reason why this is not correct under the insolvent act of 1880. That the defendants were aware that Jones' financial condition was precarious is shown by their application for the transfer made to them as security. If the defendants had pursued the inquiry, they would have found a state of things existing such as was disclosed by Jones' testimony, in which a statement of his assets and liabilities appear, and this statement, in our judgment, shows that Jones was, on the day when he made the transfer, insolvent. We entertain no doubt that the finding that when the defendants accepted the transfer of the accounts from Jones they had reasonable cause to believe that he was insolvent is sustained by the evidence. We think that the court correctly found that the assignment to defendants was out of the usual and ordinary course of business of the debtor, Jones, and there is no evidence to the contrary. By the last clause of section 55 of the insolvent act of 1880, (constituting article 8, and relating to fraudulent preferences and transfers,) in reference to such assignment as is spoken of above, it is provided that if such assignment "is not made in the usual course of business of the debtor, that fact shall be *prima facie* evidence of fraud." The same clause will be found in section 35 of the late United States bankrupt act. And fraud mentioned in this clause has been construed to mean fraud on the provisions of the bankrupt act. See the following cases in which it was so held: In re Meyer, 2 N. B. R. 422; In re Hunt, Id. 542; In re Dean, Id. 91; Collins v. Bell, 3 N B. R. 587; Martin v. Toof, 4 N. B. R. 492, 493. And we think this construction should be adopted here, that the fraud mentioned in the clause of the fifty-fifth section above cited means fraud on the provisions of the insolvent act. In this view, the transfer to the defendants being out of the usual and ordinary course of business of the debtor, it is *prima facie* evidence that the defendants had reasonable cause to believe when such assignment was made and accepted by them that it was made with a view to prevent the debtor's property assigned to defendants from coming to his assignee in insolvency, and to prevent the property of the debtor from being distributed ratably among his creditors. There being no evidence to rebut the *prima facie* case of fraud so established, it must be held to be conclusively established that the assignment to defendants was made with the view above stated. See Ohleyer v Bunce, 65 Cal. 544, 4 Pac. Rep. 549. The action was brought to recover possession of the orders mentioned above, or the value thereof, stated to be $383, in case delivery of the orders could not be had. The court below held as a conclusion of law from the facts found that the plaintiff was entitled to judgment for $250, and ordered that judgment be entered accordingly, which was done; but the court did not find as a conclusion of law that he was entitled to a recovery of the orders sued for. It is provided by section 667 of the Code of Civil Procedure that in an action to recover the possession of personal property judgment for the plaintiff may be for the possession, or the value thereof in case a delivery cannot be had, and damages for the detention. Thus a clear and statutory rule is laid down as to the judgment which shall be entered, and we cannot perceive that a judgment can be entered for the alternative value unless it is found that the plaintiff is entitled to recover the property sued for. This omission to find whether or not the plaintiff was entitled to recover the orders sued for was error. The judgment as entered is also erroneous. If the plaintiff is not entitled to recover the property sued for, we cannot see that he is entitled to a judgment. If he is entitled to recover such property, the judgment must be as prescribed in section 667, Code Civil Proc. Berson v. Nunan, 63 Cal. 552. The judgment is therefore reversed, and the cause remanded, with direction to find on the facts found whether or not, as a conclusion of law, the plaintiff is entitled to recover the orders sued for, and to enter judgment in accordance with such finding; that is to say, if it is determined on the facts found that plaintiff is entitled to recover the orders (the value of which have been found to be $150) that judgment be entered as provided in section 667, Code Civil Proc. If it is determined that plaintiff is not entitled to recover the orders, judgment should be entered for defendants. Ordered accordingly.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; WORKS, J.

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78 Cal. 556

GREEN *v.* SUPERIOR COURT OF SAN FRANCISCO. (No. 20,514.)

(*Supreme Court of California.* April 16, 1889.)

STATE COURTS—JURISDICTION.

1. Const. Cal. art. 6, §§ 1, 5, 13, vests the judicial power in superior and other enumerated courts, "and in such inferior courts as the legislature may establish in any incorporated city or town, or city and county," and gives the superior courts jurisdiction of felonies, and of all "misdemeanors not otherwise provided for," and further provides that the legislature may fix the jurisdiction of any inferior courts so established. St. 1871–72, p. 84, and other statutes, create the police court of the city and county of San Francisco, and give it jurisdiction of all misdemeanors punishable by fine not exceeding $1,000, and imprisonment for one year, or both. *Held*, that the effect of these acts was to deprive the superior court of jurisdiction over the offense of conspiring to extort money, that being among the misdemeanors "otherwise provided for" by the acts.

2. It is immaterial whether such conspiracy is an offense known to the common law as an "infamous crime," and hence punishable only by indictment or information, and that no such procedure is provided for in such inferior courts, as no such class of misdemeanors is recognized under the law of California.

Application for a writ of prohibition.

J. C. Green was indicted in the superior court of the city and county of San Francisco for conspiring with others to extort money. He applies for a writ of prohibition to restrain the court from proceeding therein, alleging that it had no jurisdiction of the offense.

J. M. Lesser and *Davis Louderback*, for petitioner. *Jas. D. Page*, Dist. Atty., *W. A. Nygh*, and *J. H. Durst*, for defendant.

WORKS, J. This is an application for a writ of prohibition to prevent the superior court in and for the city and county of San Francisco from proceeding further in an action of the people against the petitioner, upon a charge of conspiracy. The ground upon which the jurisdiction of the superior court is contested is that conspiracy is punished by imprisonment not exceeding one year, or by fine not exceeding $1,000, or by both, and that jurisdiction in such cases is exclusive in the police court of said city and county. The judicial power of this state is vested in the senate, sitting as a court of impeachment, in a supreme court, superior courts, justices of the peace, and such inferior courts as the legislature may establish in any incorporated city or town, or city and county. Const. art. 6, § 1. The constitution provides that the superior courts shall have jurisdiction in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. Id. § 5. It is further provided that the legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof. In pursuance of these constitutional provisions the legislature of the state has, by what is known as the "Consolidation Act," as amended in 1872, prescribed the jurisdiction of the police court of the city and county of San Francisco, and among other things it is provided that said court shall have jurisdiction of misdemeanors punishable by fine not exceeding $1,000, or by imprisonment not exceeding one year, or by both, which necessarily includes the offense charged in this case, and of which the superior court has assumed jurisdiction. The point made and relied upon in this application is that, under the provisions of the constitution, the legislature has the power to establish inferior courts, and to confer upon such courts jurisdiction in cases of misdemeanor, and that, when such jurisdiction is so provided for, the jurisdiction in that class of cases is taken away from the superior courts, for the reason that they become misdemeanors "otherwise provided for," within the meaning of the constitution.

Conspiracy is punishable by a fine of not exceeding $1,000, and imprisonment for one year, or by both, and jurisdiction in this class of cases is clearly conferred on the police judge's court. St. 1871–72, p. 84. And this statute is still in force under the present

Code. Ex parte Simpson, 47 Cal. 127. This jurisdiction has been reaffirmed by legislation subsequent to the adoption of the present constitution. St. 1881, p. 75, (act to create an additional police judge's court for the city and county of San Francisco, approved March 7, 1881.) These acts expressly exclude jurisdiction of justices' courts from this class of cases. It seems to us, therefore, that the only question that can arise here is whether the jurisdiction conferred upon police courts in this class of cases is exclusive, or concurrent with that of the superior courts. The evident object and purpose of the constitution in providing for the jurisdiction of superior courts, in cases of misdemeanor of the lower grades, was to leave it to the legislature to provide inferior courts in cities and towns, with jurisdiction to try the same, and that such jurisdiction should vest in the superior courts only until such inferior courts should be provided for. The language of the constitution can bear no other construction. It vests this jurisdiction in the superior court, if not otherwise provided for. Just so soon as the jurisdiction is otherwise provided for, the authority of the superior court to act ceases. This has been held in the case of the justices' courts. Ex parte Wallingford, 60 Cal. 103; Gafford v. Bush, Id. 149. In Ex parte Wallingford, the court says: "It is thus seen that by the express terms of the constitution the legislature is empowered to establish justices' courts, and to confer upon them such powers as to it shall seem proper, provided such powers shall not in any case trench upon the jurisdiction of the several courts of record, with the exceptions already noticed. The limitation as to trenching upon the jurisdiction of the several courts of record obviously refers to the jurisdiction conferred upon those courts by the constitution itself. For example, as the constitution confers upon the superior court jurisdiction in all cases of felony, the legislature could not confer on the justices' court jurisdiction in such a case. But while the constitution also confers on the superior court jurisdiction in cases of misdemeanor, it is of misdemeanors that are not otherwise provided for. When the legislature, pursuant to the power conferred by section 11, art. 6, 'to otherwise provide for' certain or all misdemeanors, does otherwise provide for certain of them, and confers upon the justice's court jurisdiction in certain cases of misdemeanor, the jurisdiction so conferred becomes exclusive, for they then become cases of misdemeanor 'otherwise provided for,' over which, according to the express language of the constitution, the superior court has no jurisdiction."

The only conceivable difference between the cases cited, and the one at bar is that the justices' courts are expressly created by the constitution, while the police court is one created by the legislature, under the authority of the constitution. We regard this difference as of no importance as affecting the question before us. Taking the several constitutional provisions together, they vest in the inferior courts such jurisdiction as may be given them, so long as the jurisdiction thus conferred upon them does not infringe upon the jurisdiction expressly conferred upon some other court by the constitution itself. Section 1, art. 6, vests jurisdiction in such inferior courts as the legislature may establish in any incorporated city or town, or city and county. This must be held to apply to the city and county of San Francisco, as it is the only consolidated city and county in the state. Section 13 of the same article provides: "The legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the powers, duties, and responsibilities of the judges thereof." Taking these constitutional provisions, together with the act creating the police court, and defining its jurisdiction, and the jurisdiction may be said to be vested in the court by the constitution. We find nothing in the constitution or the statute indicating an intention to make the jurisdiction concurrent in the two courts.

In opposition to this view, counsel for the respondent lay down this proposition: "In order that a jurisdiction may 'be otherwise provided for,' within the meaning of section 5, art. 6, of the constitution, that jurisdiction must be vested by the legislature throughout the state in a system of courts, whose aggregate territorial jurisdiction will be coextensive with the aggregate territorial jurisdiction of the system of superior courts; in other words, it must be taken from the superior courts as a system, and vested in some other courts as a system." And enlarging upon this proposition, they say further: "The constitution uses the term 'the superior court,' (article 6, § 5.) That term is a collective term. The constitution is dealing, not with individual superior courts, as separate and distinct courts, and as county establishments, but with the superior courts, as a state system of courts. It is organizing a branch of the judicial department of the state government. It is engaged in creating a state institution,—a state establishment. The superior court, as a system of courts, is the subject-matter with which it is at work. It delimits the jurisdiction of that system. It gives that system as a unit the jurisdiction over misdemeanors. It declares a subtraction in a certain event from the jurisdiction, not of one distinct superior court, but from the jurisdiction of the entire system." In support of this contention counsel cite Water Co. v. Vallejo, 48 Cal. 72; In re Marks, 45 Cal. 217. But these cases do not sustain the position assumed. This course of reasoning is plausible and ingenious, but not convincing. It goes to the expediency of the constitutional provision under consideration, and the statutes enacted under it, rather than to their construction. But we fail to recognize the force of the argument as affecting the expediency of the law. In counties like San Francisco, or other counties in which large cities are situated, where the superior court in all its departments is necessarily crowded with business, the necessity may exist for the transfer of misdemeanors and petty offenses to inferior courts, with a view of relieving the higher courts of the burden of trying the same, while in other counties no such necessity exists. And it may be for this very reason than the constitution provides for the establishment of inferior courts in cities, towns, and cities and counties, and not generally throughout the state. It is further insisted by the respondents that, if jurisdiction is conferred upon the police courts, it is concurrent with the superior courts, and not exclusive; and in support of this position counsel cite Courtwright v. Mining Co., 30 Cal. 574; Ex parte McCarthy, 53 Cal. 412; Rosenberg v. Frank, 58 Cal. 395. We have carefully examined the cases cited, and find that they lay down the well-established rule that where jurisdiction is given, either by the constitution or by statute, to two different courts, not indicating whether such jurisdiction shall be exclusive or concurrent, the same may be regarded as concurrent in both courts. But these cases do not reach the question presented here, for the simple reason that in our judgment the constitutional provision we are considering does indicate in plain terms that the jurisdiction of inferior courts, thereafter to be created, shall be exclusive, and not concurrent. The evident purpose of the constitutional provision, as evidenced by its language, is that the jurisdiction of the superior court shall be conditioned upon the establishment of other courts upon which the same jurisdiction shall be conferred, and when that condition happens and the jurisdiction is by the legislature conferred upon such inferior courts, from that time the constitution itself transfers such jurisdiction from the superior court and vests it in the inferior courts. From that time the jurisdiction is "otherwise provided for," and the jurisdiction of the superior court at once ceases.

Again, it is contended that the jurisdiction in this case could not constitutionally be conferred upon the police court, for the reason that the offense is one that must be prosecuted by indictment or information, and that no such practice is provided for in case of such inferior courts. What has been said upon the other points made is decisive of this question, and for the very same reasons. The distinction between high and low misdemeanors is one that has never been recognized in this state. The constitution and statutes relate exclusively to felonies and misdemeanors. The dividing line between the two is clearly marked and defined. The common-law distinction between high and low misdemeanors, depending upon the question whether the offense charged was infamous or not, was more imaginary than real, and calculated to lead to great confusion and uncertainty in the administration of justice. To attempt, in this state, to perpetuate such a distinction, would necessarily increase the avenues through which criminals too often escape justice. It is contended that the offense charged here was a high misdemeanor, and always prosecuted by indictment prior to the adoption of the constitution of 1879, and that justices' courts never had jurisdiction of such offenses. But this is a mere assertion without authority to support it, and this court has expressly held that under the present constitution the legislature is empowered to establish justices' courts, and confer upon them such powers as to it shall seem proper, and that under this provision the legislature may confer jurisdiction in the justices' courts over misdemeanors, and that such jurisdiction is exclusive. Ex parte Wallingford, 60 Cal. 104; Gafford v. Bush, Id. 149. The power given the legislature by the constitution is not limited to any class of misdemeanors, high or low, but extends to such offenses generally. Const. art. 6, § 13. Therefore, to hold that it is unconstitutional to try a misdemeanor of the kind here charged in a justices' or police court is to hold that the provision of the constitution referred to is itself unconstitutional. That it was the intent that such jurisdiction might be conferred upon inferior courts is manifest from the fact that the jurisdiction had already been conferred upon the police court by an act which was in force at the time the present constitution was adopted. St. 1871-72, p. 84. The jurisdiction, so far as it relates to this particular court, has not been changed since the constitution was adopted. It was a misdemeanor "already provided for," and strictly within the letter of the constitution. The point made that this class of cases cannot be prosecuted in inferior courts because they must be presented by indictment or information does not affect the question of jurisdiction. As was said in Ex parte Wallingford, supra: "But counsel entirely overlook the all-important fact that the jurisdiction of the offense is not determined by the form of procedure by which it is prosecuted, but by the nature of the offense itself. And since, as already shown, the superior court has no jurisdiction of such misdemeanors as have been committed by the legislature to the justice's court, and since the legislature has committed to the last-named court all cases of petit larceny, a conclusion quite the reverse of that drawn by respondent's counsel would seem to follow from section 976 of the Penal Code." Section 13, art. 6, Const. provides: "The legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1 of this article, and shall fix by law the power, duties, and responsibilities of the judges thereof." Under this section the legislature has power to confer upon such courts jurisdiction in all cases not vested in some other court by the constitution. Gafford v. Bush, supra. That all misdemeanors are included in this power is clearly apparent from the fact that jurisdiction of such offenses is, by the constitution itself, withheld from the higher courts upon provision being made by the legislature vesting it in such inferior courts. These cases could only be "otherwise provided for" by vesting the jurisdiction in such inferior courts as the legislature might establish, for the reason that power to create other courts, and to confer jurisdiction upon them, is confined to such inferior courts. The legislature has acted upon this provision by conferring jurisdiction upon police courts in cities having a population of not less than 30,000, nor more than 100,000, inhabitants, in all misdemeanors. St. 1885, p. 213. If counsel are right that only low misdemeanors can be prosecuted in such courts, so much of this act as includes high misdemeanors is unconstitutional, and the court in which the action is commenced must, in every case, in order to fix its jurisdiction, determine whether the offense charged belongs to one or the other of the two classes of misdemeanors. We find nothing in the constitution which leads us into this labyrinth of uncertainty. Its provisions are plain and direct. If one misdemeanor is within its terms, all must be. That it does confer the power to vest exclusive jurisdiction of some misdemeanors in inferior courts has been decided by this court, as we have seen, in two well-considered cases. That it relates, in terms, to all misdemeanors is equally clear to our minds. The questions of law involved are raised by demurrer, but counsel have discussed the whole case in their briefs in such manner as to indicate to us that there was no dispute as to the facts, and we have considered the case fully with that understanding. If, however, it is desired, the respondent is allowed 10 days within which to file an answer. If no answer is filed within the time limited, a peremptory writ of prohibition will issue as prayed for.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

(79 Cal. 34)

BAKER *et ux.* v. FIREMEN'S FUND INS. CO. *et al.* (No. 12,803.)

(*Supreme Court of California.* April 23, 1889.)

MORTGAGES—REDEMPTION.

1. Plaintiffs, whose property had been sold under a mortgage foreclosure, induced B. to advance the money to redeem it, and they executed a deed absolute in form to him, an agreement being simultaneously executed by him to sell, and by plaintiffs to buy, the land for a certain sum, if paid at a certain time; it being stipulated that, on the failure of plaintiffs to comply with its terms, B. should be released from all obligations in law or in equity to convey the property, and should be entitled to the immediate possession, and to a strict foreclosure of the contract. The deed and agreement were recorded. *Held*, that the deed was in effect a mortgage, and subsequent purchasers from B. were charged with notice of and took subject to plaintiffs' right to a reconveyance.[1]

2. Parol evidence as to whether the deed was in fact a mortgage, though unnecessary in the view stated, was admissible.

3. B. obtained insurance on the property as owner to an amount equal to that advanced by him to redeem the property and his expenses. He had also taken a bill of sale of plaintiffs' growing crops, and received the proceeds of their sale. Upon the destruction of the premises by fire, the adjuster, finding plaintiffs in possession, objected to paying the insurance, but it was finally settled between B. and the company by the latter paying B. the amount he had advanced, less the amount he had received from the crops, and B. transferred his interest under his contract with plaintiffs, and made a deed to the property to the company. *Held* that, the company having notice of plaintiffs' rights, this operated as a payment of the insurance, and upon a bill to enforce their agreement they are entitled to a credit of the full amount of the policies.

4. As the bill is in effect an action to quiet title, the failure of the plaintiffs to tender enough money to pay the debt in time did not divest them of their title to the land, but, being in possession, they could bring their action to redeem within any time.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by Peter Baker and wife against the Firemen's Fund Insurance Company. C. R. Browne, having purchased the property from defendant, intervened. Defendants appeal.

W. C. Belcher and *J. W. Mastick*, for appellants. *J. C. Campbell*, (*C. H. Clement*, of counsel,) for respondent.

FOOTE, C. The plaintiffs were the owners of a certain tract of land in San Joaquin county. They had mortgaged the property to persons not parties to this action, the mortgage had been foreclosed, and the land sold, and the time for redemption was about to expire. In this emergency they applied to H. Barnhart to help them out of their difficulty by advancing the money necessary to satisfy the purchasers under the sale. This Barnhart did, and an instrument which is a deed absolute in form was executed to him by the plaintiffs, and simultaneously an agreement in writing was entered into by the parties. Both the deed and agreement were duly recorded. The agreement recited that for a certain sum of money, if paid in a certain time, Barnhart would sell the lands to plaintiffs, and they agreed thus to purchase them, and to pay the amount named in the agreement. The following is a clause of that instrument, (the words italicized being so marked by the writer of this opinion:) "Time is hereby especially made the essence of this contract, and, in the event of the failure to comply with the terms hereof by said parties of the second part, the said parties of the first part shall be released from all obligations in law or equity to convey said property, *and shall be entitled to the immediate possession of the same, said parties of the second part shall forfeit all rights thereto, and said parties of the first part shall be entitled to a strict foreclosure of this contract;* and the said parties of the first part, on receiving such payment at the time and in the manner above mentioned, agree to execute and to deliver to the said parties of the second part or to their assigns a good and sufficient deed." It was not provided that in any contingency the plaintiffs were to be released from their obligation to pay. "And it is understood that the stipulations aforesaid are to apply to and bind the heirs, executors, administrators, and assigns of the respective parties," etc. At the same time Barnhart obtained from the defendant corporation two policies of insurance, one for $2,500 on the house upon said land, and another for $1,000 upon the barn thereon. These policies were issued to Barnhart as the owner of the property, and not as mortgagee. The sum of money mentioned in the agreement above referred to was made up of the amount paid by Barnhart upon the redemption of the land from the foreclosure sale, the expenses of preparing the deed, agreement, and other papers, the premiums on the policies of insurance, and $500 in addition, which last sum we surmise to have been as compensation to Barnhart for laying out of the use of his money for the time specified in the agreement, at the expiration of which the plaintiffs were to purchase back their land. There was also executed upon the same day with the other instruments heretofore mentioned a bill of sale of the crop growing upon the land of the plaintiffs. After all these agreements were made the plaintiffs still continued to remain, reside upon, and apparently control the premises; Barnhart in the meanwhile receiving money from the proceeds of the crop. On the 18th of September, and before the maturity of the agreement, the house on the premises was destroyed by fire, and shortly afterwards the barn. The adjuster for the defendant corporation appeared on the scene, visited the premises, saw the plaintiffs in possession, and objected to paying the insurance money. Then it appears that, by an arrangement between him and Barnhart, Barnhart received from the insurance company all the money which he claimed the plaintiffs had agreed in their contract to pay him, less what he had admitted he had already received from them, transferred all his interest under the contract to the corporation, and made it a deed to the property. After this suit was commenced they made a conveyance of it to the intervenor. The plaintiffs before suit brought, and before the time stated in the agreement, when their right to purchase the land would expire, tendered to the defendant corporation the money which the plaintiffs claimed to be due under the terms of their contract with Barnhart, and demanded a deed. Defendant offered to receive the money as so much on account, but refused to execute a deed. The money thus tendered was then deposited in a bank, and was thereafter so kept, ready to be paid the defendant on demand. On December 17, 1886, a few days after the tender and refusal, plaintiffs filed their complaint herein, alleging that the deed from them to Barnhart was intended to be and was a mortgage, and prayed for a reconveyance of the land by the defendant to them, upon the payment of $1,000.20, which they had tendered. Upon leave being given to intervenor to file his complaint of intervention, plaintiffs answered that pleading, and filed a cross-complaint. To the cross-complaint the intervenor demurred, the demurrer was overruled, and the intervenor answered the cross-complaint. A trial by jury was had upon certain specific issues. The court below afterwards adopted the findings of the jury upon them, and filed other findings, which sustained the contention of the plaintiffs that the deed which they had executed to Barnhart was a mortgage, and adjudged that the intervenor should execute and deliver to the plaintiffs a deed to the premises, upon the payment to him of the amount of their tender and deposit in bank. A motion for a new trial was made by the defendant and intervenor, and refused. From the judgment and order this appeal is taken.

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[1] In general, as to what constitutes a mortgage, see Booth v. Hoskins, (Cal.) 17 Pac. Rep. 225, and note; Strong v. Strong, (Ill.) 18 N. E. Rep. 665, and note; Norris v. Schuyler, 4 N. Y. Supp. 558; Chandler v. Chandler, (Iowa,) 41 N. W. Rep. 319, and note.

We perceive no error in impaneling the jury before framing the special issues to be submitted to them. The issues could not be tried by a jury until it was impaneled. Nor can we perceive any error in the finding that the deed to Barnhart was executed to secure a debt due from the plaintiffs to him. Looking at the deed and the contract in the nature of a defeasance irrespective of the oral testimony in the record, it is apparent from the clause which we have italicized that it was intended that the deed should be a mortgage, securing the payment of a debt. It appears therefrom that there was a sum of money to be paid, and the grantee in the supposed deed was not to be entitled to the possession of the property until there was a failure to pay said sum. This is inconsistent with the theory of an absolute deed. Moreover this provision is supplemented with language about the "foreclosure" of the plaintiffs' rights. This seems to us sufficiently to indicate the nature of the transaction, and to put subsequent purchasers upon inquiry. This being so, and both instruments having been duly placed upon record, the defendant and the whole world were charged with notice of these facts. Therefore the transaction must be held to be a mortgage upon the face of the papers themselves, and, inasmuch as the papers were recorded, the insurance company is conclusively presumed to have had notice of the real nature of the transaction. The parol evidence upon the question of mortgage or no mortgage, although unnecessary in the view just stated, was nevertheless admissible, and, taken in connection with the papers, leaves no doubt in our minds upon the question.

The appellant makes a strenuous and forcible argument that the evidence, as to the matter of the settlement by Barnhart with the insurance company's adjuster, shows without any conflict that there was no payment of the losses under the policies of insurance. It is claimed that Barnhart and the agent both positively swear that the policies were canceled by the payment of one dollar each, and that no settlement was made for the losses occasioned by the fire. Let it be admitted that the only oral testimony upon the subject, that of Barnhart and the adjuster, is to that effect, and yet the circumstances surrounding the whole matter leave a most decided impression that these two witnesses are mistaken as to their recollection of the facts of the actual transaction. As was said by BALDWIN, J., in Blankman v. Vallejo, 15 Cal. 646: "We do not understand that the credulity of a court must necessarily correspond with the vigor and positiveness with which a witness swears. A court may reject the most positive testimony, though the witness be not discredited by direct testimony impeaching him or contradicting his statements. The inherent improbability of a statement may deny to it all claims to belief." The court below was in possession of all the peculiar facts surrounding this affair, saw the witnesses, and heard them testify, and we cannot say that its determination as to the real truth of the matter was unwarranted. We concur with appellant in its reply brief: "It is entirely true, as respondents contend, that an actual payment of the policies by defendant, at least with notice of the facts concerning the ownership, would have estopped defendant from relying on the clause avoiding the policies in case of untrue representation on that point." And we think that the defendant did pay the policies with notice of the ownership, and is now estopped to claim the benefit of the forfeiture clause. If it voluntarily paid the loss, it makes no difference whether Barnhart was the owner, or only, as the court and jury found here, a mortgagee.

It was agreed by an oral agreement that any insurance money which should be received by Barnhart should be credited against the amount due him. Therefore when such money was received it operated as a payment of the indebtedness *pro tanto.* The insurance company knew of this payment to Barnhart, for it made the payment itself; and, inasmuch as it had notice that the transaction was a mortgage, it was put upon inquiry as to whether the mortgage was paid or not. As said heretofore by the appellate court, this action to redeem is in effect merely an action to remove a cloud from the title, and the failure, if there was a failure, to tender enough money to pay the debt in time, did not divest the mortgagors of title to the land, and, being in possession of the land, they could bring the action to redeem at any time. Raynor v. Drew, 72 Cal. 311, 13 Pac. Rep. 866. Of course the plaintiffs cannot have their title quieted unless they have paid or shall pay all the money which they owe by their agreement. The tender of the sum of money offered was refused, as not being sufficient in amount, as it is stated that the defendant would only receive it on account. This we think was a sufficient specification of the reasons why the tender was not considered sufficient under section 2076 of the Code of Civil Procedure, and 1501 of the Civil Code.

But we do not agree with the court below as to the amount due from the plaintiffs. We have endeavored, without success, to ascertain definitely upon what arithmetical calculation, based upon the evidence in the record, the finding can be supported in relation to the exact sum of money which was paid to Barnhart on account of the proceeds of the crop of grain and hay. The amount in the finding is different from that claimed in the complaint. All the money which Barnhart actually received was $350.81. What went with some of the hay or the money it brought, if sold, does not appear satisfactorily, and it is uncertain what its value was. We think upon the whole case that the transaction between the plaintiffs and Barnhart was a mortgage, and that the recording of the writings gave the insurance company sufficient notice thereof; that the title remains in the plaintiffs, but that they are entitled to relief in the nature of the removal of a cloud upon condition of payment of what was due; that upon the question of what was due they are entitled to be credited with the sum of $3,500, received from the insurance company by Barnhart, and with whatever sums were realized from the crops, and be charged with whatever sums they owe on account of taxes paid for them, and the sums due under the contract with Barnhart. And we advise that the judgment be reversed, and the cause remanded for a new trial in accordance with the principles of the opinion.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial in accordance with the principles of the opinion.

(79 Cal. 23)

COWARD *v.* CLANTON. (No. 12,813.)

(*Supreme Court of California.* April 23, 1889.)

PARTNERSHIP—VALIDITY OF CONTRACT—ACCOUNTING.

1. Where plaintiff and defendant formed a partnership to deal in real estate, the profits to be equally divided between them, and sales were made and profits realized, the defendant could not, in an action brought by the plaintiff for his share of the profits, and for an accounting, object that the partnership agreement was in parol, and void under the statute of frauds.

2. In such case, where the defendant furnished the money to buy a tract of land, and the plaintiff was to furnish the skill in selling the same, but the entire tract was not sold, and the amount received for the portion sold was less than the amount paid by defendant for the entire tract, the plaintiff was not entitled to recover, although a profit may have been realized on the portion sold.

3. Where a pleading by a party is offered in evidence against him, and it appears that it was not signed by such party, but by his attorney, but no objection is made to its admission on that ground, the appellate court will not presume that the attorney was acting without authority.

4. A pleading filed in another action is admissible against the party filing it as containing an admission by him, though it was superseded by another pleading.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

George P. Harding, for appellant. *R. Clark*, *W. H. Grant*, and *E. R. Bush*, for respondent.

WORKS, J. The plaintiff and respondent brought his action in the court below against the appellant, upon a contract which he avers in his complaint was one of partnership, by which the defendant was to furnish the capital to purchase real estate, and the plaintiff to furnish the necessary skill and labor in reselling the same, and to pay certain expenses connected therewith, the parties to share equally the profits realized from such resales; that a certain tract of land was purchased in pursuance of the contract in the name of the defendant; that there was a net profit resulting from such resale, which the defendant had received and failed to account for. The prayer of the complaint was for a dissolution of the partnership, an accounting, and judgment for plaintiff for the share of the profits found to be due him. The defendant denied the partnership, and alleged that he had, by the contract, employed the plaintiff to sell the real estate as his agent, upon terms similar to those set up by plaintiff. The contract is alleged to have been in parol, and it is so found by the court. The matter of accounting was referred to a commissioner, who found that the tract of land was purchased for $20,000, and was sold in parcels for an amount aggregating $24,156.50; that the net profits amounted to $3,420.66, and that respondent was entitled to recover $1,710.33; and judgment was rendered accordingly. Upon a motion for a new trial, the court below found that the findings of the commissioner that the whole of the tract had been sold were not sustained by the evidence. The decision was as follows: "The motion for a new trial in this action having been submitted and considered by the court, the court, being fully advised, decides that the findings herein to the effect that the plaintiff and defendant, or either of them, sold to Jeans Brothers twenty acres of land for $3,000 is not sustained by the evidence; and that the finding herein to the effect that plaintiff and defendant, or either of them, sold to J. I. Eaton thirty acres of land for $4,500 is not sustained by the evidence; and that the findings that the plaintiff and defendant, or either of them, sold to H. D. Rodgers five acres of land for $1,050 is not sustained by the evidence; and the court in this decision finds and decides that none of said sales were made by plaintiff and defendant, or either of them; and the court further adjudges and decrees that by reason of said sales not being made, the amount of the judgment heretofore rendered herein is too large by $812.50; and it is ordered that unless the plaintiff, within five days from the filing of this order, consents that said judgment be reduced to the sum of $1,500, a new trial of said cause be granted, and that it be so ordered." Upon this finding the court ordered that a new trial be granted, unless the plaintiff remit the said sum of $812.50, which was done, and the new trial was thereupon denied. The defendant appeals from the judgment and from the order denying him a new trial, but the appeal from the judgment was taken more than one year after its rendition, and cannot be considered.

We think, however, that the material questions raised in the case are presented by the appeal from the order denying a new trial. As we have seen, the plaintiff contended that the contract between the parties was one of partnership; the object being to buy and sell real estate, the net profits to be divided equally; while the defendant contended that the contract was one of agency, the plaintiff to have a share of the profits as his commissions for the sale of the tract of land described in the complaint. Upon this question the court below found for the plaintiff. The defendant contends in this court that, conceding that the contract was one of partnership, as it was in parol, it was within the statute of frauds, and cannot, for that reason, be enforced. It was held by this court, in an early case, that a partnership, the object of which was to deal in real estate, could not be formed by a contract resting in parol. Gray v. Palmer, 9 Cal. 616, 639. The question seems not to have been very thoroughly considered, and the case is clearly against the great weight of authority. York v. Clemens, 41 Iowa, 95, 101; Sherwood v. Railway Co., 21 Minn. 127; Snyder v. Wolford, 33 Minn. 175, 22 N. W. Rep. 254; Bunnel v. Taintor, 4 Conn. 568; Holmes v. McCray, 51 Ind. 358; Dale v. Hamilton, 5 Hare, 369; Hunter v. Whitehead, 42 Mo. 524; Chester v. Dickerson, 54 N. Y. 1.

The contract, as between the parties to it, does not in any way affect the title to real estate, nor does the present controversy between the parties involve any such question. The subject-matter of the contract was the profits to be realized from sales made, and the controversy here is as to such profits, and the adjustment of accounts as between the partners. This is a matter over which a court of equity has complete jurisdiction, and the defendant cannot, after the contract has been executed, and the profits have gone into his hands, be heard to say that the contract under which the profits were realized was void under the statute of frauds.

But, admitting the contract to have been one of partnership, it is conceded that to entitle the respondent to recover, it must appear that profits were made by the purchase and sale of the lands. This was shown by the findings of the commissioner, which were adopted by the court. By the specifications of particulars, in which the findings were not sustained by the evidence, the sufficiency of the evidence to sustain the findings that certain sales of the property were made, are brought in question. The court below found that such findings were not sustained by the evidence, and that some of the alleged sales had not been made. It is conceded that before the respondent could recover the purchase money paid for the real estate, with interest, certain expenses must be paid, or enough be realized to pay the same. The findings of the commissioner are to the effect that the purchase money for the tract of land was $20,000. If the amounts of the supposed sales which the court found on the hearing of the motion for a new trial were not made are deducted from the gross amount found by the commissioner, there was not sufficient realized to repay the purchase money, to say nothing about interest and expenses. This being the case, we are unable to see upon what theory the court below could have found that the respondent was entitled to recover the sum of $1,500, or any other amount. When these amounts were deducted it clearly appeared that the respondent was not entitled to recover, for the plain reason that no profits were proved. Instead of requiring the respondent to remit a part of his judgment, and then denying a new trial, the new trial should have been granted. The respondent contends that it was sufficient for him to show that for that portion of the entire tract sold a profit had resulted, but we are not inclined to give the contract such a construction. There would be no justice or equity in giving the respondent a share of the purchase money of the part sold, and leaving the appellant with the remainder of the tract on his hands, upon the sale of which a loss might occur. As we view the contract and the evidence, the whole tract must have been sold at a profit to entitle the respondent to recover a money judgment. If a part of the property remains unsold, and it is shown to be partnership property, it may be disposed of as other partnership assets are disposed of in closing up the business; but a court of equity cannot say that one of the partners shall take the money, and the other the land, under the circumstances of this case.

There is another question presented by the record which may arise upon another trial, and we, for that reason, find it necessary to pass upon it. The appellant offered in evidence an answer of the respondent in another action between the parties here, in which he alleged an indebtedness from the appellant to him for commissions for the sale of a part of this tract of land as appellant's agent. As the appellant was contending in this case that these sales were made by respondent as his agent, and not as a partner, it will be seen that the answer contained a material admission. But the respondent objected to the admission of the answer on the ground that it was superseded by the filing of another answer in the case. This was no reason for excluding it as evidence. No matter if it had ceased to exist as a pleading in the cause, it was still binding upon the respondent as an admission. It is urged here that the answer was not verified, and was not signed by the respondent, but by his attorney. It is enough to say that this objection to its admission was not made in the court below, and this court will not presume, under such circumstances, that the attorney was acting without authority. There is some confusion in the cases as to the right to introduce a pleading in evidence, where the same is signed by an attorney, without first proving that it was pleaded with the knowledge and by the authority of the party. Duff v. Duff, 71 Cal. 513, 521, 12 Pac. Rep. 570; Cook v. Barr, 44 N. Y. 156; Kamm v. Bank, 74 Cal. 191, 15 Pac. Rep. 765. In our judgment it should be presumed, where a pleading is filed by the attorney of the party, that such attorney was acting within his authority, and that the pleading should be regarded as the admission of the party, subject to his right to show that as a matter of fact the pleading was not authorized by him. But as the point is not directly raised here, and a decision of the question is not necessary, we do not pass upon it. Under the objection made to it the answer should have been admitted. The appeal from the judgment is dismissed, and the order denying a new trial reversed.

We concur: THORNTON, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

BEATTY, C. J. I think the contract sued on was wholly invalid, and therefore concur in the judgment.

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79 Cal. 51

MAULDIN *v.* CLARK *et al.* (No. 12,754.)

(*Supreme Court of California.* April 24, 1889.)

JUDGMENT—RES ADJUDICATA.

1. In an action for damages for the conversion of a number of cords of wood, it appeared that prior to such action plaintiff had brought suit against the defendant for the possession of certain real estate, and for rents and profits, and for damages for waste in selling timber on said real estate; and it was alleged that the timber the sale of which was alleged to be waste was identical with the wood alleged to have been converted. *Held* that, as so much of the former action as was based on the allegation of waste was for an injury to real property, a judgment in such action could not be a bar to the subsequent action for the conversion of the wood, which was personalty.

2. And, where there was no other evidence that plaintiff was the owner of the wood alleged to have been converted than the judgment in the former action for the possession of the real estate, a nonsuit was proper.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Action by Millicent R. Mauldin against C. W. Clark and others. Judgment was given for defendants, and plaintiff appeals.

Thornton & Merzbach and *Grove L. Johnson*, for appellant. *A. L. Hart*, for respondents.

WORKS, J. This is an action for damages for the conversion of 3,000 cords of wood. The complaint was not verified. The defendant pleads the general denial, and, as a separate defense, that prior to the bringing of this action the plaintiff brought a suit in the court below for the possession of certain real estate, describing it, and to recover the rents and profits, and for $6,000 damages, for waste in knowingly, willfully, and maliciously cutting off and selling the timber on said real estate; and that judgment was rendered in favor of the plaintiff in said action for the recovery of said real estate, and against her as to the alleged damages for detention thereof and waste. It is averred that the wood and the value thereof, described in the complaint in this action, constituted the rents and profits of the said land during the time that defendants were in the possession of the same as aforesaid, and is identical with that described in the complaint of plaintiff in the former action above named, as having been cut and sold by defendants during their said possession of said property, and as constituting waste thereon. "And the defendants aver that the said judgment in the said former action is now in full force, and is a bar to the recovery of the plaintiff in this action." Upon the trial the plaintiff commenced her case by an attempt to prove the defense. The judgment roll of the case referred to was introduced in evidence, and proof made that while the defendants were in possession of the property they cut down timber, converted it into wood, and sold the wood. The value of the wood was proved, and the issuance of a writ of restitution and its service. The defendant moved for a nonsuit on several grounds, among others that there was no proof that plaintiff owned the property sued for, and that her cause of action was barred by the former action.

Counsel on both sides have elaborately argued the question whether the former action was a bar or not, and, incidentally, whether there was such a finding and judgment upon the question of waste as could bind the plaintiff under any circumstances. Without going into a discussion of these questions, it is sufficient to say that the judgment could not bar this action, for the plain reason that the issues in the two cases were essentially and entirely different. Taylor v. Castle, 42 Cal. 367. So much of the former action as was based upon the allegation of waste was an action for injury to real estate. The case at bar is one for the conversion of personal property. But the nonsuit was rightly granted on the other ground mentioned. There was no proof that the plaintiff owned any cord-wood. Appellant contends that by proving the judgment for the possession of the real estate she proved her ownership of the timber thereon. But she is not suing for injury to the timber, which would be a part of the real estate, but for the conversion of personal property, which has no connection with the realty. To hold with the appellant on this ground would compel us to hold that the judgment pleaded was a bar. If the former judgment concluded the respondents as to the ownership of the wood, it must be equally binding upon the appellant as to the right to recover damages therefor. We think the former judgment was totally immaterial to either of the parties in this action. The case should therefore be treated as if no such judgment had been pleaded or proved. So treating it, the plaintiff failed to prove her case, and the nonsuit was properly granted. Judgment and order affirmed.

McFARLAND, J. I concur in the judgment

THORNTON, J. I concur on the ground that the judgment in the former action of Mauldin v. Clark & Cox constituted a bar to this action.

BEATTY, C. J. I cannot agree that there was no evidence of a conversion by the defendants of the cord-wood belonging to the plaintiff. But I concur in the judgment on the ground that the evidence introduced by plaintiff to show her title in this action would have sustained a judgment in her favor for the damages claimed in her former action against the same defendants, and, consequently, that the judgment in that action—which was, in legal effect, a judgment against her on her claim for damages for cutting the same wood—is a bar to the present action

I concur: PATERSON, J.

SHARPSTEIN, J. I concur in the judgment.

(78 Cal. 490)

RISER v. WALTON. (No. 11,858.)

(*Supreme Court of California.* March 25, 1889.)

PLEADING—HARMLESS ERROR.

A complaint in an action for fraudulent representations in the sale of land was demurred to because it did not contain a formal allegation of damages sustained, but the demurrer was overruled. The complaint prayed for a certain sum and costs, and defendant answered, and the cause proceeded precisely as if the complaint had contained the allegation. *Held*, under Code Civil Proc. Cal. § 475, requiring the court at every stage of the proceedings to disregard errors and defects not affecting the substantial rights of the parties, that a judgment for plaintiff would not be reversed.

Department 2. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

Action by Frank A. Riser against Jesse Walton. Judgment for plaintiff, and defendant appeals.

Hall & Rodgers, for appellant. *Mesick & Maxwell*, for respondent.

SHARPSTEIN, J. This action is for a fraudulent representation by the defendant in the quantity of land sold by him to the plaintiff. The plaintiff alleges that the defendant falsely and fraudulently represented to plaintiff that said tract contained 60 acres of land, whereas it actually contained no more than 46 acres. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled, and appellant contends that the order is erroneous, because there is no averment that the plaintiff sustained any damage.

The complaint states facts sufficient to sustain a judgment for damages; and, while it does not contain a formal allegation of the amount of damages sustained by plaintiff, it concludes with a prayer for judgment for $1,400 and costs. We think that the equivalent of a statement of the amount of damage which he had sustained. The defendant answered, denying the material allegations of the complaint; and the trial, so far as we can observe, proceeded precisely as it would had the complaint contained the allegation which it is claimed it should have contained. And the court must, in every stage of an action, disregard an error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties. Code Civil Proc. § 475. We perceive no good ground for reversing the judgment on the alleged defect in the complaint.

The findings of the court are sufficient to sustain the judgment, but the appellant claims that the evidence is insufficient to justify the findings. That the defendant's agent who negotiated the sale on behalf of defendant to plaintiff represented to plaintiff that the tract contained 60 acres is clearly proved, and it is clear that plaintiff believed that representation. It is quite clear, too, that defendant at the time knew that the tract did not contain that number of acres. The evidence shows beyond doubt that the plaintiff was deceived, and the defendant has adopted the sale made by the deception, and received the benefits of it. Under such circumstances he takes the sale with all its burdens. Veazie v. Williams, 8 How. 134; Fitzsimmons v. Joslin, 21 Vt. 129. There is evidence tending to prove that the defendant personally participated in the misrepresentation. He was present when plaintiff, defendant, and defendant's agent were examining an abstract of title to the tract, and came across a map, and defendant made a diagram on it with a lead pencil, with the remark, "My sixty acres lie there." The record in our opinion discloses no error, and the judgment must be affirmed.

We concur: THORNTON, J.; MCFARLAND, J.

(78 Cal. 593; 3 Cal. Unrep. 70)

WHITE *et al.* v. LEE *et al.* (No. 12, 814.)

(*Supreme Court of California.* April 18, 1889.)

MINES AND MINING—LOCATION.

Rev. St. U. S. § 2324, providing that upon entering a mining claim "the location must be distinctly marked on the ground, so that its boundaries can be readily traced," requires the boundaries of a placer claim to be thus marked, though the claim is co-extensive with a legal subdivision of land surveyed under the government system; and though sections 2329 and 2331 provide that the entry of land so surveyed shall, as to its exterior limits, conform to legal subdivisions, and that, where placer claims are upon surveyed lands, and conform to the legal subdivisions, no further survey or plat shall be required.

Commissioners' decision. Appeal from superior court, Placer county; B. F. MYRES, Judge.

Action by Lincoln White and William Singer, Jr., against George Lee and Jesse S. Wall, to determine the right to a gold-bearing placer mine known as the "Scott Placer Mine." The mine was located on, and was co-extensive with, the S. W. ¼ of the N. W. ¼, section 22, township 11 N., range 7 E. of the Mount Diablo meridian, in Placer county. Judgment for plaintiffs, and defendants appeal.

William Singer, Jr., and *Hale & Craig*, for appellants. *C. A. & F. P. Tuttle*, for respondents.

HAYNE, C. Action to determine the right to a mining claim. Judgment for defendants. Plaintiffs appeal. In 1885 the grantors of the plaintiffs located the land, marked off the boundaries, and did all the other acts required of them by law, and therefore they acquired a valid claim, if there was no prior right in the grantors of the defendants. The latter posted and recorded notice of location, but failed to mark off the boundaries. The statute requires that "the location must be distinctly marked on the ground, so that its boundaries can be readily traced." Rev. St. § 2324. And it is well settled that a failure to comply with this requirement invalidates the claim. It is contended for the respondents, however, that the requirement does not apply where the public surveys have been extended over the land, and the claim is for the whole of a legal subdivision; and this is the only question to be determined. The learned counsel for the respondents expressly says: "The one point to be passed upon by the court in this case is whether in locating a placer mining claim by legal subdivisions on surveyed ground it is necessary to mark the lines of the location." The position is that this exception to the general requirement follows from other provisions of the Revised Statutes. But we do not think that this position can be maintained. Section 2329 provides, among other things, that "where the lands have been previously surveyed by the United States the entry in its exterior limits shall conform to the legal subdivision of the public lands." This, however, simply provides where the claimant shall run the lines of his claim. It does not at all dispense with the requirement as to how the lines shall be marked or evidenced. Section 2331 provides that "where placer claims are upon surveyed lands, and conform to legal subdivisions, no further survey or plat shall be required," etc. This provision does not refer to the marking by the claimant of the boundaries of his claim upon the ground, but to the plat and survey which are to be filed upon the application for the patent. Nor do we see any provision which dispenses with the general requirement that the boundaries shall be marked.

The construction contended for does not seem to us to be in harmony with the general purpose of the act. The purpose of the requirement that the claimant shall mark the boundaries of his claim is to inform other miners as to what portion of the ground is already occupied. The men for whose information the boundaries are required to be marked wander over the mountains with a very small outfit. They do not take surveyors with them to ascertain where the section lines run, and ordinarily it would do them no good to be informed that a quarter section of a particular number had been taken up. For this reason it is required that the boundaries shall be "distinctly marked upon the ground." The construction contended for by the respondents would, in our opinion, defeat the purpose of the requirement. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

3 Cal. Unrep. 72

WELSH, Road Overseer, *v.* GOULD. (No. 12,434.)

(*Supreme Court of California.* April 18, 1889.)

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

A finding of the court will be affirmed, where it cannot be said upon the record that the decision was erroneous.

Commissioners' decision. In bank. Appeal from superior court, Butte county; LEON D. FREER, Judge.

Action by Columbus Welsh, as road overseer, against E. H. Gould, to abate a nuisance. Defendant had built a fence across one of the public roads running through plaintiff's district, and the latter had removed it, only to find it rebuilt by defendant, who threatened to rebuild it as often as it was removed. On the trial defendant claimed that there never was a road there, and also, if there had ever been one, it had been closed by a decree of the superior court in an action wherein this defendant was plaintiff and the county of Butte defendant, to quiet plaintiff's title to certain land therein described. Judgment for defendant, and plaintiff appeals.

John C. Gray, Dist. Atty., for appellant. *P. O. Hundley*, for respondent.

HAYNE, C. The question upon which this case turns is whether there was a public road through the land of defendant. The court below found that there was not. And we cannot say upon the record before us that its action should be disturbed. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

78 Cal. 588

CHOPE *v.* CITY OF EUREKA. (No. 11,739.)

(*Supreme Court of California.* April 18, 1889.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS.

A municipal corporation is not liable, in the absence of statutory provision, for personal injuries to one who fell into a sewer which was in process of construction, and was negligently left insufficiently guarded by the officers of the corporation.

BEATTY, C. J., and WORKS, J., dissenting.

In bank. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

S. M. Buck, for appellant. *John A. McQuaid*, for respondent.

MCFARLAND, J. This is an action to recover damages for alleged personal injuries, caused by the plaintiff falling into an excavation for a sewer within the corporate limits of defendant, a municipal corporation. A general demurrer to the complaint was overruled, a motion for nonsuit was denied, and the jury found a verdict for plaintiff. The defendant appeals from the judgment, and from an order denying its motion for a new trial. The defendant was incorporated by a special charter in 1874. St. 1873–74, p. 91. Its legislative body is a common council, consisting of five members. The charter also provides for a marshal and certain other officers. The common council is given the powers enumerated in section 4408 of the Political Code, and also certain other special powers, but it is nowhere provided that the corporation shall be liable for injuries suffered by individuals through the neglect of the officers of the corporation to properly perform their duties. The facts upon which the judgment rests are these: The records of the proceedings of the common council, introduced in evidence, show the following, and no more: "In regard to certain alleyway nuisances, more particularly that of the sewer leading down the alley from the Western Hotel, and forming a cess-pool at the end of said alley-way, the matter was, on motion, left in the hands of the committee on streets; they to take prompt action thereon." After this the city marshal, for the purpose of removing said cess-pool nuisance, commenced the construction of a sewer; and the jury had, perhaps, the right to find from the evidence that in doing so he acted under the direction of one or more members of said committee on streets. The sewer, while in process of construction, was left open, with a 12-inch plank across it, and without the protection of guards or lights. On a dark night the plaintiff fell into the sewer and was hurt, and for the damages thus received he recovered the judgment. Without noticing any of the other points made by appellant, it is sufficient to say that it has long been the settled law of this state that a municipal corporation is not liable for personal injuries to individuals, such as that claimed to have been sustained by plaintiff, where there is no statutory provision declaring such liability. There is, no doubt, some conflict of decisions on the question in other states, although it is to be observed that in the New England and some other states there are statutory declarations of the liability. But in California the doctrine above stated has been clearly and continuously adopted, and, if any change in the law is desirable, that change must be made by the legislature. And so far, at least, the legislature has shown no disposition to make the change. Winbigler v. City of Los Angeles, 45 Cal. 36; Tranter v. City of Sacramento, 61 Cal. 275; Barnett v. Contra Costa Co., 67 Cal. 77, 7 Pac. Rep. 177; Crowell v. Sonoma Co., 25 Cal. 315; Huffman v. San Joaquin Co., 21 Cal. 430. The nonsuit, therefore, should have been granted, and the verdict and judgment were against the law and the evidence. Judgment and order reversed, and cause remanded.

We concur: SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

WORKS, J., (*dissenting.*) I cannot concur in the conclusion reached, or the doctrine announced, in the foregoing opinion, that a city cannot be held liable for damages for injuries resulting under the circumstances of this case. The obstruction of the street was the direct act of the city. The work being done, which resulted in such obstruction, was the work of the city, and not of a contractor. To deny all remedy, as against a city, under such circumstances, is, in many cases, a practical denial of justice. It may be that some of the cases cited in the prevailing opinion are broad enough to cover this case, and justify the conclusion reached, but if so they should, in my judgment, be modified. Most of the cases are for mere negligence of the corporation to keep public highways in repair, or perform some other duty devolving upon its officers. Huffman v. San Joaquin Co., 21 Cal. 427; Sherbourne v. Yuba Co., 21 Cal. 113; Winbigler v. City of Los Angeles, 45 Cal. 36; Tranter v. City of Sacramento, 61 Cal. 271; Moore v. City of Los Angeles, 72 Cal. 287, 13 Pac. Rep. 855; Barnett v. Contra Costa Co., 67 Cal. 77, 7 Pac. Rep. 177. Whether these cases state the law correctly or not it is not necessary to determine. It is enough to say that they differ materially from the case under consideration. Two of the cases cited may be fairly construed as broad enough to cover this case. Crowell v. Sonoma Co., 25 Cal. 313; Howard v. San Francisco, 51 Cal. 52. But so construed they cannot, in my judgment, be supported either by reason or authority. Mr. Dillon, in his valuable work on Municipal Corporations, states the rule thus: "Where streets have been rendered unsafe by the direct act, order, or authority of the municipal corporation, (not acting through independent contractors, the effect of which will be considered presently,) no question has been made or can reasonably exist as to the liability of the corporation for injuries thus produced, where the person suffering them is without contributory fault, or was using due care. Even in those states in which a municipality is not held impliedly liable to a private action for neglecting to keep its streets in repair, it is yet held to be liable if it, or its officers under its authority, by positive acts, place obstructions on the streets or by such acts otherwise render them unsafe, whereby travelers are injured. Where the duty to keep its streets in safe condition rests upon the corporation, it is liable for injuries caused by its neglect or omission to keep the streets in repair, as well as for those caused by defects occasioned by the wrongful acts of others; but, as in such case the basis of the action is negligence, notice to the corporation of the defect which caused the injury, or facts from which notice thereof may reasonably be inferred, or proof of circumstances from which it appears that the defect ought to have been known and remedied by it, is essential to liability." 2 Dill. Mun. Corp. (3d Ed.) § 1024. I take this to be a correct statement of the law, and one that is supported by an overwhelming weight of authority. 1 Shear. & R. Neg. §§ 273, 288, 289, 291; Galveston v. Posnainsky, 62 Tex. 118; Barnes v. District of Columbia, 91 U. S. 541; Ehrgott v. New York, 96 N. Y. 264; Nelson v. Canisteo, 100 N. Y. 89, 2 N. E. Rep. 473; Thomp. Neg. 735, 736, notes; Maxmilian v. New York, 62 N. Y. 160; Harper v. City of Milwaukee, 30 Wis. 365, 372; Barton v. City of Syracuse, 36 N. Y. 54; Eastman v. Meredith, 36 N. H. 284, 294; City of Denver v. Rhodes, 9 Colo. 554, 562, 13 Pac. Rep. 729. Innumerable cases might be cited to the same effect, but to do so would unnecessarily extend this opinion. Many of them will be found cited in the text-books above referred to. For the reasons stated I am of the opinion that the judgment and order appealed from should be affirmed.

BEATTY, C. J. I concur in the foregoing opinion of Justice WORKS.

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78 Cal. 600

SWAIN v. STOCKTON SAV. & LOAN SOC.

(No. 12,716.)

(*Supreme Court of California.* April 19, 1889.)

SUBROGATION—PARTIES—FINDINGS.

1. A judgment creditor, after purchasing his debtor's land at a sale under his judgment, and before the statutory period of redemption expires, has a lien on the land, giving him the right to be subrogated to the benefits of a trust-deed prior to his judgment, under Civil Code Cal. § 2904, providing that a junior lienholder may, upon satisfying the claim secured by a superior lien, be subrogated to all the rights thereunder, when necessary to protect his interest.

2. Neither the trustees in the deed of trust nor the grantors are necessary parties to a suit for such subrogation, as they cannot be affected by the judgment therein.

3. A finding that the *cestui que trust* is unwilling to allow the plaintiff (the judgment creditor) to be subrogated to its rights, but that it was always, and is still, willing to receive the amount of its debt, and to procure the trustees to reconvey to the grantors, is consistent with and supports a judgment allowing plaintiff to be so subrogated.

In bank. Commissioners' decision. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by Cornelius Swain against the Stockton Savings & Loan Society, to be sub rogated to a lien held by defendant on certain land of Thomas Cornwall and Sarah E. Cornwall. Judgment for plaintiff, and defendant appeals. The plaintiff's action is based upon Civil Code Cal. § 2904, which reads as follows: "One who has a lien inferior to another upon the same property has a right (1) to redeem the property in the same manner as its owner might from the superior lien; and (2) to be subrogated to all the benefits of the superior lien, when necessary for the protection of his interest, upon satisfying the claim secured thereby."

W. L. Dudley, for appellant. *J. H. Budd*, *Aug. Muenter*, and *W. B. Nutter*, for respondent.

Foote, C. This action was brought under section 2904 of the Civil Code, to subrogate the plaintiff to certain superior lien rights of the defendant. The defendant demurred to the complaint, which was overruled. Upon answer filed a trial was had, and a judgment as prayed for passed for the plaintiff, from which the defendant appeals.

1. It is contended by the appellant that the complaint does not state facts sufficient to constitute a cause of action.

2. That there is a non-joinder of parties defendant.

3. That the findings do not support the judgment.

a. The first point made by the defendant as to the insufficiency of the complaint rests upon the assumption that the plaintiff has no lien which would entitle him to subrogation under the section of the Civil Code supra. The argument is made that after a sale of real property under a judgment to the plaintiff, a judgment creditor, but before the deed is made by the sheriff, and before the time of redemption has passed, the judgment creditor, who has purchased at the sale, has no lien; that it ceased when the sale was made. This is fallacious and is in opposition to the plainly expressed views of the appellate court in People v. Mayhew, 26 Cal. 661, where it is said: "If the right or interest that the purchaser or redemptioner holds prior to the execution of the sheriff's deed is not a mere lien, and with the qualification only of a mere lien, we are unable to give it a legal designation. See Vaughn v. Ely, 4 Barb. 159, and cases there cited."

b. It was necessary to the protection of the plaintiff's interests that he should redeem the property he had purchased at sheriff's sale from a superior lien, and hold the lien himself, which the defendant held as a *cestui que trust*, under a trust-deed in the nature of a mortgage, which secured a debt from the Cornwalls, who were also the judgment debtors of the plaintiff, and other junior judgment creditors. The plaintiff had become a mere lienholder until the execution of the sheriff's deed should be had. The Cornwalls were insolvent, other junior judgment creditors had a right to redeem the property from the plaintiff, and he could not look to them to repay what he might pay to the defendant, unless he could make it evident that he had paid the superior lien debt of the former, and held the lien. If the defendant, as it wished to do, was permitted (upon the plaintiff's paying to them their debt) to reconvey the property to the mortgagors, the Cornwalls, *non constat* but what the junior judgment creditors, without further proof that the plaintiff had paid the debt to protect his lien, might claim that the mortgage debt was canceled, the property revested in the Cornwalls, and that the plaintiff did not hold the superior lien given by the trust-deed in the nature of a mortgage. To prevent any such embarrassment it was to the plaintiff's interest to be subrogated to the defendant's rights, and have satisfactory proof thereof.

c. What the plaintiff sought in this action was that he might be placed in the same situation as the defendant in relation to the trustees under the trust-deed, and to the judgment debtors, who were the mortgagors in that instrument. This could only affect the defendant. It did not in any way impinge upon the rights of the trustees or the mortgagors, who were also judgment debtors of the plaintiff. So far as the mortgagors are concerned, it could not fix the amount of their indebtedness. They could have been heard to resist the payment of a greater sum than they owed, under the trust-deed, when an attempt should be made to execute the trust. The trustees could act, under the terms of the deed in trust, as well for one beneficiary as another. It could make no possible difference to them whether the plaintiff or defendant was their *cestui que trust*. In so far as the subrogation prayed for was concerned, if granted, it could not alter the relations of the parties any more than if the plaintiff had by agreement purchased the debt of the defendant, and had it and the lien securing it transferred to himself.

d. The finding complained of (as to what the defendant was willing to do; that is, to accept the payment of the money it claimed as due under the deed in trust, and procure the trustees to deed the property back to the mortgagors, yet still refusing to subrogate the plaintiff) is entirely consistent with and supports the judgment. Perceiving no prejudicial error, we advise that the judgment be affirmed.

We concur: Belcher, C. C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

(78 Cal. 611)

Grandona *v.* Lovdal. (No. 12,443.)

(*Supreme Court of California.* April 19, 1889.)

Nuisance—What Constitutes.

1. Code Civil Proc. Cal. § 731, defines an actionable nuisance as anything which is *inter alia*

obstruction to the free use of property." "Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance." In an action where the nuisance complained of was a line of cottonwood trees growing near the line of plaintiff's land, it appeared that his land was used for raising vegetables and alfalfa, and that the effect of the branches and shade of the cottonwoods would be injurious to the growing of fruit trees upon that part of his land shaded, but he had never planted any fruit trees adjacent to or anywhere near the cottonwoods, and there was no evidence that he ever intended to do so. *Held*, that his land was not "injuriously affected," nor his personal enjoyment lessened, by the maintenance of the alleged nuisance.[1]

2. It appeared that the trunks of the trees had grown so large that they extended over and upon plaintiff's land, and crowded the division fence over in like manner; but did not prevent him from plowing his land as close to the division line as he could have done if the trees had not been there. *Held*, that his personal enjoyment was not lessened by the crowding. So far as the trees and overhanging branches were on or over his land, they belonged to him, and he could have cut them off or trimmed them, as he chose.

3. The fact that defendant maintained the trees for the purpose of supplying himself with fuel and hop-poles, did not entitle plaintiff to maintain the action. The fuel and hop-poles growing over plaintiff's land were his, and could have been claimed by him as against defendant; and the fact that the balance of the limbs and branches were useful to defendant in no way harmed plaintiff.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Action to abate a nuisance, brought by Andrea Grandona against Ole Olson Lovdal. Judgment for defendant, and plaintiff appeals.

A. P. Catlin and *Henry Starr*, for appellant. *Freeman & Bates*, for respondent.

BELCHER, C. C. This action was brought to abate a nuisance, and for damages. The case was tried by the court, and judgment given for defendant, from which, and from an order denying a new trial, plaintiff has appealed. The plaintiff owns a tract of land in Sacramento county, containing about 15½ acres, and the alleged nuisance is a line of cottonwood trees standing about 8 feet apart along his southern boundary for a distance of about 534 feet. The defendant owns the adjoining land, and the trees were planted by his grantor in 1865, from 8 to 12 inches south of the dividing line. The complaint alleges that the branches of the trees extend over and upon plaintiff's land, and shade the same, and thereby destroy the crops upon about an acre of his land; that the roots of the trees extend upon plaintiff's land for the distance of about 30 feet all along the line of the trees, so near the surface of the ground as to prevent him from plowing and cultivating the land; that the trees, and the branches and roots thereof, destroy the substance of plaintiff's land for a space of about 60 feet wide along the whole line of the trees, and so impoverish the same as to make it wholly unproductive; that the trunks of many of the trees have grown so that a large part of the trunks are extended over and upon plaintiff's land, and have crowded out and pushed down his fences erected upon the dividing line. It is then further alleged that the plaintiff has suffered damages in the sum of $500 by reason of the aforesaid wrongs and injuries; that the further continuance of the same will cause him irreparable damage, and that the trees are of no use or value to defendant, and are a permanent and irreparable injury to plaintiff. The answer denies that the trees have destroyed or will destroy any portion of plaintiff's crops; that the roots of the trees, or any of them, extend into plaintiff's land further than five or six feet at any point; that such roots prevent the plaintiff from plowing or cultivating any portion of his land; that the trees, or the branches or roots thereof destroy the substance of any part of plaintiff's land or impoverish such land, or any part thereof; that the trunks of the trees have crowded out or pushed down plaintiff's fence, or any part thereof; that the plaintiff has suffered any damage by reason of the trees, or any of them, or will suffer any damage by their continuance, or that the trees, or any of them, are an injury to plaintiff. And the answer alleges that the trees are useful and very desirable along the boundary line, to mark such boundary, to fasten fences upon, and to anchor them in time of flood, and prevent their being swept away and lost; that the limbs of the trees are valuable and useful for fuel, and the trees are an ornament to both plaintiff's and defendant's lands, and enhance their beauty and value; that defendant has kept the tops of the trees trimmed, to prevent their injuriously shading or otherwise injuring the adjacent lands; that plaintiff can now plow and cultivate as near his boundary as he could if only a common fence, instead of the trees, were along his boundary; and that all of such trees were standing and growing on or near said boundary line long prior to the purchase of their lands by either plaintiff or defendant, and that defendant has not planted or placed any trees in or near such line, and has done nothing to such trees or towards their maintenance other than to trim their tops, to prevent their casting any large or injurious shade, and to fasten a fence thereto, to maintain it in place, and prevent its removal by floods or other cause. The court found upon the issues presented as follows: "That said trees described in the complaint have not destroyed any portion of plaintiff's crop. The roots thereof have not prevented plaintiff from plowing or cultivating any portion of his lands, and plaintiff can now plow and cultivate as near his boundary line as he could if a common or ordinary fence, instead of such trees, were along such boundary. Plaintiff's lands have not been destroyed, nor has the substance of any part been destroyed or impoverished, by said trees, nor by the roots or branches thereof. That said trees have not pushed down plaintiff's fence, or any part thereof, though they have crowded the same over upon plaintiff's land a few inches in places where the bodies of the trees extend across the dividing line. The portion of the fence along such line near said trees has always been maintained by defendant and his grantor, they having, by an understanding with plaintiff, constructed and kept up that part of the fence, while the latter has maintained another portion of the line fence between plaintiff and defendant. In maintaining said fence in place during times of flood the defendant has been very materially aided by such trees; and, but for the use of said trees at such times as an anchorage, said fence would have floated away and been lost on at least two occasions when the levees between said lands and the Sacramento river broke and permitted said lands to be swept by floods. That the limbs and tops of said trees have been cut off by defendant at intervals of about three years apart for use as hop-poles and fuel, and to prevent them casting too great a shade. All of said trees, except 8 or 9, were cut off about 20 feet from the ground and trimmed in the fall of 1885, and their limbs do not extend over plaintiff's line more than 6 or 7 feet. The remaining 8 or 9 trees are by the side of defendant's barn and *corral*, and their shade is desirable for his stock. They are now about 40 feet high, and their limbs overhang plaintiff's land about 15 or 20 feet. That the defendant has not done any act with respect to said trees other than to cut and trim off their tops and branches, and to fasten fences to such trees in times of flood. That the plaintiff has not suffered any damage by reason of said trees, or any of them, nor will he suffer damage by their continuance, nor are they, or any of them, an injury to him."

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[1] As to what constitutes a nuisance, see Medford v. Levy, (W. Va.) 8 S. E. Rep. 302, and note; Gas Co. v. Pebley, (Fla.) 5 South Rep. 593.

The Code of Civil Procedure (section 731) defines an actionable nuisance as follows: "Anything which is injurious to health, or indecent, or offensive to the senses, or an obstruction to the free use of property, so as to interfere with the comfortable enjoyment of life or property, is a nuisance, and the subject of an action. Such action may be brought by any person whose property is injuriously affected, or whose personal enjoyment is lessened by the nuisance; and by the judgment the nuisance may be enjoined or abated, as well as damages recovered." In order to maintain his action, it was necessary, therefore, for the plaintiff to prove that the trees complained of constituted a nuisance within the definition above given. The court, as we have seen, found that the plaintiff's proofs were not sufficient, and the only question is, were the findings justified by the evidence?

In the bill of exceptions found in the transcript the evidence is not set out, but it is stated that "there was a conflict of testimony as to whether either the shade or roots of the trees injured plaintiff's land, and as to whether said roots prevented plaintiff from plowing his lands as near said fence as he otherwise could, and as to whether either the shade or roots of said trees had an injurious effect upon the crops of alfalfa which plaintiff was in the habit of growing upon that part of the land where said line of trees partly shaded them." It is also stated that it appeared from the evidence, without conflict, that plaintiff's land was rich and valuable, and was used for raising vegetables and alfalfa, and that the effect of the branches and shade would be injurious to the growing of fruit trees upon that part of his land which was overhung by the branches and shaded by the trees. It is also stated that "the plaintiff had never planted any fruit trees adjacent to the line of trees in controversy, nor anywhere near them," and it is not stated that he ever proposed or intended to do so. It is urged for appellant that the trees were a nuisance, because they interfered with and prevented his enjoying the free and full use of his land for growing fruit trees. But we are unable to see how it can be said that land is injuriously affected, or that its owner's personal enjoyment is lessened, because he cannot use it for a purpose which he has never attempted or wished to use it for. The cases cited in support of this point do not sustain it. In Meyer v. Metzler, 51 Cal. 142, the court said: "It is found as a fact that the projection of the defendant's west wall prevents the plaintiff from raising and repairing his own building, which improvement it is also found that he is desirous of making." And it was held that this amounted to an obstruction of the free use of the plaintiff's property, and was therefore a nuisance. In Grandona v. Lovdal, 70 Cal. 161, 11 Pac. Rep. 623, the complaint alleged direct and positive damage done to the plaintiff's land by the supposed nuisance, and the court held that it was not subject to a general demurrer. In Ball v. Nye, 99 Mass. 582, it was held that "one who maintained a vault so that with his knowledge filthy water habitually filters from it, whether above or below the surface of the ground, into land of a neighbor, where it injures a cellar and well, is liable in damages for the injury, without other proof of negligence." In Com. v. Blaisdell, 107 Mass. 234, it was simply held that steps projecting from a house into a highway, so as to obstruct it, are a nuisance at common law and under the statute of Massachusetts.

It is specified that the evidence was insufficient to justify the decision because it appeared that the trunks had crowded the division fence over and upon plaintiff's land, and thereby ousted him from a part of his land. But the plaintiff had never been called upon to repair that part of the fence, and had never been prevented from plowing and cultivating his land as near the line as he could if the trees had not been there. His property was therefore not injuriously affected, nor his personal enjoyment lessened, by the crowding. Besides, the trees and the overhanging branches, in so far as they were on or over his land, belonged to the plaintiff, and he could have cut them off, or trimmed them, at his pleasure. This being so, we do not see how the fact that the trees had grown so that a small part of them was on plaintiff's land could give him any cause of action.

It is further specified that the decision was contrary to the evidence, for the reason that defendant maintained the trees for the purpose of supplying himself with fuel and hop-poles, and thereby using plaintiff's land for his own profit and advantage. But how can this maintain plaintiff's contention? The fuel and hop-poles growing over plaintiff's land were his, and could have been claimed by him as against the defendant. And the fact that the balance of the limbs and branches were useful to defendant in no way harmed the plaintiff, or gave him cause for complaint. We conclude that the judgment cannot be reversed on the ground that the decision was contrary to the evidence or the law; and, as no errors of law are specified or relied upon, we advise that the judgment and order be affirmed.

I concur: FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, judgment and order are affirmed.

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78 Cal. 606

GREENLEAF *v.* STOCKTON COMBINED HARVESTER & AGRICULTURAL WORKS. (No. 12,741.)

(*Supreme Court of California.* April 19, 1889.)

DAMAGES—LIQUIDATED.

1. Civil Code Cal. §§ 1670, 1671, provide that every contract by which the amount of damage to be paid in case of a breach of an obligation is determined in anticipation thereof is void to that extent, except where, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage. A manufacturer agreed to deliver a harvester to plaintiff, with contract of warranty, in exchange for a machine belonging to plaintiff, the latter agreeing to pay in addition thereto a named sum, and, in case the harvester should not do good work, the plaintiff was not to pay any money in consideration of the exchange. *Held*, that such contract did not come within the exception of the above statute, and that evidence was admissible of the actual damage sustained by plaintiff from a breach of the warranty.

2. A practical machinist who had examined machines manufactured by the vendor similar to the one sold to the plaintiff, was properly permitted to testify to the general design of such machine, and as to whether it was so made as to do the work it was intended to accomplish.

Commissioners' decision. In bank. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

W. L. Dudley and *Geo. A. Blanchard*, (*Joseph H. Budd*, of counsel,) for appellant. *Jackson Hatch* and *H. M. Albery*, for respondent.

BELCHER, C. C. This is an action to recover damages for breach of warranty of a harvesting machine, and the appeal is taken by defendant from the judgment and an order denying a new trial. In 1884 the defendant was engaged at Stockton in manufacturing and selling a harvesting machine known as the "Shippee Combined Harvester." The plaintiff, a farmer in Colusa county, purchased and used during that year one of these machines. In 1885 the defendant continued to manufacture the same machine, but with certain improvements. In May, 1885, the parties entered into a written agreement for an exchange of machines. The agreement stated that the party of the first part "agrees to deliver to said party of the second part, at their works, on or before June 3d, one 12-foot Shippee combined harvester, No. 23, as improved for 1885, and warrants the same to do good work when properly handled, and to furnish a man to help set up and start the machine. In consideration of which said party of the second party agrees to deliver to said party of the first part, on or before June 15, 1885, one No. 1 12-foot Shippee combined harvester, purchased last year, and to pay to said party $423 in gold coin on October 1, 1885; $423, with interest from maturity at the rate of 1 per cent per month until paid. It is further agreed that if the harvester should not do good work, that the party of the second part shall so inform the party of the first part; and, if said party fail to make the harvester do good work within a reasonable length of time, it is hereby mutually agreed that the party of the second part is not to pay any money in consideration for the exchange." The new harvester arrived at plaintiff's farm and was set up and started in the field by an employé of defendant on the 5th of June, but it choked up, and would not do good work. Subsequently, at different times, defendant sent three other employés, one of them being the foreman of its works, to adjust and rearrange certain defective parts of the machine, so as to make it do good work, if possible. The plaintiff continued to use, or try to use, the harvester until the 18th of July, when he sent it back to the defendant at Stockton. As explanatory of his reasons for sending it back, plaintiff wrote to defendant, under date of July 22d as follows: "Inclosed find shipping receipt for one of your machines, No. 23, which I shipped to-day to you. The gearing is not right, nor never was. It heats, binds, and cuts all the time, and, as Mr. Southworth said he could not fit it unless it was at the shop, I ship early, so you can have your own time to fix it. The header draper would clog occasionally, and also the feeder. The passage for the straw to the cylinder is too narrow, and don't allow the feed to pass. The drop is too flat. It allows it to move off in bunches and clog. The distance from the grain drag to the sieve is too short, and don't allow the grain to separate from the chaff. The fan don't give wind enough. The steering rig is much out of line; requires too much steering; is hard on man and beast. Had to get another machine to help finish our harvest." A correspondence in reference to the matter was then kept up between the parties for about a year, when this action was brought, and damages asked in the sum of $2,738.85. The verdict on which judgment was entered was for $1,428.

It is contended for appellant that the damages which respondent could claim in case the new harvester should fail to do good work, when properly handled, were liquidated and fixed by the contract of exchange at $423, and that evidence of the damages actually sustained in consequence of a breach of the warranty was therefore inadmissible. It will be observed that the language of the contract in this respect is not very clear or explicit. The contract does not call the $423 "liquidated damages," or say that it shall be treated as the measure of damages, but only that that sum is to be paid for the exchange; and that if the harvester does not do good work, and if appellant, on being so informed, does not make it do good work within a reasonable time, then the money referred to is not to be paid. Did the parties intend by this provision of the contract to liquidate the damages, or to fix a penalty, to be paid in case of a breach of the warranty? We do not think it necessary to answer the question, for the reason that, in any event, the following sections of the Civil Code seem to be controlling in the matter. "Sec. 1670. Every contract by which the amount of damage to be paid, or other compensation to be made, for a breach of an obligation, is determined in anticipation thereof, is to that extent void, except as expressly provided in the next section. Sec. 1671. The parties to a contract may agree therein upon an amount which shall be presumed to be the amount of damage sustained by a breach thereof, when, from the nature of the case, it would be impracticable or extremely difficult to fix the actual damage."

The rule as to the measure of damages in cases of this kind is declared in sections 3313 and 3314 of the same Code, and under that rule we are unable to see that it was impracticable or difficult to fix the damages which respondent had sustained. We therefore conclude that the court did not err in its rulings on this point.

It is said the verdict was not justified by the evidence, but was manifestly the result of prejudice. There was testimony tending to show that the damages were as great, if not greater, than the amount found; and, while there was a conflict in the evidence upon this subject, and it is impossible to tell how the jury determined upon the exact amount returned, we cannot say that a new trial should be granted on this ground.

It is objected that one Perkins was improperly allowed to testify as an expert. It was clearly shown that the witness was a practical machinist, and was familiar with the requirements of a machine like that in question. He had examined other similar machines manufactured by appellant in 1884 and 1885, and understood the principles applied in their construction. His testimony was as to the general design of the machine, and as to whether it was so made as to successfully do the work it was intended to accomplish. Under all the circumstances shown, we see no error in the rulings of the court as to the admissibility of the testimony of this witness.

It is further claimed that the court erred in modifying certain instructions, and in refusing to give other instructions asked for appellant. After carefully reading all of the instructions requested, we think the law of the case was very fully and fairly given to the jury, and that no error was committed by the modifications and refusals complained of. The other matters discussed by counsel do not require special notice. Looking at the whole case as presented by the record, we see nothing calling for a reversal of the judgment, and we therefore advise that the judgment and order be affirmed.

I concur: **Foote, C.**

Hayne, C. I concur on the ground that I do not think the contract purports to be for liquidated damages.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

(78 Cal. 619)

Curtin *v.* Phenix Ins. Co. (No. 12,698.)

(*Supreme Court of California.* April 19, 1889.)

Insurance—Conditions—Waiver.

A fire insurance policy issued to the plaintiff provided that, in case the assured should fail to pay the premium note at maturity, the policy should be and remain null and void, but that this should not prevent the company from collecting by suit or otherwise the note, nor should such attempt at collection be construed to revive the policy, but the same should remain null and void until payment of the note, when the policy should be revived. *Held* that, as the failure of the plaintiff to pay the note at maturity only operated to suspend the policy until payment should be made, the acceptance of a part of the premium after such maturity was entirely consistent with the terms of the policy, and did not operate as a waiver of any rights of the company growing out of the fact that the entire premium was not paid before the occurrence of a loss.

In bank. Appeal from superior court, Tuolumne county; J. F. Rooney, Judge.

Jarboe, Harrison & Goodfellow, for appellant. *F. D. & G. W. Nicol*, for respondent.

Works, J. Action on a policy of fire insurance. Defense that all of the premium had not been paid. Verdict and judgment for plaintiff. Defendant appeals.

The policy was issued on June 30, 1884, and was for a term of five years. No part of the premium was required to be paid in cash on the issuance of the policy. It provided for the giving of a promissory note, which was given as follows: "$190. On the 1st day of December, 1884, for value received, I promise to pay to the Phenix In surance Company of Brooklyn, New York, (at their office in San Francisco, California,) one hundred and ninety dollars and 50-100ths in payment of premiums on policy No. C 3,652 of said company, with seven per cent interest from maturity until paid. If this note is not paid at maturity said policy shall then cease and determine, and be null and void, and so remain until the same shall be fully paid and revived by said company. In case of loss under said policy this note shall immediately become due and payable, and shall be deducted from the amount of said loss. If this note be paid sixty days prior to maturity, all interest shall be waived. It is understood and agreed that this note is not negotiable."

The policy referred to in the note contained the following clause: "In case the assured shall fail or refuse to pay the premium note or notes, or order or orders, above described, when due, this policy shall then and thenceforward be and remain null and void, and the same cannot be revived without the written consent of the company; but this shall not prevent this company collecting, by suit or otherwise, the premium note or notes, order or orders, above described, nor shall such attempt or suit be construed to revive this policy; but the same shall be and remain null and void during such default, and until said assured shall pay such premium note, interest and fees and costs, and until this company shall receive the same, and return said promissory note to said assured, and in such case this policy shall be revived." The policy also contained the following clause: "No agent of this company has power or authority to waive or alter any of the terms or conditions of this policy, except only the general agents at San Francisco, and any waiver or alteration by them must be in writing."

At the time the policy was issued there was due from the company to the assured the sum of $44, on account of return of premium on a surrendered policy, and this sum was credited on the note. The note was not paid at maturity, and some correspondence passed between the parties, consisting mainly of demands by the company for the amount. On June 5, 1885, which was about seven months after the maturity of the note, the plaintiff sent to the general agents of the company at San Francisco the sum of $100 on account of the note, and this sum was accepted and retained. After this the general agents wrote to the plaintiff as follows: "We must have your note settled without further delay. Please close up this small balance." Plaintiff paid no further attention to the matter, for the alleged reason that he had sold some lumber to the local agent of the company upon the agreement that the price was to be paid to the company on account of the balance of the premium, and supposed that the matter would be settled in this way. Nothing further was done on either side, and on April 25, 1887, the property was destroyed by fire.

It clearly appears from the evidence that if the plaintiff furnished lumber to the local agent upon his promise that he would pay the company the premium, the local agent failed to make such payment, and that plaintiff was notified of that fact long before the loss occurred, and payment of the balance was demanded of him. There can be no controversy as to the effect of the provisions in the note and policy. The failure on the part of the assured to pay the amount due did not work a forfeiture of his rights under the policy, but suspended the same until payment was made. In the mean time the company had the right to collect the balance due by suit or otherwise. Upon the collection of the whole amount due, the policy would have revived, but this could not be the effect of the collection of a part of the amount only. In order to obtain the benefit of the insurance the assured was bound to pay the whole amount due by the express terms of his contract. As the company had the right to collect the money notwithstanding the suspension of the policy, the fact that it received a part of the amount could not amount to a waiver. It simply showed an intention to carry out the terms of the policy by collecting the premium, and thereby reviving the same upon full payment being made. This case differs widely from one in which the failure to pay at maturity works an absolute forfeiture of the policy. There the acceptance of the premium after forfeiture is inconsistent with the terms of the policy, and therefore it is properly held that such acceptance is a waiver of the forfeiture. But there is no analogy between such a case and the one at bar. Here the acceptance of the premium, after the maturity of the note, was entirely consistent with the right on the part of the company to hold the policy suspended until the whole amount was paid. It was not a case of forfeiture, in any sense of the term. The right of the assured to avail himself of the benefits of the policy still remained. He could have paid the balance due at any time before the loss occurred, and procured the writing provided for in the policy, and his insurance would have been as valid as in the beginning. Having failed to pay, thus extending the suspension until the loss occurred, he has no reason to complain. To hold otherwise in this case would be to set aside absolutely the plain and unequivocal terms of the contract. This should not be done, however hard the case may seem. As to the alleged payment to the local agent, if such payment was made it was in direct violation of the express terms of the note given by the plaintiff, which provided that payment should be made at the company's office in San Francisco, Cal., and the policy provided that no agent of the company had power or authority to waive or alter any of the terms or conditions of the policy, except the general agent at San Francisco. But it does not appear that payment was in fact made. For these reasons we think the court below should have granted the defendant a new trial. The failure to pay the premium was fatal to the plaintiff's cause of action. Judgment and order appealed from reversed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.; McFARLAND, J.

(78 Cal. 624)

DREXLER *v.* SEAL ROCK TOBACCO CO.

(No. 11,022.)

(*Supreme Court of California.* April 20, 1889.)

APPEAL—FAILURE TO PROSECUTE.

Where an appeal was taken in February, 1885, and a brief filed by respondent in 1888, but none has ever been filed by appellant, and the case has never been orally argued, but is submitted in January, 1889, on the briefs on file, the judgment will be affirmed without looking into the record.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMUNDS, Judge.

James L. Crittenden and *Ben Morgan*, for appellant. *McAllister & Bergin* and *W. H. Sharp*, for respondent.

BELCHER, C. C. In this case the appeal was taken in February, 1885, and points and authorities on behalf of the respondent were filed in September, 1888. The case has never been orally argued, and no brief has ever been filed on behalf of appellant. In January, 1889, the case was submitted on the briefs on file. Under these circumstances the settled rule of this court is that the judgment will be affirmed without looking into the record. Hickinbotham v. Monroe, 28 Cal. 489; Brewster v. Johnson, 51 Cal. 222; Faris v. Lampson, 73 Cal. 191, 14 Pac. Rep. 674; Peek v. Peek, 75 Cal. 298, 17 Pac. Rep. 213. We advise, therefore, that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(75 Cal. 650)

HODGDON *v.* SOUTHERN PAC. R. CO. *et al.*

(No. 11,357.)

(*Supreme Court of California.* April 27, 1888.)[1]

APPEAL—REVIEW—WEIGHT OF EVIDENCE.

Where the evidence of accident or mistake, on a motion to correct a notice of intention to move for new trial, and to insert omitted names of parties, is conflicting, the decision of the lower court will be affirmed.

Appeal from superior court, city and county of San Francisco.

McAllister & Bergin, for appellants. *D. W. Douthitt*, for respondent.

McFARLAND, J. There were several defendants in this action, and judgment went in the court below for plaintiff. A notice of intention to move for a new trial was served and filed by all of the defendants except Leland Stanford and C. P. Huntington, whose names were omitted from the notice. Afterwards, and after the statutory time for filing such notice had expired, the defendants moved the court to correct said notice by inserting therein the names of said defendants Stanford and Huntington, on the ground of accident, inadvertence, etc. Affidavits were filed on the motion by both sides, and the court denied the motion to correct. From the order denying this motion defendants appeal. Whether or not a notice of intention to move for a new trial could, under any circumstances, be amended by inserting the name of a party whose time for giving such notice had expired, it is not necessary here to determine. It is sufficient to say that the evidence before the court below was conflicting as to the point whether the omission of said two defendants from the notice was through inadvertence and mistake, or whether it was intentional, and the motion the result of an after-thought. Under these circumstances, the court had to pass upon the evidence, and find the fact, and we see no reason for interfering with its judgment in the matter. Order affirmed.

SEARLS, C. J., and SHARPSTEIN, PATERSON, THORNTON, and McKINSTRY, JJ., concurred.

(78 Cal. 597)

KERTCHEM *v.* GEORGE. (No. 12,501.)

(*Supreme Court of California.* April 19, 1889.)

EXECUTORS AND ADMINISTRATORS—SALES—SPECIFIC PERFORMANCE.

An administrator's sale of land on a petition which merely describes the land sought to be sold, and states that it is an unperfected claim under the homestead laws, and does not state its value, or whether improved or unimproved, productive or unproductive, occupied or vacant, and the like, is void for want of jurisdiction, where, in the order of sale, there is no recital that proofs of the necessity for the sale for any of the statutory purposes were had at the hearing, nor any recital tending to show the existence of any general facts creating such necessity. Code Civil Proc. Cal. § 1537, requires the petition to give a general description of all decedent's realty, and the condition and value thereof, but declares that a failure to set forth the facts showing the sale to be necessary will not invalidate subsequent proceedings if the defect be supplied by proofs at the hearing, and the general facts showing such necessity be stated in the decree. The purchaser at such sale cannot be compelled to pay the price.

Commissioners' decision. In bank. Appeal from superior court, Yuba county; PHILLIP W. KEYSER, Judge.

Action by D. J. Kertchem, administrator, against P. George. Defendant appeals. Code Civil Proc. Cal. § 1537, requires a petition for the sale of a decedent's realty to set forth *inter alia* "a general description of all the real property of which the decedent died seised, or in which he had any interest, or in which the estate has acquired any interest, and the condition and value thereof, and whether the same be community or separate property," and contains a further provision, which appears in the opinion.

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[1] Publication delayed by late receipt of copy of opinion.

William G. Murphy, for appellant. *J. H. Craddock*, for respondent.

Foote, C. This is an action to enforce the specific performance of a contract, by which, as alleged, the defendant became liable to pay the purchase price bid by him at an administrator's sale of the land of a decedent. The answer filed by the defendant alleged, among other things, in paragraph 11 thereof, that the order for the sale of the land "was made upon a defective petition, a copy of which petition is hereto attached and made part of this answer, marked 'Exhibit A,' which did not set forth the amount of personal estate that had come to the hands of the administrator, nor contain a general description of all the real property of which the decedent died seised, or in which the estate has acquired any interest, nor the condition or value of any such property, nor any other facts showing the sale to be necessary; nor were such defects supplied by proofs at the hearing, nor the general facts showing such necessity stated in the said order of sale or decree, a copy of which said decree is hereto attached and made part of this answer, marked 'Exhibit B;' nor was there any other decree order for such sale, or any other foundation therefor than said defective petition." A demurrer to the answer as to that paragraph, as being insufficient in its statement of facts and denials of those of the complaint, to constitute a defense in whole or part to the action, was sustained. Certain other allegations of the answer were stricken out, and upon the remaining issues made by the pleadings the plaintiff had judgment, from which this appeal is taken.

The important question in the case is as to whether the sale of the land was absolutely void, and could not give to the defendant even the title which the decedent may have had to the land. If the sale was absolutely void, and the defendant could get nothing whatever for his money, it does not seem as though the contract attempted to be enforced is so fair and just that a court of equity would force him, without any consideration whatever, to pay over the price for which he endeavored to buy the decedent's interest in the land, and through no fault on his (the defendant's) part failed to obtain it. Agard v. Valencia, 39 Cal. 302; Bruck v. Tucker, 42 Cal. 353. An examination of the petition for the sale, and Schedule D, to which it refers, shows a description of the land sought to be sold, and discloses the fact that the only recital upon the subject of the condition and value of the land is that it was an "unperfected claim under the homestead laws of congress to S. W. $\frac{1}{4}$ of S. W. $\frac{1}{4}$ of E. $\frac{1}{2}$, and lot 4 of S. W. $\frac{1}{4}$ of section 30, township 16 N., range 5 E., in Long Bar township, Yuba county, Cal." It is not stated what it was worth, whether it was improved or unimproved, productive or unproductive, occupied or vacant, and the like. Nor is any other information given by which the court could intelligently have exercised its judgment that this portion of the property of the estate could be most advantageously sold, so that, unless the decree of sale is of such a character (under section 1537, Code Civil Proc.) as to cure the defects of the petition, the sale was void for the want of jurisdiction in the court to order it. Fitch v. Miller, 20 Cal. 385; Estate of Smith, 51 Cal. 563; Estate of Boland, 55 Cal. 315. The portion of section 1537, supra, applicable here is, "but a failure to set forth the facts showing the sale to be necessary will not invalidate the subsequent proceedings, if the defect be supplied by the proofs at the hearing, and the general facts showing such necessity be stated in the decree." In the order of sale there is an entire absence of any recital that proofs of the necessity for the sale of the land for any of the statutory purposes were had at the hearing, or any proof at all, nor is there anything in the decree which even tends to show the existence of any "general facts" which would create such a necessity for the sale of the land as the law requires. This being so, the sale was void, and the defendant ought not to be compelled to pay a sum of money for absolutely nothing. The demurrer to the answer was improperly sustained, and the judgment should be reversed.

I concur: Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment is reversed.

(78 Cal. 629)

Alta Silver Min. Co. *v.* Alta Placer Min. Co. *et al.* (No. 12,812.)

(*Supreme Court of California.* April 20, 1889.)

Corporations—Mortgages—Principal and Agent—Pleading.

1. Under Civil Code Cal. § 2309, providing that authority to execute an instrument required by law to be in writing can only be conferred by writing, a mortgage of real property of a corporation, executed by an agent whose only authority is verbal, is void.

2. Under section 305, declaring that the powers of a corporation must be exercised, and its property controlled, by its board of directors, and section 308, providing that the decision of a majority of the directors, "made when duly assembled," is valid as a corporate act, such a mortgage, executed by the president and secretary without a resolution of the board of directors, is void, though ratified by the holders of two-thirds of the stock. Action by the board is not dispensed with, in the case of a mining corporation, by act 1880, § 1, providing that it is unlawful for the directors of such corporation to sell, mortgage, etc., unless the act be ratified by the holders of at least two-thirds of the stock.

3. A levy of an assessment by the directors, to pay the debt secured by the mortgage, does not render the mortgage valid.

4. Where amendments to a complaint in foreclosure of a mortgage allege its execution, and it is stipulated that for all the purposes of the trial and determination of the rights of the parties the amended answer shall be deemed as a special denial and traverse of the amendments to the complaint the same as if a new and additional answer

had been made, etc., denying the same specifically as required by law, the execution of the mortgage by the corporation is put in issue.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. Myres, Judge.

Mortgage foreclosure by the Alta Silver Mining Company against the Alta Placer Mining Company and others. Defendants, except the mining company, appeal.

G. H. Colby and *J. M. Fulweiler*, for appellants. *Wallace & Prewett*, for respondent.

Hayne, C. Suit to foreclose a mortgage alleged to have been executed by the Alta Placer Mining Company. This defendant made default. The other defendants had judgment liens upon the mine. The property was sold under one of these judgments to certain of the defendants, to whom a sheriff's deed was issued in due course. The court below gave judgment for the plaintiff, and all the defendants except the company appeal. The points made relate to the validity of the mortgage. The final clause of the mortgage and the signatures are as follows: "In witness whereof the said party of the first part has caused these presents to be subscribed by Robert Rauhut, its agent for that purpose, thereunto duly authorized by resolution and order of its board of directors, and the private seal of said Robert Rauhut, hereby adopted for that purpose as the seal of said corporation, to be hereunto affixed this the day herein first above written. [Seal] Robert Rauhut, Agent. Witness: J. E. Prewett, Auburn. Witness our hands and seals this 2d day of March, A. D. 1886. [Seal] E. D. Boyle, President Alta Placer Mining Company. [Seal] John S. Orndorff, Secretary Alta Placer Mining Company. [Seal] Anton Boegle, Stockholder. [Seal] J. W. Parrish, Stockholder. Witness: P. E. Shannon." Then follows a certificate of acknowledgment by Rauhut before a notary. And then comes the following: "We, the holders of two-thirds of the capital stock of the Alta Placer Mining Company, hereby ratify the foregoing mortgage. Witness our hands this February 12, 1886. Robert Rauhut, Anton Boegle, John S. Orndorff, E. D. Boyle, J. W. Parrish." And then follows a certificate by the secretary that the persons who signed the ratification were the holders of two-thirds of the capital stock. The ratification was acknowledged before a proper officer.

It affirmatively appears that the recital in the clause of the mortgage above quoted, as to a resolution of the board of directors, is untrue. The secretary, who was a witness for the plaintiff, testified as follows: "I was secretary at the time, and Robert Rauhut was authorized by the mortgagor to execute said mortgage; also, so were the president and secretary authorized to execute it. The authority was verbal. There was no resolution of the board of directors authorizing any one, either the president or secretary, or both, or said Robert Rauhut, to execute or deliver the mortgage; neither was the authorization in writing." And there is no evidence to the contrary. Such being the case, it seems clear that, even if it be assumed in favor of the respondent (for the purposes of this opinion only) that the execution was sufficient in form, the mortgage was void for want of authority from the company to execute it. Rauhut was not an officer of the corporation, and authority to execute an instrument required by law to be in writing could only be conferred upon him by a writing. Civil Code, § 2309. His signature, therefore, may be dismissed from consideration. And even if his signature and the final clause of the mortgage can be rejected as surplusage, and the signatures of the president and secretary be taken as the signatures of the mortgage, the difficulty as to the want of authority still meets us.

There is no corporate seal, and it affirmatively appears that there was no resolution of the board of directors. The president has not the power by virtue of his office to mortgage the property of the company. See, generally, Bliss v. Irrigation Co., 65 Cal. 502, 4 Pac. Rep. 507. Nor has the secretary such power by virtue of his office. Blood v. Marcuse, 38 Cal. 594. Nor have both together the power which neither has separately, nor have the stockholders such power. Gashwiler v. Willis, 33 Cal. 12. The powers of a corporation must be exercised, and its property controlled, by its board of directors, (Civil Code, § 305,) the decision of a majority of the directors, "made when duly assembled," being valid as a corporate act, (Id. § 308.) The board must be "duly assembled." Harding v. Vandewater, 40 Cal. 78. And their transactions should be recorded. Civil Code, § 377; Association v. Bustamente, 52 Cal. 192. The directors, when not acting as a board, have not the necessary power. Gashwiler v. Willis, 33 Cal. 18. The absence of a resolution of the board renders the instrument invalid. Association v. Bustamente, supra. There is nothing to the contrary in the act of 1880, in relation to mining companies. Section 1 of that act provides that "it shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders' meeting called for the purpose." Laws 1880, p. 131. This provision does not dispense with action by the board. It requires such action, but requires in addition the consent of the holders of two-thirds of the capital stock.

We do not think that the subsequent levy by the directors of an assessment to pay the debt secured by the mortgage had the effect of rendering the latter valid.

The respondent makes some criticism upon the denials of the answer. But plaintiff filed amendments to its complaint, alleging, among other things, the execution and delivery by the corporation of the mortgage; and the parties entered into a stipulation that, "for all the purposes of the trial and determination of the rights of said parties in this action, the said amended answer shall be deemed, taken, and treated as a special denial and traverse of the said amendments to said complaint the same as if a new and an additional answer had been made and served and filed, denying the same specifically, as required by law." This was sufficient to put in issue the execution by the corporation of the said mortgage. These views render it unnecessary to consider the other points made. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

(79 Cal. 7)

BOLLINGER v. MANNING *et al.* (No. 12,867.)

(*Supreme Court of California.* April 22, 1889.)

HUSBAND AND WIFE—ACKNOWLEDGMENT—MORTGAGES—HOMESTEAD—EXECUTORS AND ADMINISTRATORS.

1. Under Civil Code Cal. § 1186, providing that the acknowledgment of a married woman must not be taken unless she is made acquainted with the contents of the instrument on an examination without the hearing of the husband, etc., a certificate of acknowledgment of a mortgage, that she was first made acquainted with the contents of the instrument, and thereafter duly acknowledged, upon examination apart from and without the hearing of her husband, that she executed the same, etc.,—is insufficient, and the mortgage, as to her, is void.

2. After the execution of the mortgage the husband filed a declaration of homestead on the property included in it. Code Civil Proc. Cal. § 1475 provides that claims secured by incumbrances on the homestead "must be presented and allowed as other claims," and by section 1500 an action cannot be maintained on a claim not presented. Section 1502 provides that if an action is pending against decedent at the time of his death plaintiff must present his claim as in other cases, and no recovery shall be had unless proof be made of the presentation. *Held*, that foreclosure, pending when the husband died, could not be maintained without a presentation of the claim against the estate, though there were no other assets that could be charged with payment of the mortgage debt, and that it was immaterial that notice of pendency had been filed before the husband's death, or that the homestead was set apart "for the use of the family," it being community property.

3. Code Civil Proc. Cal. § 1490, requires executors, etc., to publish a notice to creditors, requiring them to present their claims to the executor, etc., "at the place of his residence or business, to be specified in the notice." A notice specified the office of the administrator's attorneys as the place for presentation of claims. The administrator resided and had a place of business in the same town, which was a small one. *Held*, that the notice was sufficient, knowledge of it not being denied.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Mortgage foreclosure by Andrew J. Bollinger, executor, against Patrick Manning and others. The certificate of the acknowledgment of the mortgage by Ellen Manning stated "that she was by me first made acquainted with the contents of said instrument, and thereafter she duly acknowledged to me, upon examination, separately, apart from and without the hearing of her husband, that she executed the same freely and voluntarily, for the use and purposes therein mentioned, without fear or compulsion, or undue influence of her said husband, and that she does not wish to retract the execution of the same." Plaintiff appeals. Civil Code Cal. § 1186, provides that "the acknowledgment of a married woman * * * must not be taken unless she is made acquainted by the officer with the contents of the instrument, on an examination without the hearing of her husband." Code Civil Proc. Cal. § 1475 provides that "if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate." By section 1493 "all claims arising upon contracts, whether the same be due, not due, or contingent, must be presented within the time limited in the notice, and any claim not so presented is barred forever," except in certain cases, where the claimant had no notice. Section 1500 declares that "no holder of any claim against an estate shall maintain any action thereon unless the claim is first presented," etc.

Archer & Bowden and *Schell, Bond & Eastin*, for appellant. *Wright & Hazen* and *Stonesifer & Minor*, for respondents.

BELCHER, C. C. Action to foreclose a mortgage. The court below gave judgment for defendants, and the plaintiff appeals. The mortgage in suit was executed by Patrick Manning in December, 1883, and was signed, but not properly acknowledged, by Ellen Manning, his wife. The property mortgaged consisted of 80 acres of land, with the improvements thereon, and was community property. Manning resided upon the property with his family, and in December, 1885, filed a declaration of homestead in proper form thereon, in which he declared, among other things, that he estimated its actual cash value to be $4,000. Plaintiff commenced this action in February, 1886, making Patrick Manning, Ellen Manning, and certain subsequent incumbrancers parties defendant, and at the same time filed a notice of *lis pendens*. Patrick Manning died intestate in March, 1886, and thereafter Henry Lewis was duly appointed administrator of his estate, and was substituted as defendant in his place. Notice to the creditors of the decedent was published, requiring all persons having claims against him to exhibit them, with the necessary vouchers, within four months after the first publication, "to the said administrator at the office of Wright & Hazen, in the city of Modesto; the same being his place for the transaction of the business of the said estate, in the county of Stanislaus, state of California." An inventory of the estate was filed, in which the real property was appraised at $4,000, and the personal property at $1,243.50. In September, 1886, the court, by an order duly made, set apart "for the use of the family of said P. Manning, deceased," the land described in the declaration of homestead, together with the dwelling-house thereon, and its appurtenances, and ordered that the same be not subject to administration. No claim was presented by plaintiff within the time limited in the notice, but about a year thereafter, in October, 1887, plaintiff presented his claim, duly verified, and the same was rejected by the administrator. Thereupon plaintiff amended his complaint, setting up the presentation of the claim as aforesaid, and expressly waiving all recourse against any property of the estate other than that described in the mortgage. The defendants, by their answer, pleaded in bar of the action sections 1475, 1493, 1500 and 1502, Code Civil Proc. The court below held that the action was barred by the sections named, and rendered judgment accordingly.

1. The action cannot be maintained against Mrs. Manning on the ground that she executed the mortgage, and so the title to the mortgaged premises, which vested in her on the death of her husband, fed the security, and inured to the benefit of the mortgagee. The certificate of her acknowledgment had the same defects as the certificate which was held insufficient in Hutchinson v. Ainsworth, 63 Cal. 286. And it is well settled that a deed or mortgage of a married woman is void unless it be properly acknowledged by her. McLeran v. Benton, 43 Cal. 467; Leonis v. Lazzarovich, 55 Cal. 52.

2. The case comes fully within the rule declared in Camp v. Grider, 62 Cal. 20. The correctness of that decision has not since been questioned, and the case was cited with approval in Wise v. Williams, 72 Cal. 547, 14 Pac. Rep. 204. The distinctions between that case and this are immaterial. It is true, the action here was pending, and a notice of its pendency had been filed, when Manning died; but that fact did not release the plaintiff from the necessity of presenting his claim. The Code declares that in such case the claim must be presented for allowance or rejection, and that "no recovery shall be had in the action unless proof be made of the presentation required." Section 1502, Code Civil Proc. So the fact that the court by its order set aside the property on which the homestead had been declared "for the use of the family," and not expressly to Mrs. Manning, is of no consequence. The property was community property, and on the death of the husband the title vested absolutely in the surviving wife. Section 1474, Code Civil Proc. The form of the order was therefore immaterial, as it did not and could not change or affect in any way the widow's rights, but simply excluded the property from administration. The court found "that there are not now, nor were there ever, any assets * * * that could be charged with or subjected to the payment of said note and mortgage, or any part thereof, except said land and premises" mortgaged. In Camp v. Grider it is said: "The purpose of the legislature in providing by section 1475 that, if there be subsisting liens or incumbrances on the homestead, the claims secured thereby must be presented and allowed as other claims against the estate, was undoubtedly to preserve the homestead, if possible." This being so, it is argued that section 1475 does not apply here. But it does not appear what was the condition of the Grider estate, nor, if it had appeared, do we see how the decision could have been thereby affected. The provision of the section is general, that claims secured by liens or incumbrances on the homestead, selected and recorded prior to the death of the decedent, must be presented and allowed as other claims against the estate. The whole matter was under the control of the legislature, and we are not authorized to nullify the plain letter of the law because we can see no good reason for making it applicable to a case like this. As well might any mortgagee claim under section 1500 that he could maintain his action without presenting his claim, and without waiving all recourse against the other property of the estate, if he could show that there was no other property belonging to the estate. It is next earnestly insisted that the decision in Camp v. Grider is not sound law, and ought to be overruled. But, after carefully reading the able argument of counsel, we are unable to reach their conclusion. It seems to us that the decision is a correct exposition of the sections of the Code under review, and that it must therefore be upheld and followed.

3. It is contended that the notice to creditors was insufficient, and that plaintiff lost none of his rights by his failure to present his claim within the time limited. This contention is based upon the fact that the notice specified the office of his attorneys in the city of Modesto as the place where claims were to be presented to the administrator, "the same being his place for the transaction of the business of the said estate." The Code declares that every executor or administrator must cause to be published a notice to the creditors of the decedent, requiring them to present their claims to the executor or administrator "at the place of his residence or business, to be specified in the notice." Section 1490, Code Civil Proc. The administrator resided and was engaged in the business of cabinet making at Modesto, and his attor-

neys, Wright & Hazen, had their office there. Modesto was a small town or city, and it is not pretended that plaintiff did not know of the notice, or that he could not readily have found the administrator and presented his claim, if he had chosen to do so. The simple question, then, is: Did the fact that the office of the administrator's attorneys, instead of his own workshop or dwelling-house, was designated as the place for the presentation of claims, destroy the effect of the notice, or, in other words, make it no notice? We do not think it did. It seems to us that the words "place of his business" should be construed to include the place where the administrator transacts the business of the estate, though he may be engaged in transacting some kind of business elsewhere. To hold otherwise would often render it quite inconvenient for creditors to present their claims at all. For example, the administrator may live and be carrying on a farm many miles distant from the county-seat, where most or all of the creditors reside, or he may live and be employed in a work-shop in some obscure part of a city, not easily accessible. No authorities are cited upon this point by either side, and we are not aware that any can be found. The language of the Code should therefore be liberally construed, so as to promote justice and subserve the convenience and best interests of all parties concerned. In our opinion, the notice involved in this case was sufficient, and it results that the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, judgment and order are affirmed.

(79 Cal. 6)

HEINTZEN v. BINNINGER. (No. 12,794.)

(*Supreme Court of California.* April 22, 1889.)

WATERS AND WATER-COURSES—ADVERSE POSSESSION.

An allegation that plaintiff has for 10 years had "the undisputed usufructuary right to the use of all the waters" of a creek does not show an exclusive right to the water, acquired by adverse possession.

Commissioners' decision. In bank. Appeal from superior court, Yuba county; PHIL. W. KEYSER, Judge.

Wm. G. Murphy, for appellant. *Forbes & Dinsmore*, for respondent.

FOOTE, C. This was an action brought for the purpose of restraining the defendant from interfering with the flow of the waters of a stream, a part of which ran into the plaintiff's water ditch, and for damages for such interference. The plaintiff alleged that he "for more than five years immediately prior to the diversion of said water as hereinafter stated, to-wit, for ten years, had the undisputed usufructuary right to the use of all the waters of Little Dry creek, above plaintiff's said land, to the extent of the full capacity of a certain ditch holding about 200 inches of water measured under a four-inch pressure, and running to plaintiff's said lands, across lands now owned by August Schultz, and taking water from said Little Dry creek, about 200 yards due south from the Marysville and Camptonville road." It is then alleged that the defendant erected a dam above the said ditch, and diverted the water from the ditch of plaintiff, etc. Damages are claimed, an abatement of the dam as a nuisance is prayed for, and an injunction preventing its maintenance or erection. A demurrer was filed to the complaint upon the ground, among others, that the complaint did not state facts sufficient to constitute a cause of action. The demurrer was overruled, the defendant answered, and judgment was had for the plaintiff for $75 damages, from which this appeal is taken. As a reason why the judgment should be reversed, the defendant claims, among other matters, that, although the plaintiff attempted to allege in his complaint that the defendant had interfered with water-rights obtained by prescription, the language of that pleading would not bear such a construction. In this we agree. What is an "undisputed usufructuary right to the use" of water had by an individual for 10 years? It is not necessarily a right acquired by adverse possession, which element must exist in order that the complaint should be held to have stated a cause of action. A tenant may have from his landlord an undisputed right to use water belonging to the latter, and may do so by his license, in an undisputed manner for 10 years, but this possession of the use is not necessarily adverse, because undisputed. A usufructuary right is the right of using and enjoying the profits of a thing belonging to another, without impairing the substance. Webst. Dict. This amounts to nothing more, at best, than the right to use the water of another, but is not an allegation of a continued adverse usage or exercise of a right. The plaintiff might have claimed such a right for 20 years, but, if he did not exercise it adversely, he could not have set the statute of limitations in motion to protect him. We think the demurrer should have been sustained. For the reasons above stated we advise that the judgment be reversed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

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78 Cal. 640

DUNN v. DALY. (No. 12,601.)

(*Supreme Court of California.* April 22, 1889.)

CONTRACTS—PERFORMANCE.

The defendant agreed that during a certain period of time he would give to the plaintiff all his freight to haul at a certain rate, and the plaintiff agreed to give defendant's freight preference of all other freight. *Held*, that payment by the defendant for freight hauled in accordance with the contract, after a violation of the agreement to give his freight the preference, would not operate as a condonation of the breach, so as to prevent defendant from refusing to go on with the contract.

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by H. S. Dunn against John Daly. Judgment was given for plaintiff, and defendant appeals.

Hundley & Gale and *F. B. Whiting*, for appellant. *Goodwin & Goodwin*, for respondent.

Foote, C. Daly and Dunn entered into the following written contract: "This agreement, made this 5th day of May, 1885, between John Daly, of Eureka Hill, Plumas county, Cal., and Henry S. Dunn, of Johnsville, same county and state, wherein said John Daly agrees for the term of one year to give said Henry S. Dunn the hauling of all his freight from the junction of Long Valley to Eureka Hill, or Johnsville, at the rate of 75-100 dollars per one hundred pounds, and for the next two years to give 5-100 dollars more than the Plumas Eureka gives for the hauling of their freight. And the said Henry S. Dunn agrees to haul all of said John Daly's freight from the junction in Long Valley to Eureka Hill, or Johnsville, for the term of one year, for the sum of 75–100 dollars for one hundred pounds, and for the next two years at 5–100 dollars per one hundred pounds more than the Plumas Eureka pay for their freight during the season of the year that freight teams are running and the roads are passable. And furthermore agrees to give said Daly's freight the preference of all other freight. [Signed] John Daly. H. S. Dunn." From the findings it appears that during the first year provided for in this contract Daly, the defendant, furnished to Dunn, the plaintiff, for carriage 40 tons of freight, which, being delivered, the price for its hauling, as by the contract stipulated, was paid. The plaintiff did not, during this time, comply with his contract in always giving the defendant's freight the preference in being hauled, which resulted in damage to the defendant to the amount of $50. In the beginning of the freighting season of the next year, 1886, the defendant notified the plaintiff he had sold his mercantile establishment at Eureka Hill, and that he had no more freight for him. In July of that year the plaintiff, at the place from which he was to have hauled it under the contract, demanded the freight of the defendant, and the warehouseman refused to comply with the demand,—the plaintiff being ready and willing to comply with his part of the contract; the defendant, however, refusing to give him any freight to haul, although he still in reality continued his business, as his alleged sale thereof was simulated and fraudulent, and made with the intent to avoid the contract with the plaintiff. The plaintiff teamed with six horses and two wagons, his expenses per day being $6.50. He hauled at a trip five tons of freight, which took him six and a half days to make. The hauling season at that place was between the last day of May and the 1st of November of each year. For the year 1886 the current rate of freight between the points mentioned in the contract was $15 per ton. During the year 1886 the defendant had for hauling, which he could have given to the plaintiff, but did not, 30 tons of freight. The plaintiff during that year hauled for himself 30 tons of freight, and for other parties 34 tons of freight, and his team was not idle during any part of the freighting season of that year; that for such season the plaintiff hired two teamsters,—one for three months, at $35 per month; another for two months, at $50 per month. Under these findings of fact the court declared as conclusions of law that the plaintiff had sustained damage by reason of the defendant's refusal to comply with his contract as to the giving his freight to the plaintiff to be hauled during the year 1886 in the sum of $176.51; that although the plaintiff was guilty of a breach of the contract for the year 1885, in not giving the defendant's freight preference, yet that the latter had condoned and waived the breach by paying the plaintiff for the freight hauled in accordance with the contract for that year; that the defendant was guilty of a breach of the contract for the year 1886, by reason of which the damage above set forth was recoverable by the plaintiff. The defendant claims that upon the findings the judgment should have been for him.

The contract in a sense seems to be separable, so far as the time when the payments for the freight to be hauled was concerned, and the price to be paid, but, as to the time during which the contract was to continue, and the preference to be given the defendant's freight, it was an entire contract. Conceding that any damages would be recoverable by the plaintiff, resulting from the defendant's repudiating the contract, after the plaintiff's breach of it, it then becomes a question what the plaintiff should recover. The expense which the plaintiff was at (his teams being fully employed) could have been no greater if he had hauled 30 tons of the defendant's freight, rather than 30 tons for some one else, which he did haul. He would have been compelled, had he hauled the defendant's 30 tons of freight, to have declined to haul 30 tons which he did haul. His damage, then, if any, must be measured by the the difference between the price he was to receive for hauling the defendant's freight and that which he actually received for hauling the same number of tons of freight for others. The defendant had 30 tons of freight which, if the contract existed, was to be hauled at $16 per ton. In lieu thereof the plaintiff hauled 30 tons for others at $15 per ton. His damage, then, if entitled to any, could not be more than $30. But we do not think he is entitled to anything. He first broke the contract which he had made. The defendant paid him for what he had done, as the conduct of the former evidently shows, in order that he might end the whole matter without further trouble; and the refusal afterwards to go on with the contract, was, we think, optional with the defendant. He had found, as he thought, that the plaintiff would not keep his contract. He paid him what was claimed, not as a waiver of his own rights, or condonation for the breach of the contract by the plaintiff, but with a view to leave no question about his own right to refuse to give the plaintiff further freight. Upon the whole case we think that on the findings the judgment should be reversed, and so advise.

I concur: BELCHER, C. C.

HAYNE, C. I concur in the second ground stated in the opinion.

PER CURIAM. For the reasons given in the foregoing opinion of Mr. Commissioner FOOTE, the judgment is reversed.

We dissent: BEATTY, C. J.; WORKS, J.

(79 Cal. 1)

GREENWADE v. DE CAMP. (No. 12,822.)

(*Supreme Court of California.* April 22, 1889.)

PUBLIC LANDS—CONTEST—EVIDENCE.

The fact that plaintiff, who filed application to purchase a tract of land belonging to the public domain for which a certificate of purchase had been issued to the defendant, did not commence his action within 60 days after the order of reference of the contest was made, as required by Pol. Code Cal. § 3417, did not, on a subsequent application being made by the plaintiff, and on his bringing his action within the required time, preclude him from giving evidence of acts of actual settlement performed by him upon the land prior to the time when the right to bring his action under the first order of reference terminated.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Paris, Goodcell & Fox, for appellant. *Byron Waters* and *Harris & Gregg*, (*William G. Webb*, of counsel,) for respondent.

FOOTE, C. This action was instituted upon an order of reference from the state land-office to the superior court of San Bernardino county, to annul a certificate of purchase to the defendant, and have an adjudication that the plaintiff was entitled to purchase of the state the land involved in the controversy. The plaintiff had judgment, and the defendant appeals from that, and an order denying a new trial. The main contention for a reversal of the judgment is that the findings are not supported by the evidence. From the evidence the court was warranted in believing that the plaintiff settled upon the land in dispute with the intention of making it his home, and of residing there in the capacity of an actual settler with his wife and family; that he was prevented from maintaining his constant residence there by the necessity of seeking relief for his sick wife at various points, but that he never ceased to consider the land his home and residence, exercised all the care he could over it, left some of his household goods in the house he had built, and nothing in his conduct intimated that he intended to abandon the settlement he had thus actually made. The court found "that the said defendant was not at the time of filing his application, and never has been, an actual settler upon or in occupation of any portion of said land." We cannot say that the evidence does not sustain the finding.

Another feature in the case, which it is claimed ought to have determined the controversy against the plaintiff, is that he did not, under a prior application he had made to purchase the land, comply with the provisions of section 3417 of the Political Code; that is, that he did not bring his action as a contestant within 60 days after the order of reference was made, on the first application. And this being so, and "his rights in the premises and under the application" having ceased, it is claimed that he was not entitled in this action, under his second application and order of reference, to introduce evidence of acts of actual settlement upon the land which had been been performed by him prior to the 6th of September, 1885, the date when the 60 days expired within which he should have instituted his action under the first order of reference. If the statute means to declare that all evidence of *bona fide* actual settlement, made prior to the date when a suit could be brought on an order of reference, shall go for naught, be it ever so clear and satisfactory, and is absolutely of no avail to a settler under any state of facts, unless within 60 days after the making of the order of reference he shall bring his action to determine a contest, perhaps the contention of the appellant is maintainable. In this case the proposition contended for amounts to this: that no evidence of acts of settlement is admissible, if they occurred at any time prior to the day on which, under the rule of law laid down in the section of the Political Code, supra, the right to bring the action on the first order of reference ceased. We do not think the law in question should be given so narrow a construction. It is a provision intended to compel one claiming to be an actual settler upon and a proposed purchaser of state land to have determined his contested right to purchase the land within a certain period of time. But it is not intended or declared that such acts shall not be admissible in evidence in an action upon a second application to purchase, and order of reference, to show actual settlement upon the land in controversy. The claimant had no right to purchase the premises under the first application, because he did not bring his action in time. He is not precluded thereby from bringing an action upon a subsequent application to purchase and order of reference. He stands in the action brought as he did before the first order of reference. His residence could avail him nothing under his first application, because he did not bring his action as the law required, in time. But he brings this action as if the first application had never been made. He stands like any other person, as if he had never been given a first order of reference. Greenwade v. De Camp, 72 Cal. 449, 14 Pac. Rep. 177. There is no obliteration of the existence of his prior acts of settlement, although it has resulted from his failure to bring an action in time that he could not have maintained it under the first application to purchase and order of reference. It would seem, therefore, that in this proceeding, no prior action having been brought, that he was entitled to show any acts of settlement which he performed prior to the 6th of September, 1885. We perceive no sufficient evidence of any occupancy of the land adverse to the plaintiff which would render his affidavit susceptible to the charge made that it is false in that particular. No prevailing reason has been advanced which should cause the judgment and order to be reversed, and we advise that they be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(79 Cal. 14)

STAPLES *v.* CONNOR. (No. 12,415.)

(*Supreme Court of California.* April 22, 1889.)

EXECUTORS AND ADMINISTRATORS—SALES—LIMITATION OF ACTIONS.

By Laws Cal. 1861, p. 481, and Hitt. Gen. Laws § 4735, a public administrator, before entering on the duties of his office, was required to execute a bond and take the oath of office. One appointed as public administrator did not take oath or give bond, but undertook the administration of an estate, and continued therein, and made a sale of land after the election of a public administrator. *Held*, that he did not represent the interests of minor heirs, and that, the sale being void, ejectment by such an heir was not barred by probate act Cal. § 190, providing that no action for the recovery of any estate sold by an administrator shall be maintained by any heir unless commenced within three years after the sale, or by the corresponding provision of Code Civil Proc. Cal. § 1573.

Commissioners' decision. In bank. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

Action by Marshall Staples against J. M. Connor. Defendant appeals. Probate act Cal. § 190, provided that "no action for the recovery of any estate sold by an executor or administrator under the provisions of this chapter shall be maintained by any heir or other person claiming under the deceased testator or intestate, unless it be commenced within three years next after the sale."

J. F. Wendell and *George A. Lamont*, for appellant. *John F. Ellison*, for respondent.

HAYNE, C. Ejectment. The respondent, who was a minor until within a year from the commencement of the action, claims as heir of the former owner. The appellant claims as the purchaser at an administrator's sale made in 1870. It is virtually conceded that the sale was void, and we think there can be no doubt on the subject. The position of the appellant is that the action was barred by section 190 of the probate act, and the corresponding section of the Code of Civil Procedure, (section 1573;) and except for the reason stated below we should be inclined to think that this is so. See Meeks v. Vassault, 3 Sawy. 206; Meeks v. Olpherts, 100 U. S. 564; McLeran v. Benton, 73 Cal. 342, 343, 14 Pac. Rep. 879. These cases proceed upon the principle that the administrator represents the heirs, (minors as well as others,) and that, when he is barred by limitation, they are also. But it is manifest that if there was no administrator the principle upon which the above decisions rest has no application.

Now, in the present case (which comes up without any of the evidence) the sale was by one who assumed to act as administrator, but who was not such. He had not taken out letters of administration upon the estate, and he was not entitled to act as public administrator. If he had been really the public administrator it would not have been necessary for him to take out letters upon the particular estate; for the statute in force at that time provided, in relation to counties other than San Francisco and Sacramento, that he "shall not be required to obtain letters of administration therefor, but may proceed to the performance of the same by virtue of his office." Laws 1860, p. 105, § 3. But it is also provided that before entering upon the duties of his office he shall execute a bond in a large sum of money, (Laws 1861, p. 481,) and shall take the usual oath of office. See Hitt. Gen. Laws, § 4735. The person who assumed to sell the property involved here did neither of these things. It is found that in 1866 there was a vacancy in the office of public administrator, and that the board of supervisors appointed Joseph Hewitt to fill the same, but that he "did not qualify as such public administrator in that he did not take or subscribe to any oath of office, and did not execute any bonds as such." It is further found that a public administrator was elected in 1868, but that Hewitt kept on with the estates which he had taken in charge, and in 1870 made the sale in question here. It is not necessary to say that none of the acts of Hewitt can be sustained as acts of an officer *de facto*. But we think that a man who has not given the official bond required by law, and who is not even under the sanction of an oath of office, cannot be said to represent the interests of the minors, within the meaning of the cases above cited, so as to raise the bar of the statute of limitations against them. We therefore advise that the judgment be affirmed.

We concur BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(79 Cal. 30)

AH FONG v. STERNES. (No. 12,740.)

(*Supreme Court of California.* April 23, 1889.)

FALSE IMPRISONMENT—VENUE.

1. A complaint averred that plaintiff was unlawfully confined and restrained of his liberty by the defendant; that a writ of *habeas corpus* was duly issued to defendant to produce the body of plaintiff at a specified time and place, which was served upon defendant while he had plaintiff in his custody, but that defendant refused and still refuses to obey said writ; and that by reason thereof plaintiff "has been unlawfully imprisoned and restrained of his liberty by the defendant," and has suffered damages in the sum of $5,000. *Held*, that the complaint states a cause of action for false imprisonment, and must be brought in the county of the defendant's residence. MCFARLAND, J., dissenting.

2. If the complaint can be regarded as stating a cause of action under Pen. Code Cal. § 1505, providing for the recovery of a penalty for refusal to obey a writ of *habeas corpus*, which by Code Civil Proc. § 393, must be tried in the county where the cause of action arose, it presents a double aspect, and the ambiguity must be resolved against the pleader.

3. If the complaint be regarded as stating two separate causes of action, one of which is removable to the county of defendant's residence, and the other not, this fact cannot deprive defendant of the right to a change of venue.

THORNTON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action by Ah Fong against George H. Sternes.

Charles W. Kitts and *A. L. Hart*, for appellant. *Cross & Simonds*, for respondent.

HAYNE, C. Appeal from an order refusing a change of venue. The complaint avers, in substance, that the plaintiff was unlawfully confined and restrained of his liberty by the defendant at Nevada township, Nevada county, Cal.; that a writ of *habeas corpus* was duly issued to the defendant by the superior court of Nevada county, commanding him to produce the body of the plaintiff at a specified time and place; that said writ was served upon the defendant while he had the plaintiff in his custody and under his control, but that defendant refused and still refuses to obey the said writ; and that "by reason of the aforesaid acts and doings of said defendant plaintiff has been unlawfully imprisoned and restrained of his liberty by the defendant for the period of five days, and has suffered damages and injury in the sum of $5,000." The prayer was for judgment for that sum and costs. The motion was for change of venue to Sutter county, on the ground that that was the residence of the defendant.

If the action is to be regarded as an action for false imprisonment, the defendant was entitled to have the case sent to Sutter county. If, however, it is to be regarded as an action for the recovery of a statutory penalty under section 1505, Pen. Code, which provides in relation to writs of *habeas corpus* that, "if the officer or person to whom such writ may be directed refuse obedience to the command thereof, he shall forfeit and pay to the person aggrieved a sum not exceeding $5,000, to be recovered by an action in any court of competent jurisdiction," then the retention of the case in Nevada county was proper, under section 393, Code Civil Proc., which provides that actions "for the recovery of a penalty or forfeiture imposed by statute" must be tried in the county where the cause of action or some part thereof arose, subject to the power of the court to change the place of trial in proper cases.

We think that the complaint states a good cause of action for false imprisonment. The allegation that the plaintiff was "confined and restrained of his liberty by the defendant" is an allegation of physical and bodily restraint, which would serve as a foundation for the old action of trespass *vi et armis*. In such an action it is not necessary to aver, as would be necessary in an action for malicious prosecution, that the imprisonment was malicious or without probable cause. Colter v. Lower, 35 Ind. 286; Carey v. Sheets, 60 Ind. 20, 21; Akin v. Newell, 32 Ark. 605. It is not even necessary to allege that the imprisonment was unlawful, (though that is alleged here.) If matter of justification exists, it must be pleaded by the defendant. "Whoever assaults or imprisons another (except in some cases under particular statutes * * *) must justify himself by showing specially to the court that the act was lawful." 1 Chit. Pl. (16th Amer. Ed.) *635; Gallimore v. Ammerman, 39 Ind. 318; Carey v. Sheets, supra; People v. McGrew, 20 Pac. Rep. 92. We do not regard the expressions in the opinion in Hirsch v. Rand, 39 Cal. 318, as intended to assert a different rule. The allegation of imprisonment, coupled with the averment of damage above quoted, constitutes a cause of action for false imprisonment

And we are inclined to doubt whether the complaint can be regarded as stating a cause of action for a penalty, under section 1505, Pen. Code, for the reason that the complaint makes no reference to that section, or indicates in any way that it is for the violation of a statute. But, assuming that it can be so regarded, it is evident that it was framed with a double aspect. In one aspect it is a good complaint for false imprisonment; in another aspect it may be assumed to be a good complaint for a penalty imposed by statute. Now, we do not think that the plaintiff by so framing his complaint can deprive the defendant of his right to have the case tried in the county of his residence. The rule is that ambiguities must be resolved against the pleader, and we think that this is a proper case for its application.

Even if the complaint be regarded as stating two separate causes of action, upon one of which the defendant would be entitled to a change of venue, but not upon the other, the result would be the same. It is the plaintiff's own doing if the complaint be so drawn. He cannot deprive the defendant of his right to a change of venue by the addition of something to the complaint. If this were not the rule, it would be very easy for a plaintiff to defeat the defendant's right in the matter. All that plaintiff would have to do would be to add another cause of action to his complaint. It need not be a genuine cause of action, and it would not matter whether the two causes of action were properly united or not. For the defendant could not compel their separation by demurrer before moving for a change of venue, because he is required to take his proceedings for such change at the time of answering or demurring. Code Civil Proc. § 396. And the "right is to be determined by the condition of things existing at the time the parties claiming it first appeared in the action." Machine Co. v. Cole, 62 Cal. 318; Buell v. Dodge, 57 Cal. 645. And even if this were not so, and the court had power to postpone the hearing of the motion until after the hearing of the demurrer, it would deprive the defendant of his right to have the demurrer heard in the county of his residence. Heald v Hendy, 65 Cal. 321, 4 Pac. Rep. 27.

In any view that can be taken, therefore, the order refusing a change of venue was erroneous. The other propositions do not require special notice. We therefore advise that the order appealed from be reversed, with directions to the court below to make an order transferring the case to Sutter county.

We concur: Belcher, C. C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is reversed, with directions to the court below to make an order transferring the case to Sutter county.

McFarland, J. I dissent. The complaint either states a cause of action under the provisions of the Code about *habeas corpus*, or it states no cause of action at all. There is no averment of any liability of defendant under the original arrest. The averred liability is upon his refusal to obey the writ of *habeas corpus*. I think, therefore, that the motion for a change of venue was properly denied.

Thornton, J. I dissent.

79 Cal. 105

PEOPLE *ex rel.* DAVIDSON *v.* PERRY. (No. 12,537.)

(*Supreme Court of California.* May 1, 1889.)

BOARD OF HEALTH—TERM OF OFFICE—APPEAL—CONSTITUTIONAL LAW.

1. The proceeding under Code Civil Proc. Cal. §§ 802–810, to determine conflicting claims to an office, is substantially equivalent to *quo warranto*, and is therefore a "case at law," within the meaning of Const. Cal. art. 6, § 4, relating to the appellate jurisdiction of the supreme court.

2. Where in such proceeding there is a prayer that the court impose a fine of $5,000, as it is by Code Civil Proc. § 809, authorized to do in any action for the usurpation of an office, in case of a decision adverse to the defendant, the proceeding is a case at law, embracing a money demand amounting, exclusive of interest, to more than $300, and the supreme court has appellate jurisdiction.

3. Pol. Code, § 909, requires the oath "of all officers, whose authority is not limited to any particular county," to be filed in the office of the secretary of state; and that of all county officers to be filed in the offices of the clerks of their respective counties. Section 996 provides that an office becomes vacant on the officer's "refusal or neglect to file his official oath or bond within the time prescribed." Id. § 3005, declares that the board of health for the city and county of San Francisco consists of the mayor and four physicians residing in such city and county, appointed by the governor, and holding their offices for the term of five years. By section 3007 the board has authority to appoint a health officer, not only for the city and county, but also for the port, of San Francisco; and, by section 3009, a quarantine officer for the quarantine grounds, which are fixed at the anchorage of Sausalito, in Marin county. All vessels coming into the harbor with cholera, smallpox, etc., must report to the quarantine officer. By section 3022 the board may provide and maintain suitable hospitals at Sausalito. *Held*, that the members of the board of health are both county officers and officers "whose authority is not confined to any county," and that, as the statute (section 909) makes no provision for such a contingency, their failure to file their oath in the office of the clerk of the county, after filing it in the office of the secretary of state, cannot be regarded as a "refusal or neglect" to file it, so as to work a forfeiture.

4. Const. Cal. art. 20, § 16, provides that, "when the term of any officer or commissioner is not provided for in this constitution, the term of such officer," etc., "may be declared by law; and, if not so declared, such officer," etc., "shall hold his position * * * during the pleasure of the authority making the appointment, but in no case shall such term exceed four years." The members of the board of health for San Francisco, whose terms of office are by statute fixed at five years, have power to appoint subordinate officers, exercise a general supervision over the sanitary affairs, etc., control the landing of passengers and freight, control burials, abate nuisances, etc. *Held*, that they are "officers," within the meaning of the constitution, and hence the attempt to make their term of office five years is invalid.

5. The clause relating to the term of office, being invalid, must be regarded as out of the statute entirely; thus leaving the term of office at the pleasure of the governor, the appointing power. The court cannot hold it unconstitutional, only as to the excess over four years.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Garrett W. McEnerney and *David McClure*, (*R. S. Mesick* and *M. M. Estee*, of counsel,) for appellant. *Wilson & Wilson*, for respondent.

BEATTY, C. J. This is an action instituted by the attorney general under the provisions of chapter 5, tit. 10, pt. 2, Code Civil Proc. §§ 802–810, to determine the respective claims of the relator and the defendant to the office of member of the board of health of the city and county of San Francisco. A general demurrer to the complaint was sustained by the superior court, and judgment thereupon rendered in favor of the defendant, from which the plaintiff appeals. It appears from the complaint that the defendant was appointed a member of the board of health by the late Gov. Bartlett on the 14th day of April, 1887. He was notified of his appointment on the following day, and six days later—April 21, 1887—assumed the office. He took and subscribed the official oath, and filed the same with the secretary of state in due time, but he has never filed it in the office of the county clerk of San Francisco. In this state of the case, Gov. Waterman on the 23d day of November, 1887, appointed and commissioned the relator a member of the board in the place and stead of the defendant. Relator thereupon, and within 10 days after being notified of his appointment, took and subscribed the oath of office and filed the same with the clerk of San Francisco. But the defendant, after notice of relator's appointment and qualification, refused, and was sustained by the board in refusing, to admit him to the office. These allegations of the complaint, confessed by the demurrer to be true, present the two questions upon which the decision of the controversy depends.

It is conceded that if there was a vacancy in the office at the date of relator's appointment, or if the tenure of the incumbent was during the pleasure of the governor, the title of the relator is valid. And in his behalf it is contended—*First*, that there was a vacancy in the office by reason of the failure of defendant to file his official oath in the office of the clerk of San Francisco; and, *second*, that, whether such vacancy existed or not, the tenure of the office is, under the law and the constitution, at the pleasure of the governor.

But, before entering upon a discussion of these questions, it will be necessary to dispose of a preliminary objection of the respondent to the jurisdiction of this court to entertain the appeal. He claims that the jurisdiction of this court is derived from the constitution alone, and can neither be enlarged nor restricted by the legislature, and he contends that cases of this character are not comprehended in the constitutional enumeration of cases in which this court has jurisdiction. Section 4 of article 6 of the constitution provides as follows: "The supreme court shall have appellate jurisdiction in all cases in equity, except such as arise in justices' courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to $300; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also in all criminal cases prosecuted by indictment or information in a court of record, on questions of law alone."

We understand the argument to be that this is not a case in equity, nor a case at law, but that it is an action in a particular case,—a special statutory proceeding similar to that under consideration in Houghton's Appeal, 42 Cal. 36. We cannot assent to this view. There is no analogy between this case and the proceeding which the court was asked to review in Houghton's Appeal. That was an assessment of damages and benefits resulting from the change of grade of certain streets. This is a proceeding substantially equivalent to that by *quo warranto*. It is the same as *quo warranto*, with something added. *Quo warranto* was a case at law. It afforded the legal remedy for the usurpation of an office. And we think this court retains jurisdiction of the case, notwithstanding the legislature may have changed the procedure, enlarged the remedy, and given it a new name. To hold otherwise would be to admit a power in the legislature to abridge our jurisdiction, and take from parties the right of appeal, by the easy device of a change of procedure, in many cases where the right and jurisdiction are unquestioned.

This case also sustains the other test of jurisdiction. It embraces a money demand amounting, exclusive of interest, to more than $300. The office, it is true, is purely honorary, the incumbent being entitled to no salary or other pecuniary reward. But the court may, in its discretion, in any action for the usurpation of an office, in case of a decision adverse to the defendant, impose, as part of the judgment, a fine of $5,000, (Code Civil Proc. § 809;) and in this case such judgment is prayed. Without reference, therefore, to the numerous "particular cases" in which this court has assumed and exercised appellate jurisdiction, or the cases (such as Palache v. Hunt, 64 Cal. 474, 2 Pac. Rep. 245) in which it has been held that a meaning must be attributed to the section of the constitution above quoted broader than is contained in its express terms, we feel fully warranted in holding that we have jurisdiction of this appeal, as a case at law in which there is a demand, exclusive of interest, exceeding $300.

Coming then, to the merits of the controversy, we will consider, first, whether there was a vacancy in the office, caused by defendant's failure to file his official oath with the county clerk. Section 3 of article 20 of the the constitution provides the form of official oath to be taken and subscribed by all officers before entering upon the duties of their respective offices. Section 904 of the Political Code contains a similar provision. Sections 907 and 909 are as follows: "Sec. 907 Whenever a different time is not prescribed by law, the oath of office must be taken, subscribed, and filed within ten days after the officer has notice of his election or appointment, or before the expiration of fifteen days from the commencement of his term of office, when no such notice has been given." "Sec. 909. Every oath of office certified by the officer before whom the same was taken must be filed within the time required by law, except when otherwise specially provided, as follows: (1) The oath of all officers whose authority is not limited to any particular county, in the office of the secretary of state; (2) the oath of all officers elected or appointed for any county, and of all officers whose duties are local, or whose residence in any particular county is prescribed by law, in the offices of the clerks of their respective counties; (3) each judge of a superior court and county clerk must, so soon as he has taken and subscribed his official oath, file a copy thereof, signed with his own proper signature, in the office of the secretary of state."

If the defendant was such an officer as is described in the first subdivision of section 909, he was clearly right in filing his oath of office with the secretary of state. If he was such an officer as is described in the second subdivision, he would have been as clearly right in filing his official oath with the county clerk. It happens, as we construe the act creating the office, that it is embraced by both subdivisions. The authority of the board is not limited to any particular county, but residence of the members in a particular county is prescribed by law. "The board of health for the city and county of San Francisco consists of the mayor of the city and county, and four physicians in good standing, residing in the city and county of San Francisco, appointed by the governor, and holding their offices for the term of five years." Pol. Code, § 3005. But the board has authority to appoint a health officer, not only for the city and county, but for the port, of San Francisco. Section 3007. The quarantine grounds of the bay and harbor of San Francisco are fixed at the anchorage of Sausalito, in Marin county. Section 3004. The board appoints a quarantine officer. Section 3009. All vessels coming into the harbor with cholera, small-pox, etc., must report to the quarantine officer. Section 3013, and see sections 3014-3017. The board may provide and maintain suitable hospitals at Sausalito. Section 3022. In short, they may exercise authority, not only in San Francisco, but in all the counties including any part of the bay of San Francisco, and especially in Marin.

Was it, then, the intention of the legislature that these officers should file their official oath in two places,—one with the secretary of state, and another with the county clerk?

Or was it sufficient to file in one place, with the clerk or the secretary, as they might choose? We have little doubt that in framing the provisions of section 909 of the Political Code it was intended and understood that subdivisions 1 and 2 should embrace distinct categories, mutually exclusive, and that the case of an office embraced under each was never contemplated, and consequently that it was not in fact intended that the oath should be filed in both places; but, at the same time, it is no doubt true that an officer whose residence in San Francisco is prescribed, but whose authority extends to other counties, does not fully and literally comply with the directions of the statute unless he files his oath of office with both the county clerk and the secretary of state. The question, however, still remains, does a failure to comply with this improvident exigency of the law in its literal terms work a forfeiture of the office? By section 996 of the Political Code it is provided that "an office becomes vacant on the happening of either of the following events: * * * (9) His refusal or neglect to file his official oath or bond within the time prescribed." Independent of this provision of the Code, the requirement as to filing the oath within a certain time might well be treated as merely directory, not working a forfeiture in case of non-compliance, and we are not prepared to hold that an officer who by the first subdivision of section 909 is directed to file his official oath with the secretary of state, and by the second subdivision is directed to file the same oath with the county clerk, has, within the meaning of the section denouncing a forfeiture of the office, (996,) refused or neglected to file his official oath, when he has, in fact, filed it with the secretary of state. Provisions for forfeiture of vested rights, whether in statutes or contracts, are not favored, and are, as they ought to be, construed as strictly or as liberally as possible against the forfeiture. In this case it is not literally true that the officer has neglected or refused to file his oath of office. The most that can be said is that he has neglected to file it in one of the two offices where, by apparent inadvertence, the legislature has, upon a doubtful construction, directed it to be filed. Having complied with the constitutional requirement of taking and subscribing the oath, and satisfied the object and policy of the statute by filing it in the office where state officers (to which class he belongs,—Pol. Code, §§ 343, 360, 3005) generally are required to file their official oaths, we think he is protected against the forfeiture, and that, if the relator is entitled to the office, it is only because the members of the board of health hold at the pleasure of the appointing power.

The act creating the board of health was passed April 4, 1870, and was entitled: "An act to establish a quarantine for the bay and harbor of San Francisco, and sanitary laws for the city and county of San Francisco." St. 1869-70, p. 716. Its main provisions were subsequently incorporated into the Political Code, § 3004 et seq., and it was afterwards supplemented by several statutes, all passed prior to the adoption of the new constitution. By section 2 of the act corresponding to section 3004 of the Political Code, the membership of the board is prescribed, and the term of its members, other than the mayor of San Francisco, who is *ex officio* a member, is fixed at five years. The authority conferred upon the board embraces the power to appoint subordinate executive officers, to exercise a general supervision over all matters appertaining to the sanitary condition of the city, to control the landing of passengers and freight, to seclude persons affected with contagious diseases, control burials, and abate nuisances. There can be no doubt, we think, that this constitutes the members of the board "officers," within the meaning of that term as used in article 11, § 7, of the old constitution. Unlike the commissioners of the funded debt, who in People v. Middleton, 28 Cal. 605, were held not to be officers within the meaning of the section referred to, the members of this board exercise important police powers pertaining to the administration of the state government, and are officers according to the strictest definition of the term. So much of the act, therefore, as fixed the duration of their office at five years, was in direct conflict with the section cited from the constitution of 1862, then in force, which reads as follows: "Sec. 7. When the duration of any office is not provided for by this constitution, it may be declared by law; and, if not so declared, such office shall be held during the pleasure of the authority making the appointment; nor shall the duration of any office not fixed by this constitution ever exceed four years." And we think it is equally in conflict with the corresponding provision of the new constitution, which reads as follows: "When the term of any officer or commissioner is not provided for in this constitution, the term of such officer or commissioner may be declared by law; and, if not so declared, such officer or commissioner shall hold his position as such officer or commissioner during the pleasure of the authority making the appointment; but in no case shall such term exceed four years." Article 20, § 16, Const.

The argument of counsel for respondent, that this section of the new constitution refers exclusively to officers mentioned in the constitution itself, and not to officers of statutory creation, is ingenious, but not convincing. In its terms the section embraces all classes of officers, statutory as well as constitutional, and no considerations of policy are suggested requiring any abridgment of its apparent meaning. The words "such term," in the last clause, evidently refer, as their antecedent, to the term to be declared by law when not provided in the constitution. And it is contrary to the whole tenor and spirit of the constitution to suppose that, while its framers carefully limited the terms of all executive officers by them created within the period of four years, they would give unlimited power to the legislature to create offices with terms extending indefinitely beyond that period. We must hold, therefore, that the clause of the act fixing the term at five years is unconstitutional; and unless we can at the same time hold, in accordance with the contention of respondent, that it is only unconstitutional as to the excess of the term attempted to be fixed over that permitted by the constitution, it follows that no term has been declared by law, and consequently that the defendant held at the pleasure of the governor, and that the relator's title is valid. It is, of course, a familiar doctrine that an entire legislative act will not be declared invalid merely because some single section or isolated provision is in conflict with the constitution. If this were not so, it would follow that the attempt of the legislature in the act under consideration to make the term of the members of the board of health five years had the effect of destroying the entire statute. It is clear, we think, under the authorities, that no such effect follows, and that, on the contrary, the act is in other respects valid and in force. But we know of no precedent for holding that a clause of a statute, which as enacted is unconstitutional, may be changed in meaning in order to give it some operation, when admittedly it cannot operate as the legislature intended. This would, it seems to us, be making a law, and not merely correcting an excess of authority. Our conclusion is that the legislature has failed to fix the term of the members of the board of health; that the term of the office is at the pleasure of the governor; and that on the case presented by this record relator is entitled to the office. For these reasons the judgment of the superior court is reversed, and the cause remanded, with directions to said court to overrule the demurrer, and for further proceedings in accordance with the views herein expressed.

We concur: WORKS, J.; MCFARLAND, J.; PATERSON, J.

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79 Cal. xix

PEOPLE *v.* CLINTON. (No. 13,045.)

(*Supreme Court of California.* May 1, 1889.)

In bank.

PER CURIAM. For the reasons stated in People v. Perry, ante, 423, (opinion this day filed,) the judgment of the superior court is reversed, and the cause remanded for further proceedings in accordance with the views therein expressed.

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79 Cal. xix

PEOPLE *v.* ROSENSTIRN. (No. 13,046.)

(*Supreme Court of California.* May 1, 1889.)

In bank.

PER CURIAM. For the reasons stated in People v. Perry, ante, 423, (opinion this day filed,) the judgment of the superior court is reversed, and the cause remanded for further proceedings in accordance with the views therein expressed.

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79 Cal. xix

PEOPLE *v.* MCCARTHY. (No. 13,047.)

(*Supreme Court of California.* May 1, 1889.)

In bank.

PER CURIAM. For the reasons stated in People v. Perry, ante, 423, (opinion this day filed,) the judgment of the superior court is reversed, and the cause remanded for further proceedings in accordance with the views therein expressed.

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78 Cal. 581

In re ALLEN'S ESTATE. (No. 12839.)

(*Supreme Court of California.* April 18, 1889.)

EXECUTORS—RESIGNATION.

1. A paper signed by the executrix of her deceased husband's will, after her second marriage, reciting the fact of her marriage, and that she has thereby become incompetent to act as executrix, and requesting the court to confer upon a person mentioned therein the appointment of an administrator, is the equivalent of a resignation, within Code Civil Proc. Cal. § 1427, providing that an executor may resign by filing a writing to that effect in the superior court, having first settled his accounts, and delivered up the estate to the person appointed by the court to receive it; and, there being no evidence to the contrary, it will be presumed, after the court has appointed her successor, that she has settled her accounts, and paid over the funds.

2. Such an executrix is not within Code Civil Proc. Cal. § 1365, subd. 1, authorizing a surviving wife, though a non-resident of the state, to nominate her deceased husband's administrator, as by her subsequent marriage she loses her *status* as surviving wife, and becomes only an heir or legatee.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

O'Brien, Morrison & Daingerfield and *Davis Louderback*, for appellants. *Naphtaly, Friedenrich & Ackerman*, for respondent.

BELCHER, C. C. James Allen, a resident of the city and county of San Francisco, died in the month of October, 1887, leaving a will, which was admitted to probate in December of that year. Margaret Allen, the widow of deceased, was appointed executrix of the will, and duly qualified as such. On the 2d day of April, 1888, Mrs. Allen married one John F. Von Muegge, and has ever since been his wife. Four days later, on the 6th of April, Frederick Eulert filed in court a petition asking to be appointed administrator of the estate of deceased with the will annexed, and with his petition he also filed a paper, subscribed by Margaret Von Muegge, which reads as follows: "Superior Court, San Francisco, Department Nine. In the Matter of the Estate of James Allen, deceased. I, the undersigned, surviving wife of the above-named deceased, hereby request Dr. Frederick Eulert to accept the office of administrator with the will annexed of said deceased, to serve in my place and stead, as I became the wife of John F. Von Muegge on the 2d of April, 1888, and am no longer authorized to be or act as executrix of the last will and testament of said deceased; and I hereby request the above-named court to appoint said Eulert as administrator with the will annexed." On the 20th of April, William Allen, the eldest son of deceased, filed a petition asking that letters of administration on the estate be issued to him, and on the same day, upon his motion, James C. Pennie, the public administrator of the city and county of San Francisco, was appointed special administrator of the estate, "whereupon," as stated in the bill of exceptions, "said Eulert and Margaret Von Muegge excepted." On the 3d of May, William Allen renounced his right to letters, and nominated Pennie for the office, and thereupon on the same day Pennie filed his petition asking to be appointed administrator of the estate with the will annexed. Notices of the several applications were posted as required by law, but no citation to show cause why her letters testamentary should not be revoked was ever issued or served upon Mrs. Von Muegge, nor did she ever consent to any revocation thereof, or resign her office as executrix, except as hereinbefore stated. When the applications came on to be heard, the court denied the petition of Eulert, and granted that of Pennie, and letters were issued to him on the 29th of May, 1888. From this last order Eulert and Mrs. Von Muegge have appealed.

In support of the appeal two points are made by the appellants: *First*, that the court had no authority to direct that special or general letters be issued to Pennie until an order had been made, after notice and hearing, revoking the letters issued to the executrix; and, *second*, that Mrs. Von Muegge had a right to nominate her successor.

In support of the first point, the case of Schroeder v. Superior Court, 70 Cal. 343, 11 Pac. Rep. 651, is cited and relied upon. In that case the petitioner was appointed executrix of the will of her deceased husband, and afterwards married. Special letters of administration upon the estate were then issued, the executrix never having resigned her trust, or been suspended or removed, or notified to appear and show cause why her letters should not be revoked, and it was held that, under the circumstances shown, the superior court had no power to make the order appointing a special administrator; the decision, it would seem, resting mainly upon the fact that when section 1352, Code Civil Proc., is read in connection with other sections, the words, "her authority is extinguished," used in that section, must be construed as only the equivalent of "she ceases to be competent."

That case differs from this in an important particular. Here the court finds that the executrix, after her appointment, married and became the wife of Von Muegge, and that the paper signed by her, and reciting the fact of her marriage, and that she was "no longer authorized to be or act as executrix," and asking the court to appoint Eulert administrator of the estate, has been filed in court. That paper was the equivalent of an express resignation of her trust, and the court had the right to receive and act upon it as such. "Any executor or administrator may, at any time, by writing filed in the superior court, resign his appointment, having first settled his accounts, and delivered up all the estate to the person whom the court shall appoint to receive the same." Section 1427, Code Civil Proc. It is true it does not appear that the executrix had settled her accounts or turned over the estate, nor does the contrary appear. It must be presumed, therefore, in support of the action of the court, that the law in this respect was fully complied with. It is suggested that the executrix should have had an opportunity to appear in court, and contest the averment of her marriage and the genuineness of the paper asking for Eulert's appointment; but she was in court when the special administrator was appointed, and excepted to the order. She did this under the name of Margaret Von Muegge, and, so far as the record shows, no question was then or ever made in that court as to the fact of her marriage, or the genuineness of the paper referred to. Our conclusion is that the case of Schroeder v. Superior Court, supra, is not in point, and that, under the circumstances shown by the record here, the court below had jurisdiction to make the orders appointing both the special and general administrator, and that its action in this regard must be upheld.

As to the second point: When Mrs. Von Muegge requested the court to appoint Eulert as administrator, she had ceased, by reason of her second marriage, to be the widow, or in any strict sense the surviving wife, of the deceased. She had become incompetent to be appointed or to serve as executrix of the will. In Estate of Cotter, 54 Cal. 215, and in Estate of Stevenson, 72 Cal. 164, 13 Pac. Rep. 404, it was held that, under subdivision 1, § 1365, Code Civil Proc., a surviving wife, though a non-resident of the state, might nominate a person to act as administrator of her deceased husband's estate. But the subdivision referred to does not meet the case in hand. Here the trouble is not that the surviving wife was a non-resident, but that she had lost her *status* as such, and become only an heir or legatee of the decedent. The rule declared in the Estate of Morgan, 53 Cal. 243, seems, therefore, to be applicable. In that case the nomination was made by the heirs and next of kin of deceased, and it was held that, as they were married women, and therefore incapable of administering upon the estate, their expressed preferences for the appointment of the administrator "were of no legal consequence whatever." It was further held that in any event the nominations were addressed to the mere discretion of the court, and were not controlling. See, also, Estate of Beech, 63 Cal. 458. It results, in our opinion, that the order appealed from should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

78 Cal. 578

Higgins *v.* Deeney *et al.* (No. 11,632.)

(*Supreme Court of California.* April 18, 1889.)

Contributory Negligence—Province of Jury.

A woman, carrying one child, and leading another, saw a wagon driven with the horse on a trot on the other side of the street, and started to get into the street for the purpose of crossing. Feeling the child slipping from her arms, she let go the hand of the other child, which ran ahead and was struck and injured by the wagon. The wagon was being driven at a greater speed than was allowed by city ordinance. *Held*, that the question of contributory negligence of the woman was for the jury, and judgment for damages will not be disturbed.

Commissioners' decision, Department 2. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

Stanly, Stoney & Hayes, for appellant. *F. M. Hulsted* and *Walter Gallagher*, for respondent.

Foote, C. Action for damages. The plaintiff alleged that his child, two years and five months old, had been run over, knocked down, and injured by the team of horses and wagon of the defendant William Deeney, driven by Philip Deeney, the servant and agent of William; that the team was being driven at an unlawful rate of speed, and in violation of a city ordinance. Judgment was had for the plaintiff in the sum of $500, from which, and an order denying a new trial, this appeal is taken.

The point is made here for the first time that the complaint does not state facts sufficient to constitute a cause of action, no demurrer having been filed. We think that the complaint, after the verdict of the jury, does state a sufficient cause of action to sustain the judgment. Further, it is said that the evidence of the child's mother, a witness for the plaintiff, shows that the injuries to the child were caused by the mother crossing the street when she saw the team coming up at a trot, and that she knew she would expose herself and children to the reception of injury. That her conduct, according to her own statement, put her in the position of one taking the chances of getting herself or children seriously hurt, and that this evidence is uncontroverted, and therefore the verdict of the jury cannot be upheld. Upon an examination of the evidence which the defendant claims shows that the negligence of the mother was the proximate cause of the injury to the child, we find that the mother had in her arms an infant, and was leading by the hand another small child, and had just gotten onto the crossing of the street, when she saw coming upon the other side of the highway the wagon of the defendant, the horses drawing it on a trot. It does not appear that she attempted to cross in front of the team, but that she was getting into the street for the purpose of crossing at some time, perhaps after the team had passed. At that instant, absorbed in the care of her two little ones, she felt her infant slipping from her arms, and to save it a fall upon the stones beneath, perhaps, she let go her hold upon the other child's hand, and it ran ahead, and near the horses thus going at a trot, and was injured. The team being driven at that place upon a crossing in the midst of a city, and on a much used thoroughfare, at an unlawful rate of speed under a city ordinance (Siemers v. Eisen, 54 Cal. 420; Jessen v. Sweigert, 66 Cal. 182, 4 Pac. Rep. 1188,) it may well have happened that the jury thought that if the team had been driven at a lawful rate of speed the child would not have been hurt at all, and that the mother, under all the circumstances, could not be expected to have foreseen the child running on ahead of her, and that the team would not go at a walk on the crossing, where she was properly preventing the infant from falling on the street, and that she was not guilty of carelessness in letting go the child's hand for a moment, but the driver of the wagon was negligent. This being the state of the facts, we cannot say the evidence shows without conflict that the mother was guilty of contributory negligence. Such being the case, it was for the jury to determine the issue, and we do not feel warranted in stating that they have found improperly. The instructions given were proper and suitable, and the amount of damages awarded is not excessive under all the evidence. Perceiving no prejudicial error, we advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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3 Cal. Unrep. 73

Stover *v.* Baker. (Nos. 11,993, 12,355.)

(*Supreme Court of California.* April 18, 1889.)

Trial—Sufficiency of Finding to Support Judgment.

In an action to recover money alleged to have been received by the defendant as the agent of the plaintiff on the sale of certain property of plaintiff, the latter alleging that the agent had falsely represented the amount received, and had thereby induced him to settle for a sum much less than he was entitled to, findings that the agent had agreed with the plaintiff on the amount due him, that no false representations had been made, and that the amount agreed upon had been paid, are sufficient to support a judgment for defendant.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

John Gale and *T. M. Osment*, for appellant. *Van Clief & Gear*, for respondent.

Sharpstein, J. This action is for the recovery of money alleged to have been received by the defendant as the agent of the plaintiff, on account of a sale by the defendant, under the authority of the plaintiff, of his interest in a water-right, for which, it is alleged, defendant received $15,000, and fraudulently concealed the fact from the plaintiff, who was induced by the false representations of the plaintiff to settle with him for $1,000. The court found that the defendant sold the interest of the plaintiff in the water-right, together with other interests therein, and afterwards settled with plaintiff for his interest in said water-right. That defendant made no false representations in connection with said settlement, and paid to plaintiff the amount then agreed upon. Judgment was entered for the defendant. Plaintiff moved for a new trial, which was denied, and this appeal is from the judgment and the order denying the motion for a new trial. Appellant insists that the findings do not support the judgment, and that the evidence is insufficient to justify the findings. We think the finding that the defendant settled with plaintiff for his interest in said water right, and made no false representation in connection therewith, and paid plaintiff the amount agreed upon in said settlement, fully supports the judgment. The evidence upon the material issues is conflicting, and we cannot disturb the findings, without violating an old and well-established rule of this court. Judgment in cause No. 11,993 and order in cause No. 12,355 affirmed.

We concur: McFARLAND, J.; THORNTON, J.

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79 Cal. 55

SNODGRASS *et al.* *v.* PARKS *et al.* (No. 12,841.)

(*Supreme Court of California.* April 24, 1889.)

VENDOR AND VENDEE—QUIETING TITLE—PARTIES—EVIDENCE—RECEIPT.

1. Where the vendee of land voluntarily abandons his contract of purchase, and becomes the tenant of the vendor, the latter may maintain an action against the former to quiet his title, and to cancel a mortgage given by the vendee to a third person, without first rescinding the contract, and delivering up the vendee's notes for the purchase money.

2. By accepting the abandonment of the contract the vendor waived his lien, and it cannot be contended that his only remedy is by a bill in equity to enforce his lien.

3. The fact that the vendor has contracted to convey it to another does not prevent his bringing the action, as he is still the owner of the legal title, and has the right to defend it.

4. The fact that the vendee has had a homestead declared upon the property is no defense to the action. Conceding that a homestead may be declared upon land held under contract of purchase, such declaration does not give any new title or strengthen the old.

5. The vendee having failed to allege the fact that he was a tenant of the vendor, and therefore entitled to possession, cannot contend on appeal that for that reason a judgment in favor of the vendor is erroneous.

6. The recital in the receipt given for rent paid by the vendee, that the money was paid on the original contract, is not conclusive, and the vendor may show a parol agreement by the vendee, after the abandonment, to pay rent.

7. The mortgagee of the vendee is not a necessary party, for, if the vendee is asserting an unfounded claim, he cannot defend on the ground that some one else is also asserting one.

In bank. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Blackstock & Shepherd, (*McKinley & Williams,* of counsel,) for appellants. *J. Hamer, J. M. Brooks, E. S. Hall,* and *Fred Hall,* (*W. H. Wilde,* of counsel,) for respondents.

WORKS, J. This action was commenced by Larkin Snodgrass, Charles L. Cooper, and J. Marion Brooks against S. B. Parks, N. S. Dunlap, and Alice Dunlap, his wife, to quiet title to real estate, and to have canceled a mortgage given by the defendants Dunlap and wife to Parks upon the property. Dunlap and wife answered that they held the property under a contract from Snodgrass for the conveyance of the lands to Mrs. Dunlap and one Susan A. Watkins, her daughter, deed to be made upon payment of certain sums of money, and the performance of other conditions; that Snodgrass was, at the time of entering into the contract, the sole owner of the property; that Mrs. Watkins had conveyed her interest in the property to Mrs. Dunlap; that the latter had declared a homestead on the property in due form; that she and her husband had executed the mortgage to the defendant Parks, and had subsequently conveyed the land to W. G. Adams and John McElvea; and that the conditions of the contract had been fully performed on the part of said Dunlap and Watkins. The action was dismissed, before trial, as to the defendant Parks, and the said Adams and McElvea were allowed to intervene and set up their interest in the property substantially as in the answer of the Dunlaps. It was also set up by both the Dunlaps and the intervenors that the plaintiffs had, before the bringing of the action, contracted to convey the property to one Redrup, and were for that reason not the real parties in interest. The findings of the court are to the effect that the plaintiffs are the owners of the property; that Snodgrass made the contract to convey as alleged; that the other conveyances between the defendants and Mrs. Watkins were made and the homestead declared by Mrs. Dunlap, as alleged in the answer; but that the defendants had wholly failed to pay the purchase money, or comply with the other conditions of the contract with Snodgrass, and had voluntarily abandoned the same, and become tenants of his, and paid rent for the property. It was also found that the plaintiffs had entered into a contract with said Redrup, agreeing to convey the property to her on certain payments to be made in the future. Under these findings judgment was rendered in favor of the plaintiffs, and a motion for a new trial by the defendants denied. The defendants appeal.

Many questions are presented by counsel for appellants and argued at great length. We hope to be able to notice all of them. It is contended that Parks, who held the mortgage of Dunlap and wife, was a necessary party to the action. We do not think so. If the defendants are asserting an unfounded claim to the property, they cannot defend an action of this kind on the ground that some one else is doing the same thing.

The claim made that the fact that plaintiffs had contracted to sell and convey the property to another was sufficient to prevent them from bringing the action is equally unfounded. Notwithstanding such contract they were still the owners of the legal title to the property, and had the right to protect and defend the same. The very fact that they had contracted to convey the property and make a good title to their vendee might have rendered it absolutely necessary to remove the adverse claim of the defendants to the land.

Again, it is claimed that as Snodgrass had agreed to convey the property to Dunlap and Watkins, and held their obligation to pay certain sums of money, the plaintiffs, who claim under him, could not maintain the action, at least until he had rescinded the contract and delivered up such obligation. There might be some force in this position, but for the fact that the court finds, upon sufficient evidence, that the defendants acknowledged their inability to pay for the land, and voluntarily abandoned the contract. This court has held in a similar case that, where the vendee has refused to comply with his contract, the vendor may maintain ejectment and recover the land. Hicks v. Lovell, 64 Cal. 14. This is a stronger case than the one cited, as the vendees have in this case not only failed to pay, but have expressly abandoned their contract. Having done so, they cannot now be heard to assert any rights under it.

It is further urged that because a homestead was declared upon the property by Mrs. Dunlap the action cannot be maintained. This cannot be so. Conceding, as claimed by the appellants, that a homestead may be declared upon land held under a mere contract to convey, such declaration did not give any new title, or tend in any way to strengthen or enlarge the one then existing. Therefore, when the equitable title created by the contract, and possession under it, was lost in the manner stated, the homestead fell with it. It would be a marvelous doctrine that the filing of a declaration of homestead could create a new title, or render a bad title good.

It is further contended that the evidence and findings of the court show that the defendants Dunlap and wife had an estate in the lands as tenants, and having such estate they were entitled to possession under it, and therefore the judgment in favor of the plaintiffs is erroneous. This might have been so if the defendants had set up any such estate, and claimed under it, but, unfortunately for them, they asserted no such claim in the pleadings, and positively denied in their evidence, given at the trial, that they were such tenants. It is asking too much of this court to protect them from the consequences of such a defense in the manner indicated by counsel. So far as the findings tend to establish any such right in the defendants, or any of them, they are outside of the issues in the case, and must be disregarded. The evidence on the part of the plaintiffs that they had consented to become their tenants was competent, as tending to prove the ultimate fact that they had abandoned the contract of purchase, but in the findings it was a mere recital of a part of the evidence, and should have been omitted.

The court finds that no part of the purchase money named in the contract to sell was paid. It is contended that this is not so, because the defendants delivered to Brooks, for Snodgrass, certain property in payment of the amounts due. The answer to this contention is that the court found, on sufficient evidence, that Brooks was not authorized to receive the property, and that the defendants knew of his refusal to accept the same as payment.

The appellants contend, also, that the contract to sell was never rescinded. What we have said above disposes of this question, but it is due to counsel for appellant to say that their contention is that, even if any agreement was made with Snodgrass which would, if made by Mrs. Dunlap, have amounted to an abandonment of the contract, it appears that such arrangement was made by her husband, and there is no evidence of his authority to act for her. But the court finds that he had such authority, and we think the evidence supports the finding. It is shown that all of the transactions between Snodgrass and Mrs. Dunlap were carried on, on her part, through her husband, and his authority to act for her throughout is not denied by either of the defendants. Again, it is claimed that, if Dunlap had authority to act, the abandonment was without consideration. But this does not appear to have been the case. The abandonment was mutual. Mrs. Dunlap, by stipulation of both parties, ceased to be a purchaser, and became the tenant of Snodgrass. It does not appear that the contract was surrendered, but what took place would bar a recovery upon it, which amounted to the same thing.

In making this second arrangement the parol evidence shows that Dunlap agreed to and did pay $81 as rent. There was a receipt given for the money, which recited the fact that this money was paid on the original contract. Appellants contend that the recital in the receipt was conclusive, and that it was error to allow parol proof to show for what the money was paid. In this counsel are in error. The receipt was not conclusive, and evidence to show for what the money was paid was proper. Winans v. Hassey, 48 Cal. 637; Pereira v. Railroad Co., 66 Cal. 92, 4 Pac. Rep. 988; Bergson v. Insurance Co., 38 Cal. 541. It will be seen by the authorities cited that a receipt is not a written instrument, the terms of which cannot be contradicted by parol, unless it also contains an agreement binding upon the parties as such.

It is claimed that Snodgrass waived any forfeiture that might have been enforced, for failure to comply with the contract, by extending time of payment. There are two answers to this contention: *First*, it does not appear that there was any extension of the time of payment; *second*, there was no forfeiture, but a voluntary abandonment of the contract.

The contention that the only remedy of Snodgrass was by a bill in equity to enforce his vendor's lien is answered by the fact that by the agreement by which the purchase was abandoned, and the defendants became his tenants, Snodgrass waived and abandoned his vendor's lien, if he had one.

It is earnestly contended that there was no forfeiture of the rights of the defendants under the contract of sale. This may be admitted. There was no forfeiture, but an abandonment and surrender of their rights, which was quite another thing. We do not agree with counsel that the conduct of Snodgrass was such as to bind him by the acts of Brooks, on the ground that he had held him out as his agent, and was estopped to deny his authority.

Counsel contend, with much earnestness, and with apparent feeling, that the findings are contradictory and inconsistent, and that one of the issues was not found upon. They say: "It has never been our fortune to examine findings that were so contradictory and inconsistent." We have carefully compared the findings, and find in them no material contradictions or inconsistencies. The findings are subject to criticism, however. They contain much of the evidence, instead of finding the facts proved by such evidence. This very fact has given rise to the alleged contradictions and inconsistencies attempted to be pointed out by the appellants, but, in order to show that such inconsistencies exist, counsel have been compelled to misconstrue or place a wrong construction upon the evidence thus improperly brought into the findings. The court below might have avoided this difficulty by making proper findings. The issue that it is claimed was not found upon was as to the rescission of the contract of sale. The conclusive answer to this is that there was no such issue presented by the pleadings. The court found all of the facts and a great part of the evidence. It could not have done more unless the portion of the evidence omitted had been inserted in the findings. We are not inclined to reverse the case because this was not done. Judgment and order affirmed.

We concur: PATERSON, J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.

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85 Cal. 1

EVERSDON *v.* MAYHEW. (No. 12,517.

(*Supreme Court of California*. April 25, 1889.)

TRUSTS—PLEADING—NOTICE—EVIDENCE.

1. Plaintiff's mother, a widow, purchased town lots from one in possession, taking the title in an assumed name, entered into possession, and lived upon the property until her second marriage, when her husband lived with her. The mother died intestate, leaving as her heirs her husband and plaintiff. Prior to her second marriage the United States issued a patent to the town-site to the county judge, in trust for the several use and benefit of the occupants, according to their respective interests. After her death the husband applied for and obtained a certificate of title to the whole of the property in his own name, which title by conveyances became vested in defendant. Plaintiff commenced ejectment, claiming the entire property; the complaint alleging that the husband had obtained the title by fraud. On the first appeal the court held that the complaint stated a cause of action in ejectment. On the second appeal the husband was held to have taken the title in trust for plaintiff to the extent of her interest, by virtue of the relationship between them as co-heirs, and decreed to plaintiff a half interest therein. *Held*, that the sufficiency of the complaint, as stating a cause of action for the enforcement of a trust, was established by that appeal, and, no specific objection having been raised as to misjoinder of causes or variance, the objection will not be considered on the third appeal.

2. On the second appeal the defendant was held to have had constructive notice of plaintiff's rights, but that the answer failed to present the defense. On the third trial the answer was amended, and, while the record introduced failed to show the husband's application, it contained the certificate of title, which recited that the husband duly made claim and application in writing. *Held*, that the defendant had notice that an application had been filed, and that it would be presumed that it was on file when defendant purchased, and that it set forth the only title the husband had, which was a claim through the wife. BEATTY, C. J., dissenting.

3. It is not error to admit in evidence a copy of a deed without producing the original, where only a general objection is made to its admissibility.

Commissioners' decision. In bank. Appeal from superior court, Tehama county; CHARLES P. BRAINARD, Judge.

John F. Ellison and *J. Chadbourne*, for appellant. *Chipman & Garter*, for respondent.

HAYNE, C. The material facts of this case are as follows: The property in controversy consists of several lots in the town of Red Bluff. For several years before 1865 one Stafford was in possession of these lots. In 1865 he made a deed purporting to convey them to a woman who was then known by the name of Ann Watson, but whose real name was Idonia Eversdon. It does not appear that there was any legal change of name. It would seem that the name of Ann Watson was one which she chose to assume, and it was the name by which she was known. After the conveyance from Stafford she lived upon the property up to the time of her death, in 1867. The plaintiff, who was her child, lived upon the property with her mother. These facts appear clearly and without contradiction. The assertions of counsel as to the insufficiency of evidence appear to us to be based mainly on the difference between the names Idonia Eversdon and Ann Watson. But, inasmuch as the identity of the person bearing or known by these two names is clearly established, we think that the difference of name is unimportant.

It appears, therefore, that the mother of of the plaintiff was an inhabitant of the town of Red Bluff, and was in possession of the property under color of title. She was therefore one of the class for whose benefit the town-site acts were passed. In December, 1866, she married one Henry Wasson. After this marriage she and her child and Wasson lived upon the property until her death, in 1867. She is not shown to have left any will or any other heirs than the plaintiff and Wasson. Before her marriage with Wasson, viz., in September, 1866, the United States government issued a patent for the lands in the town to the county judge, "in trust for the several use and benefit of the occupants of said town-site according to their respective interests;" and after her death Wasson applied for and obtained a certificate of title to the whole of the property in his own name. He conveyed to one Bryant, and he conveyed to the defendant, who paid valuable consideration for the property, and who had no notice of the rights of the plaintiff other than was given by the public records.

This is the third appeal. The first trial resulted in a judgment for the defendant. This was reversed; the court holding, among other things, that the complaint stated a good cause of action in ejectment. Nothing was said concerning the rest of the complaint. 57 Cal. 144. The second trial also resulted in a judgment for the defendant, and the judgment also was reversed. 65 Cal. 163, 3 Pac. Rep. 641. Upon this second appeal the court held that the plaintiff and Wasson were tenants in common, and that the title acquired by him under the county judge's certificate inured to the benefit of the plaintiff; in other words, that Wasson was a trustee for the plaintiff to the extent of her interest in the property. This was not put upon the ground of any false representation by Wasson in his application for title, but upon the ground of the relation which existed between him and his co-heir. The court further held that the records were sufficient to give notice to the defendant of the plaintiff's rights. The third trial resulted in a judgment for the plaintiff, from which, and from an order denying a motion for a new trial, the defendant appeals. There are several matters which the appellant claims were not disposed of by the second appeal.

1. It is contended that, while the complaint states a cause of action in ejectment, as was held upon the first appeal, it does not state a cause of action for the establishment of a trust. The complaint, however, contains more than a cause of action in ejectment. It attempts to show that the certificate of the county judge was obtained by fraud, and that the plaintiff was entitled to the whole property instead of one-half thereof, which was the portion which the court held upon the second appeal that she was entitled to. Now, whatever may be its defects, we think that its sufficiency as a complaint to establish the trust must be held to have been passed upon on the second appeal. We have looked into the transcript and briefs upon that appeal, as it is permissible to do in order to ascertain what is the law of the case, (see McKinlay v. Tuttle, 42 Cal. 576,) and we find that the complaint here is the same as that then before the court, and that the same argument was made against it then that is made now. The court did not say in express terms that it was sufficient, but treated it as stating a cause of action for the enforcement of a trust; for it would not have adjudged that upon the record before it the plaintiff was entitled to the beneficial interest in one-half of the property, if the only cause of action stated in the complaint was in ejectment. The sufficiency of the complaint in this regard, therefore, was not only argued, but was necessarily involved in the decision. Reclamation Dist. v. Goldman, 65 Cal. 636, 4 Pac. Rep. 676. It results that the complaint must now be regarded as stating two causes of action,—one in ejectment, and one for the establishment of a trust. But there was no demurrer for misjoinder of causes of action or on any other ground, and the matter could not be presented by a motion to strike out part of the pleading. And if it be true that the cause of action shown by the evidence was somewhat, but not radically, different from that stated in the complaint, the objection should have been presented either by a specific objection to evidence, or by a motion for nonsuit on that particular ground. The precise ground should have been indicated, which was not done.

2. It is contended that there is nothing to show that the defendant had notice of the plaintiff's rights at the time he purchased. On the second appeal the question of notice was disposed of on two grounds. It was held, in the first place, that the records were such as to give defendant constructive notice of facts sufficient to put him on inquiry; and, in the second place, that the answer was not such as to present the defense. The answer having been amended in the particulars indicated by the court, the question is whether the records were such as to put the defendant upon inquiry. The decision of the court in this regard was rested upon the fact that the record of the deed from Stafford to Ann Watson gave notice that she had a claim, and that the written application of Wasson for the certificate of title showed that he claimed as her heir. The court, in addition, stated that the defendant had examined the records, but whether he had or not is certainly immaterial. Besides this, the defendant expressly admits that he had the records examined. If the record before us shows these two facts, the decision upon the former appeal is conclusive. The written application, however, is omitted from the record, the respondent says, through inadvertence; but, as a matter of course, we must take the record as we find it. In this regard it might, perhaps, be argued that the burden of proof to show that he had no notice is on the defendant. It was held on the second appeal that he must plead the want of

notice; and it has been said that the burden of proof of want of notice is on the party setting it up. See Long v. Dollarhide, 24 Cal. 227. But, while this is certainly true as to the payment of value, we are not sure whether it is true as to the want of notice, (see Shotwell v. Harrison, 22 Mich. 419,) and we express no opinion in regard to it; for we think that, upon the record before us, the fact must be taken to be that the defendant had notice that Wasson claimed as the heir of his wife. The county judge's certificate, which conveyed the legal title, and under which the defendant claims, contains the following recital: "Henry Wasson, having duly made claim and application in writing by his oath to me under the last-named act," etc. The defendant, therefore, had notice that a written application was in fact filed by Wasson; and, having been once filed, it will be presumed to have been on file at the time the defendant purchased. Now the law under which the application was made requires that it shall state "the facts constituting the possession or right of possession of the claimant," (Laws 1867-68 p. 489, § 7;) and, inasmuch as the judge granted the application, it must be presumed to have been regular in form, and consequently to have stated the facts constituting Wasson's right of possession. But the only right of possession which he had, and apparently the only one which he claimed, was as the heir of his wife. And it must be presumed that he stated the one which he had, and not some one which he did not have or claim; for if he did not state the facts truly he would have been guilty of perjury, which will not be presumed. The presumption of innocence is strong, and has been held to overcome even the presumption of life. Montgomery v. Bevans, 1 Sawy. 653. It is rather to be presumed that the county judge mistook the law than that Wasson committed perjury in stating the facts. If he stated the facts truly, the application on file showed that he claimed as heir of his wife. And hence it must be held upon the record before us that the defendant had notice that Wasson claimed through his wife. This brings the case within the decision upon the second appeal, which is the law of the case.

3. It is contended that the court erred in admitting in evidence the copy of the deed from Stafford to the mother of the plaintiff without accounting for the original. The exclusion of such a document would have to be placed upon the ground that the copy was not the best evidence. But the objection was not made upon this ground, and a general objection is insufficient. Braly v. Reese, 51 Cal. 462. If a specific objection had been made, the defendant might have accounted for the original. The other matters do not require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

WORKS, J. I concur in the judgment.

BEATTY, C. J., (*dissenting.*) I dissent from the conclusion that the defendant had notice, actual or constructive, of plaintiff's equity at the time of his purchase. Upon this point the evidence in the record before us differs materially from that presented on the second appeal. 65 Cal. 167, 3 Pac. Rep. 641. And I do not understand it to have been held in that case that constructive notice of the deed to plaintiff's mother, and of Wasson's application for patent, was imputed to defendant by reason merely of their existence as records. It was, as I understand the opinion, decided that he had actual knowledge of these records, and that this was sufficient to put him on inquiry which would have informed him of plaintiff's rights. In this record evidence of actual notice of the deed and application is wanting. The judgment and order should, in my opinion, be reversed.

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78 Cal. 625

PAINTER *v.* PAINTER *et al.* (Nos. 11,731, 11,795.)

(*Supreme Court of California.* April 20, 1889.)

ATTORNEY AND CLIENT—COMPENSATION.

1. Under Code Civil Proc. Cal. § 1510, providing for the appointment of an attorney to defend an action on a claim presented against an estate by the personal representative thereof, and that, if the plaintiff recover no judgment, he shall pay all costs, including reasonable attorney's fees to be fixed by the court, a charge for services rendered by an attorney so appointed, for his services in the supreme court in the successful defense in such an action, included by him in his bill of costs presented to the trial court after the record has been remitted, should be stricken out, as such a fee is no part of a bill of costs, but should be fixed by the court.

2. The allowance of the fee can only be made after termination of the action, and should be fixed by the trial court.

3. The claim sued upon being for the sum of $57,000, an allowance to the attorney of $1,000 for services in the supreme court is reasonable.

Commissioners' decision. Department 1. Appeals from superior court, city and county of San Francisco; F W. LAWLER, Judge.

Theodore P. Painter, one of the executors of the will of J. B. Painter, deceased, presented a claim against said estate for more than $57,000, which was rejected, and he brought suit thereon. Warren Olney, Esq., an attorney, was appointed to defend the action, and did so, final judgment being rendered on demurrer to the complaint against the plaintiff. The court allowed Mr. Olney $250 for his services, and, the judgment having been appealed from, it was affirmed by the supreme court. 9 Pac. Rep. 450. The other facts appear in the opinion.

C. H. Parker, (*Edward J. Pringle*, of counsel,) for plaintiff. *Warren Olney, pro se*, (*Jas. K. Byrne* with him.)

Foote, C. An attorney was appointed by the superior court to resist a claim against an estate, under section 1510 of the Code of Civil Procedure. He did so successfully in the superior court, and was allowed $250 for such service. The case was then heard upon appeal in the supreme court, and the judgment affirmed. 68 Cal. 396, 9 Pac. Rep. 450. Upon the going down of the *remittitur*, the attorney presented for allowance in the court below a cost-bill including a fee of $1,000 for his services in the appellate court. A motion was made to strike out the fee from the cost-bill. The motion was granted, and from it an appeal was taken by the attorney, the matter in the appellate court being numbered 11,731. Apprehending, perhaps, that this was not the proper way in which to have the court fix his fees, the attorney then moved, upon notice, that the superior court fix a reasonable fee for services performed by him in the appellate court. The court below granted the motion, and fixed the fee at $1,000. From that order an appeal is taken by T. P. Painter, the plaintiff, and the cause is numbered 11,795. Both appeals were argued and submitted together.

With reference to the first contention, it is clear that the fee was no part of the cost-bill. It was not for the attorney, but for the proper court, to fix the fee for his services. In a case concerning a similar matter the supreme court entertained the view just expressed. Rapp v. Gold Co., 74 Cal. 533, 16 Pac. Rep. 325.

The portion of the section of the Code of Civil Procedure, supra, pertinent to the second matter of controversy is: "If the claimant recover no judgment he must pay all costs, including defendant's reasonable attorney's fees, to be fixed by the court." It was not positively ascertained that the plaintiff did recover "no judgment" until the appellate court acted on his appeal. Then it was finally declared that he could have no judgment. The estate stood as much in need of an attorney in the appellate as in the lower court. Under that statute no attorney's fee could be fixed or allowed by any tribunal for services performed before the appellate court by the attorney appointed by the superior court, until the court of last resort had made it a finality that the plaintiff was entitled to "no judgment." The language of the section cited certainly indicates that the same court which was to allow the costs was to fix the "reasonable fees" for the attorney so appointed. This authority given the court could only be exercised when the fee now in dispute was to be allowed by an order made after final judgment, and the allowance is necessarily an incident to such judgment when given against the claimant as plaintiff in the action. A reasonable attorney's fee was as just and proper for services in the upper as in the lower court. The amount fixed by the latter tribunal is not objected to. The superior court was familiar with the condition of the estate, the services already performed under its supervision, and was fully competent in the light of such knowledge to declare what was a reasonable fee for services rendered in the appellate court. If the supreme court had in all cases the burden thrown upon it of determining such matters, where oral testimony would often have to be heard as to the proper fee to be fixed, including such facts as the value of the estate, its condition, and the amount of service performed, it would be very inconvenient, and perhaps not so easy of ascertainment as in the court where the estate is held in charge and the proceedings are first begun. It is therefore reasonable to suppose that the legislature intended to leave as a matter of original jurisdiction the fixing of all fees contemplated by the section, supra, to the superior court. Its discretion has been fairly exercised, and in a manner very similar to what was done in the case of Ex parte Winter, 70 Cal. 291, 11 Pac. Rep. 630, approved in Larkin v. Larkin, 71 Cal. 330, 12 Pac. Rep. 227. We therefore advise that both orders appealed from be affirmed.

I concur: Belcher, C. C. Hayne, C., took no part in this decision.

Per Curiam. For the reasons given in the foregoing opinion the orders are affirmed.

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79 Cal. 50

McAulay *v.* Truckee Ice Co. (No. 12,-919.)

(*Supreme Court of California.* April 24, 1889.)

Appeal—Record.

As, under Code Civil Proc. Cal. § 397, a court has power in certain cases to change the place of trial of an action, it will be presumed, on appeal from an order making such change, when the record does not contain the "papers used on the hearing in the court below," as required by section 951, that they were sufficient.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; J. M. Walling, Judge.

Action by Thomas McAulay against the Truckee Ice Company, a corporation, to recover for labor performed and money advanced. On motion of defendant, an order changing the place of trial to the city and county of San Francisco was made, from which plaintiff appeals.

Fred Searls, for appellant. *George A. Knight*, for respondent.

Foote, C. An appeal from an order changing the place of trial of the cause. The appellant in such case "must furnish the court with a copy of the notice of appeal, of the * * * order appealed from, and of papers used on the hearing in the court below." Section 951, Code Civil Proc. A copy of the notice of appeal and of the order appealed from is in the record, but there are no papers identified as having been used on the hearing of the motion to change the place of trial. The court below had the power in certain contingencies to make the order. Section 397, Code Civil Proc. "There being no showing to the contrary," it must be presumed to have exercised "its power properly, and within the rules prescribed by law." Pardy v. Montgomery, 19 Pac. Rep. 530. We therefore advise that the order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

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78 Cal. 586

INGRAM'S ESTATE *v.* CLOUGH *et al.* (No. 12,869.)

(*Supreme Court of California.* April 18, 1889.)

DESCENTS AND DISTRIBUTIONS—AMENDMENT.

1. Under Civil Code Cal. § 1386, par. 5, providing that if a decedent left a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate shall go to the surviving husband or wife, a surviving husband of an intestate wife, who left no issue or any of the relatives mentioned, is her sole distributee, though the children and grandchildren of a deceased sister of the intestate survive her; as paragraph 2 of said section, enacting that the children of a deceased brother or sister of the intestate shall take their parent's share, applies only to cases in which there is a surviving brother or sister.

2. A decree awarding only half of the estate of the intestate in such case to the husband's assignee may, on motion of the latter, after notice, be amended so as to distribute to him the whole estate.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

J. M. Seawell, for appellants. *M. C. Baum* and *Henry I. Kowalsky*, for respondent.

MCFARLAND, J. Hannah G. Ingram died intestate, and left surviving her John W. Ingram, her husband, but left no issue, and no surviving father or mother, brother or sister. There were living, however, at the time of her death, certain children and grandchildren of a deceased sister, who are the appellants herein. A decree of distribution was rendered May 10, 1888, in the court below, by which one-half of the estate was distributed to the said surviving husband, (or rather to his assignee, Kowalsky,) and the other half to the said children of the deceased sister. Afterwards, upon due notice and hearing, on July 18, 1888, the decree was amended so as to distribute the whole of the estate to the said assignee of said surviving husband. From this amendment of the decree the appeal herein is taken.

It is entirely beyond doubt that the whole of the estate should have been distributed to the surviving husband. Paragraph 5 of section 1386 of the Civil Code is too clear to present any difficulty of construction whatever. It is as follows: "If the decedent leave a surviving husband or wife, and neither issue, father, mother, brother, nor sister, the whole estate goes to the surviving husband or wife." Paragraph 2 of said section refers to the case where there is a surviving brother or sister, and provides that in such case, if there be also children of the deceased brother or sister, they shall take their parents' share by right of representation. It is vain to argue against the injustice of the rule, or to contend that in a case like the one at bar the children of a deceased sister ought to have a share in the estate when there is not any surviving brother or sister, as well as when there is. Succession to estates is purely a matter of statutory regulation, which cannot be changed by courts.

We think the court had power to modify the decree upon the ground stated in the motion to amend, and that the power was properly exercised. The judgment of the court below is affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

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79 Cal. 90

HUTSON *v.* WOODBRIDGE PROTECTION DIST. *et al.* (No. 12,342.)

(*Supreme Court of California.* April 29, 1889.)

DUE PROCESS OF LAW.

Act Cal. April 15, 1880, providing for the protection of lands from overflow by a system of works under direction of boards of trustees appointed for certain protection districts, the expense to be assessed upon the lands benefited, by commissioners, whose report shall be subject to review by the supervisors of the county at a meeting to be held after advertisement thereof in a newspaper, the decision upon the report, when made by said supervisors, to be final, and to constitute the basis of assessment within the district, and further providing that the collection of the tax so assessed may be enforced by sale of the land, is unconstitutional for authorizing property to be taken without due process of law, no opportunity being given to land-owners to be heard as to the validity of the assessment. Following 16 Pac. Rep. 549.

In bank. On rehearing. For statement of facts, see former opinion by department 2, 16 Pac. Rep. 549.

J. H. Budd, for appellants. *J. B. Hall*, (*Dunlap & Vischer*, of counsel,) for respondent.

PER CURIAM. The judgment and order appealed from are affirmed for the reasons stated in the opinion of department 2, (16 Pac. Rep. 549,) which opinion is approved and adopted as the opinion of the court in bank.

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3 Cal. Unrep. 75

DORLAND *v.* BERNAL *et al.* (No. 11,928.)

(*Supreme Court of California.* April 18, 1889.)

APPEAL—RECORD.

An appeal from a judgment, and from an order discharging a rule requiring plaintiff to show cause, etc., will be dismissed when the transcript does not contain a copy of the judgment roll.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

For opinion on former appeal, see 4 Pac. Rep. 1065.

Moses G. Cobb, for appellants. *J. M.*

Wood, (*J. C. Bates*, of counsel,) for respondent.

Per Curiam. As stated in the notice of appeal, this appeal is from a judgment entered June 1, 1886, and from the order discharging the order upon the plaintiff to show cause, etc., made on the 23d day of July, 1886. The transcript does not contain a copy of the judgment roll, and is fatally defective in that respect. There is no order of July 23, 1886, in the transcript, and this appeal was taken more than 60 days after that date. Appeal dismissed.

3 Cal. Unrep. 75

Powell v. Sutro. (No. 11,728.)

(*Supreme Court of California*. April 20, 1889.)

Change of Venue.

Where the defendant in an action commenced in a justice's court asks to have the cause transferred to the superior court of the county where he is sued, for the reason that the cause involves the legality of a tax, there is no authority, upon the transfer being made, to transfer the cause to another county for trial.

Department 2. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Edmund Tausky, for appellant. *Moore & Reed*, for respondent.

Thornton, J. This action was commenced in a justice's court in the county of Alameda. The defendant set up in his answer facts going to show that the determination of the cause would necessarily involve the legality of a tax, and therefore, on his motion, the cause was transferred to the superior court of the county of Alameda for trial. The defendant then claimed in that court that he was, and had been for many years, a resident of the city and county of San Francisco, and demanded that the place of trial be changed to the superior court of the city and county above mentioned. This demand was denied, and thereupon he prosecuted an appeal to this court. We find no power vested in the superior court to change the place of trial in this case. The defendant, having been sued in a justice's court, asks that the cause be transferred to the superior court of the county where he is sued, for the reason mentioned above, and his request is granted. When the cause gets to such superior court the defendant must try his cause in that court. The law makes no provision for its removal to any other court. Order affirmed.

We concur: McFarland, J.; Sharpstein, J.

79 Cal. 137

Doland v. Mooney *et al.* (No. 12,762.)

(*Supreme Court of California*. May 1, 1889.)

Taxation.

1. It will not be adjudged that a tax-sale was made for a sum exceeding the amount of the tax and legal costs, and is therefore void, because the recitals of the amount in the certificate and deed differ.

2. The certificate recited that M. was "the bidder who offered to take the least quantity of said property, or the smallest portion of interest therein." A certificate of tax sale and the deed stated that "said least quantity of said property, or smallest portion of interest therein, is situated in said county of S., and is described as follows, to-wit: All of the above-described property." *Held*, that the "least quantity," and not only "the smallest portion of interest," was offered for sale and sold.

3. The certificate and deed recited that "said taxes, with 5 per cent. and the cost of publication, and other costs, not having been paid," etc.; but also recited that the purchaser offered to take the least quantity, and pay the taxes and costs due thereon. *Held*, that it did not appear that the amount for which the sale was made included anything for costs of publication, and the sale was not on that account void.

McFarland, J., dissenting.

In bank. Appeal from superior court, Sacramento county; John W. Armstrong, Judge.

Action by F. F. Doland against John E. Mooney and another. For opinion on former appeal, see 13 Pac. Rep. 71. Plaintiff appeals. Pol. Code Cal. § 3776, requires the certificate of tax-sale to state, when known, "the name of the person assessed; a description of the land sold; the amount paid therefor; that it was sold for taxes, giving the amount and year of the assessment, and specifying the time when the purchaser will be entitled to a deed." By section 3786, "the matters recited in the certificate of sale must be recited in the deed. * * *" Section 3773 provides that the owner or possessor may designate the part to be sold, and, if he does not, the collector may; "and the person who will take the least quantity of the land, or, in case an undivided interest is assessed, then the smallest portion of the interest, and pay the taxes and costs due, including 50 cents to the collector for the duplicate certificate of sale, is the purchaser."

D. E. Alexander, for appellant.

Grove L. Johnson, *C. L. White*, and *Lincoln White*, for respondents.

The proceedings in tax sales are *strictissimi juris*. Norris v. Russell, 5 Cal. 249; Ferris v. Coover, 10 Cal. 632; Kelsey v. Abbott, 13 Cal. 609; Russell v. Mann, 22 Cal. 131; Treadwell v. Patterson, 51 Cal. 637; Harper v. Rowe, 53 Cal. 233; Grimm v. O'Connell, 54 Cal. 522; Blackw. Tax-Titles, (4th Ed.) 36–38. The motto *de minimis non curat lex* does not apply. Treadwell v. Patterson, 51 Cal. 637.

Paterson, J. Action to quiet title. At the trial plaintiff offered in evidence to support his claim of title a certificate of tax-sale and a tax-deed. The certificate was admitted; the deed was excluded. The ruling of the court in excluding the deed is assigned as error. Respondent contends that the deed is void because it does not recite the matters recited in the certificate. We have examined the particulars in which the deed differs from the certificate, and are of the opinion that none of them are material.

In the certificate it is stated that the taxes and costs amount in all to the sum of $35.71. In the deed the amount recited is $35.21. The authorities cited hold that, if a sale of land for a delinquent tax is made for a sum in excess of the tax and legal costs, the sale is void unless the excess is less than the smallest fractional coin authorized by law. We cannot say that because the certificate and deed differ in such recitals the sale was for a sum in excess of the tax and legal costs. If an excessive amount was demanded, and the property sold therefor, it would invalidate the sale, and that fact may be shown, but the presumption is in favor of the regularity of official action.

In the certificate it is recited that Mayo was "the bidder who offered to take the least quantity of said property, or the smallest portion of interest therein." The point is made that only the "least quantity" should have been offered for sale or sold. We think it clear that such was the fact. The certificate and deed both define what is meant by "least quantity" and "smallest portion of interest," as follows: "Said least quantity of said property or smallest portion of interest therein is situated in said county of Sacramento, and is described as follows, to-wit: All of the above-described property." Quantity was offered, and only quantity was sold.

It is contended that the certificate and deed both show that a portion of the costs for which the property was sold was "costs of publication;" that, although it does not appear how much was collected by the tax collector as costs of publication, yet the recitals make it clear that something was collected; and that, as the law nowhere provides that any costs of publication may be collected, the sale must have been for a sum in excess of the taxes and legal costs due, and was therefore void. There are in the certificate and deed preliminary statements that "said taxes, with 5 per cent. and the cost of publication and other costs not having been paid," etc.; but they both recite that Mayo was the bidder who offered to take the least quantity and pay the taxes and costs due thereon, including 50 cents for the certificate, and it does not appear that the amount for which the property was actually sold included anything for "costs of publication." We think that the certificate and deed conform substantially to sections 3776 and 3786, Pol. Code, and that the court erred in refusing to admit the deed in evidence. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.

I dissent: MCFARLAND, J.

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79 Cal. 97

FAGUNDES *v.* CENTRAL PAC. R. CO. (No. 12,660.)

(*Supreme Court of California.* April 30, 1889.)

WHO ARE FELLOW-SERVANTS.

1. A laborer, employed by a railroad company to remove snow and other obstructions, is a fellow-servant, within the law of negligence, with the track-walker, whose duty it is to see that the track is clear, and with a conductor of a train.[1] PATERSON and THORNTON, JJ., dissenting.

2. Defendant was properly allowed, after introducing his evidence, to renew a motion for nonsuit, first made immediately after plaintiff's evidence was introduced.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F MYRES, Judge.

Hale & Craig, for appellant. *T. H. Laine* and *Wallace & Prewett*, for respondent.

FOOTE, C. The plaintiff brought this action to recover damages for the death of his son, caused by the alleged carelessness of the defendant. After the introduction of the evidence on the part of the plaintiff, the defendant moved for a nonsuit, which was refused. It then introduced evidence in its own behalf, after the conclusion of which a motion for a nonsuit was again made and granted. The plaintiff then moved for a new trial, which the court allowed, from which the defendant appeals.

There is no conflict in the evidence. The deceased was a laborer employed by the defendant to remove snow and other obstructions from its track, and was under the immediate control of a road-master. He had directed the former to take his place in the car having sleeping accommodations, in company with other laborers, to be transported by an expected train to another part of the road, in order that he might perform certain work which had to be done in clearing the track of snow. The laborers were asleep in the car on a side track, when a train, which had to get upon that track in order to permit a passenger train to pass, collided with the car in such a way as to cause a snow-shed to fall upon it, whereby the deceased was killed. The accident was primarily caused by a track-walker by the name of Joe Rabbitt, who interfered with a switch with which he had no concern, turning the car-wheels in the wrong direction, and of the conductor of the train, perhaps, in not being sufficiently on the alert to prevent the intermeddling of Rabbitt.

Conceding, without deciding, that the evidence was responsive to the issues made by the pleadings, the question to be determined is whether or not the Central Pacific Railroad Company is responsible for the carelessness of the conductor and track-walker. If they are to be held as the fellow-servants of the deceased, and engaged about the business of their common master, in the same general employment, then the company would not be responsible, unless the record shows that the defendant neglected to use ordinary care in the selection of the conductor and track-walker. Civil Code, § 1970; Stephens v. Doe, 73 Cal. 28, 14 Pac. Rep. 378; McLean v. Mining Co., 51 Cal. 257; Fisk v. Railroad Co., 72 Cal. 42, 13 Pac. Rep. 144; Brown v. Railroad Co., 72 Cal. 523, 14 Pac. Rep. 138. There is nothing in the evidence which tends to show any negligence on the part of the defendant in the selection of the employés whose carelessness caused the casualty. Neither the conductor nor track-walker is shown to have had anything to do with the selection of employés for the company, nor is it made evident that either of them was in any sense managing assistant for it in the conduct of its general business as a railroad company. They had with the laborer who was killed certain duties to perform as employés of the company, in the same general business. The conductor ran the train; the track-walker was to see that the track was clear of obstructions, and to signal when they existed; the laborer was engaged on his part in helping to keep the track in good order, so that the trains might run upon it in safety. They all must have known the dangers incident to their employment. They were fellow-servants of the same employer, and employed by it in the same general business. The deceased met his death through the negligence of the conductor and track-walker, and not that of the railroad company, which, therefore, is not responsible.

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[1] As to who are fellow-servants within the rule exempting the master from liability to one for injuries caused by the negligence of the other, see Sullivan v. Railroad Co., (N. Y.) 20 N. E. Rep. 569; Slatterly v. Railroad Co., 4 N. Y. Supp. —; Wolcott v. Studebaker, 34 Fed. Rep. 8, and note; Railroad Co. v. O'Brien, (Wash. T.) 21 Pac. Rep. 32, and note.

The exception taken to the order permitting the defendant to renew its motion for a nonsuit after introducing its evidence is not well taken, for if the motion had been denied, and a verdict found for the plaintiff, it would have been the duty of the court to have set aside the verdict as not supported by the evidence. Vanderford v. Foster, 65 Cal. 49, 2 Pac. Rep. 736. In cases where the facts are undisputed, the question of negligence is a question of law, to be passed on by the court. Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. Rep. 518, and cases cited. The judgment of nonsuit was correct, and the order granting a new trial should have been refused. For these reasons we advise that the order appealed from be reversed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the order appealed from is reversed.

PATERSON, J., (*dissenting.*) I am unable to distinguish this case from McKune v. Railroad Co., and other recent cases, in which it has been held here that an employé in one department of a business, like railroading or mining, is not a fellow-servant of an employé in another and different department of the business. In McKune v. Railroad Co., 66 Cal. 302, 5 Pac. Rep. 482, it was held that a train-dispatcher and material-man was not a fellow-servant of an ordinary track-laborer. Mr. Justice FIELD, in a recent case, said: "The question in all cases, therefore, is, what is essential to render the service in which different persons are engaged a common employment? And this question has caused much conflict of opinion between different courts, and often much vacillation of opinion in the same court. * * * There is, in our judgment, a clear distinction to be made in their relation to their common principal between servants of a corporation, exercising no supervision over others engaged with them in the same employment, and agents of the corporation, clothed with the control and management of a distinct department, in which their duty is entirely that of direction and superintendence. A conductor, having the entire control and management of a railway train, occupies a very different position from the brakemen, the porters, and other subordinates employed. He is, in fact, and should be treated, as the personal representative of the corporation, for whose negligence it is responsible to subordinate servants. * * * In no proper sense of the terms is he a fellow-servant with the firemen, the brakemen, the porters, and the engineer. The latter are fellow-servants in the running of the train under his direction; as to them and the train, he stands in the place of, and represents, the corporation. As observed by Mr. Wharton, in his valuable treatise on the Law of Negligence: * * * 'The true view is that, as corporations can act only through superintending officers, the negligences of those officers with respect to other servants are the negligences of the corporation.' Section 232*a*." A large number of cases are cited and reviewed in support of the principle of law enunciated therein.

In that case the plaintiff, an engineer, received injuries through the negligence of the conductor of his train, and it was held that the relation of fellow-servant did not exist, and the company was liable. Railroad Co. v. Ross, 112 U. S. 377, 5 Sup. Ct. Rep. 184.

But the exigencies of this case do not require us to say that the engineer of a train is not a fellow-servant with any other of the employés on the same train with him. We have held that a conductor and brakeman are fellow-servants. Baughman v. Superior Court, 72 Cal. 573, 14 Pac. Rep. 207. The case before us is a much stronger case against the company than the one above referred to,—Railroad Co. v. Ross. The relationship between those who caused the accident here and the deceased was not nearly so close as that of employés on the same train. The deceased was a laborer employed by defendant to remove snow and other obstructions from its track, and was under the immediate control of a road-master. There was no contributory negligence on his part in sleeping in the car on a side-track under directions of the road-master. McKune v. Railroad Co., supra. It is admitted that the accident was primarily caused through the negligence of a track-walker, named Rabbitt, and the conductor of the train which collided with the car in which the laborers were sleeping.

The case before us is very much like Railroad Co. v. Weaver, 11 Pac. Rep. 408. The question there was whether a section boss was a fellow-servant of an engineer, and it was held that he was not. The court said: "The division road-master and the section foreman, and his assistants, were in one line of duty, while the trainmen were in another and a different line of duty, and each set within its own line of employment represented the master as to the other set, and the members of one set were not the near fellow-servants with the members of the other set." In the same volume of the Pacific Reporter, at page 545, another somewhat similar case is reported (Hobson v. Railroad Co.,) in which the court held that a teamster engaged in hauling ties for the construction of a railroad was not consociated with the engineer of the train on which the teamsters and other workmen were in the habit of riding back and forth from their headquarters to the place of work, so as to defeat the recovery against their common master for injuries received through the negligence of the engineer.

I concur: THORNTON, J.

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3 Cal. Unrep. 76

MALLOY v. HIBERNIA SAV. & LOAN SOC. *et al.* (No. 11,726.)

(*Supreme Court of California.* April 22, 1889.)

NEGLIGENCE—DANGEROUS PREMISES—PLEADING.

A complaint alleged that defendants were the owners of a certain lot in San Francisco; that on or about a certain day they did unlawfully, wrongfully, and negligently maintain thereon, and about 10 feet from a public traveled street, a privy-vault, filled to the surface with the contents thereof, and of the depth of 10 feet, without any guard or protection, and without any inclosure to separate it from the public street; that prior thereto they did unlawfully and negligently remove the fences inclosing the privy-vault, and all the covering around the same, and removed the building adjoining same, and prior thereto had commenced grading said lot and removing the earth therefrom, the premises being then open and accessible for teams and workmen; that by reason of their negligent acts in leaving the vault thus exposed and unprotected, without any fence or inclosure separating it from the street, plaintiff's minor child, three years of age, without any fault of plaintiff, fell into the same, and was drowned; wherefore he prayed damages. *Held*, that it stated a cause of action.

Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by Daniel Malloy against the Hibernia Savings & Loan Society, John Grant, Julius Platshek, and Samuel Platshek, for negligently causing the death of plaintiff's minor child. The second amended complaint was as follows:

"The plaintiff complains of the defendants and alleges in this, his second amended complaint: (1) That on and prior to the 16th day of August, 1876, he was, and still is, the father of William Malloy, a minor child of the age of three years and ten months, now deceased. (2) That the defendant, the Hibernia Savings & Loan Society, was on and prior to the said 16th day of August, 1876, and is now, a corporation under and by virtue of the laws of the state of California. (3) That on the said 16th day of August, A. D. 1876, the said defendants were the owners of, and had possession, management, and control of, certain real estate, being a lot about 175x200 feet, more or less, on the south-east corner of Bryant and Second streets in the city and county of San Francisco, and were the owners of, and in the possession, management, and control of, the buildings on said real estate, and all improvements connected therewith and pertaining thereto. (4) That the said defendants, on the said 16th day of August, 1876, while the owners of said real estate and the buildings thereon and improvements connected therewith, and while in the possession thereof and having the care, control, and management thereof, did unlawfully, wrongfully, and negligently keep and maintain, and suffer and permit to be and remain, upon said real estate, (at and near the buildings and improvements thereon,) and connected therewith, and about eight or ten feet from the sidewalk of Bryant street,—a public traveled street in said city and county aforesaid,—a certain privy-vault, pit, sink, cess-pool, or vault, filled to the surface of the earth with the contents thereof, and of the depth of about ten (10) feet, and (9) feet long by six and a half (6½) feet in width, without any guard, wiring, or protection whatever over or around the same, and without any inclosure to separate the same from the sidewalk of Bryant street aforesaid, and in an unguarded, negligent, and dangerous condition. (5) That the said defendants, on or about the 10th day of August, 1876, as plaintiff is informed and believes, being as aforesaid the owners of, and in the possession, control, and management of, the said real estate and the buildings and improvements thereon and pertaining thereto, and of an inclosure and fence (separating said Bryant street from said privy-vault, pit, and sink) then upon the same, did unlawfully, wrongfully, and negligently remove the fences inclosing the said privy-vault, sink, cess-pool, pit, or vault from Bryant street as aforesaid, and all the covering over and around the same connected therewith, and removed a portion of the building adjoining the same, and raised a portion thereof two or three feet from the ground for the purpose of removing the same, and previous thereto had commenced the work of grading said lot of land and of hauling and removing the earth therefrom, (said premises,) then open and uninclosed, and accessible for teams and conveyances then employed by said defendants, their agents and servants, in removing the earth therefrom, and in hauling and removing the improvements and material thereof; by reason of which said wrongful, unlawful, and negligent acts and omissions of said defendants, their agents and servants, in suffering and permitting the said privy-vault, sink, cess-pool, or vault to be and remain at and upon their said premises and property, and in removing the inclosure and covering thereof, and permitting the same to be and remain in said open, uncovered, and dangerous condition as aforesaid, and for want of a sufficient guard, covering, and protection over or around the same, or a fence or inclosure separating it from said Bryant street aforesaid, or any guard, covering, or protection whatever, the plaintiff's minor child, without any fault or want of care on the part of plaintiff, fell into the same, and was, on said 16th day of August, A. D. 1876, drowned therein, and was taken out of the same dead, to the damage of the plaintiff in the sum of $25,000. Wherefore plaintiff prays judgment against the said defendants for the sum of twenty-five thousand dollars damages, and the costs of this action."

Defendants demurred to the complaint for failure to state a cause of action, which demurrer was sustained, and plaintiff appeals.

Edward P. Cole, for appellant.

The charge of negligence against defendants is sufficient. Bliss, Code Pl. § 211. The jury must pass on the question of negligence of the child or parent and that of defendant. Railroad Co. v. Stout, 17 Wall. 657; Railroad Co. v. Styron, 66 Tex. 421, 1 S. W. Rep. 161; Birkett v. Ice Co., 110 N. Y. 507, 18 N. E. Rep. 108; Ihl v. Railroad Co., 47 N. Y. 317; Thurber v. Railroad Co., 60 N. Y. 335. Great caution is required of persons having dangerous premises exposed near a public street. Lynch v. Nurdin, 1 Q. B. 29; Lane v. Atlantic Works, 107 Mass. 104; Birge v. Gardner, 19 Conn. 507; Powers v. Harlow, 19 N. W. Rep. 259; Works Co. v. Orr, 83 Pa. St. 336; Railroad Co. v. Allen, 22 Kan. 285. Persons carrying on excavations where there are small children, must take measures to keep them away. Fink v. Furnace Co., 10 Mo. App. 69. The court cannot determine when it is negligence in the parent to permit his child to run in the street. Bliss v. South Hadley, 145 Mass. 91, 13 N. E. Rep. 352; Kline v. Railroad Co., 37 Cal. 406; Karr v. Parks, 40 Cal. 193; Schierhold v. Railroad Co., Id. 455; Largan v. Railroad Co., Id. 273; Roller v. Railroad Co., 66 Cal. 231, 5 Pac. Rep. 108; Nehrbas v. Railroad Co., 62 Cal. 321.

Tobin & Barry, for respondents.

Where the facts are uncontradicted, the question is for the court. Flemming v. Railroad Co., 49 Cal. 253. If defendants were making such use of his property as a reasonable man would, and the complaint shows this to be true, he is not guilty of negligence. If the person drowned had been an adult, it will not be claimed that damages could have been recovered from defendants. Nor could the father of a child of years of discretion have recovered under the facts here. Shear. & R. Neg. (3d Ed.) § 505, p. 599; Hardcastle v. Railway Co., 4 Hurl. & N. 67; Binks v. Railway Co., 3 Best & S. 244; Howland v. Vincent, 10 Metc. 371. The mere killing or injury of a child *non sui juris* is not proof of defendants' negligence. Railroad Co. v. Lammert, 12 Ill. App. 408; Railroad Co. v. Stumps, 69 Ill. 409. A person is not responsible for injuries resulting from lack of discretion on part of child or from childish indiscretion. Shear. & Neg. (3d Ed.) § 49, p. 64; Burke v. Railroad Co., 49 Barb. 529; Lumsden v. Russel, 18 Ct. Sess. Cas. 468; McMahon v. Railway Co., 39 Md. 438; Cram v. Railroad Co., 112 Mass. 38. Nor is it his duty to guard against the possibility of accident from such cause. Railroad Co. v. McLaughlin, 47 Ill. 265. The age of the child here should cut no figure in the case. The issue is, was it negligent to take away the fence from the cistern under the circumstances of this case? "This issue must be determined by the test whether such an exposure is consistent with the mode of action of a prudent and skillful business man. In applying this test we must necessarily consider the community as a mass." Whart. Neg. § 315, p. 287; City of Chester v. Porter, 47 Ill. 66; Brown v. Railway Co., 58 Me. 384. To hold that on a well-traveled street in San Francisco a man shall not remove fences, etc., to improve and alter his property because by a possibility an unguarded infant may stray 12 feet away from the street, and be injured, is to put a bar to public improvements. There is no allegation that defendants owed a duty to the deceased child, nor that he was rightfully upon the premises. The exposure of defendants' premises not being hazardous or negligent, plaintiff cannot recover. Hughes v. Macfie, 2 Hurl. & C. 744; Mangan v. Atterton, L. R. 1 Exch. 239; Zoebisch v. Tarbell, 10 Allen, 385; Severy v. Nickerson, 120 Mass. 306; Roulston v. Clark, 3 E. D. Smith, 366. It has been held that where there is a bare license there is no duty, and an infant trespasser can be in no better position than a licensee. 1 Shear. & R. Neg., (4th Ed.) § 97, p. 157. The New York doctrine of contributory negligence of infants has been adopted in this state, and bars plaintiff's recovery. Meeks v. Railroad Co., 52 Cal. 602.

Frank Eisner & Platshek, for respondents.

The deceased was a bare trespasser, and, it not appearing that he was invited or induced to come upon the premises, defendants owed him no duty, and plaintiff cannot recover. Hughes v. Macfie, 2 Hurl. & C. 744; Mangan v. Atterton, L. R. 1 Exch. 239; Lane v. Atlantic Works, 111 Mass. 136; Wood v. School-Dist., 44 Iowa, 27; Kohn v. Lovett, 44 Ga. 251; Singleton v. Railway Co., 7 C. B. (N. S.) 289; Larmore v. Iron Co., 101 N. Y. 391, 4 N. E. Rep. 752: Wright v. Railroad, 129 Mass. 440; McAlpin v. Powell, 70 N. Y. 127; Howland v. Vincent, 10 Metc. 371; Duff v. Railroad Co., 91 Pa. St. 458; Cauley v. Railway Co., 95 Pa. St. 398; Moore v. Railroad Co., 99 Pa. St. 301; Hargreaves v. Deacon, 25 Mich. 1; McDonald v. Railway Co., 35 Fed. Rep. 38.

THORNTON, J. This action was brought by the father against the defendants for negligently causing the death of his minor child. The complaint was demurred to on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was sustained. This ruling on the demurrer presents the only point for consideration. We have examined the complaint and are of opinion that the court erred in its ruling on the demurrer. The judgment is therefore reversed and the cause remanded, with directions to the court below to overrule the demurrer to the complaint. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

(79 Cal. 140)

GAGE *et al.* v. DOWNEY *et al.* (No. 12,377.)

(*Supreme Court of California.* May 1, 1889.)

JUDGMENT—PLEADING—CHAMPERTY—PAYMENT—NEW TRIAL—APPEAL.

1. A judgment in favor of the widow, in an action by her against her deceased husband's administrators and heirs for land which she alleges was acquired by the husband under a mortage taken by him to secure her money, is conclusive of her title, though the husband also claimed under another source of title.

2. Reference in the complaint to the grant under which the mortgagor claimed, and to the homestead set off to him in a suit to foreclose a former mortgage, which homestead was the tract included in the second mortgage, and to the mortgagor's "right" in connection with "property," will not be construed as a deraignment of title on plaintiff's part, the evident intention being to describe the land, and to state that the right claimed is the right to the tract set apart as a homestead, and the decree and deed executed thereunder conforming to such intention.

3. Where a cause is transferred, because of the disqualification of the judge, to an adjoining judicial district, under authority of statute, the judgment therein is not void or subject to collateral attack because the county to which the cause was transferred was not the nearest one, as required by the statute.

4. An agreement by plaintiff, in an action to recover land, to convey part of it to his attorneys when recovered in compensation for services is not a defense to the action, whether the agreement is void or not.

5. Where a part of the tract included in a mortgage is set apart as a homestead on foreclosure, and the residue is directed to be sold, but it does not appear that the latter ever was sold, it will be presumed, after the lapse of 30 years, in the absence of evidence to the contrary, that the debt was paid, and such residue was not sold.

6. The express requirement of a former statute, that the notice of intention to move for a new trial be made part of the record on appeal, having been omitted from Code Civil Proc. Cal., and there being no provision for bringing it up in any manner, such notice need not be presented on appeal, and its absence from the record is not ground for dismissal of the appeal. Following Pico v. Cohn, 20 Pac. Rep. 706.

In bank. On rehearing. 19 Pac. Rep. 113.

Glassell, Smith & Patton and *Henry T. Gage*, for appellants. *Levi Chase, Bicknell & White*, and *O'Brien & Morrison*, for respondents.

THORNTON, J The motion to dismiss the appeals herein is denied on the authority of Pico v. Cohn, 20 Pac. Rep. 706, (opinion filed March 13, 1889.)

The plaintiffs in this cause are Henry T. Gage and Cornelia Rains de Foley, and the defendants are John G. Downey and the Merchants' Exchange Bank of San Francisco. The action is ejectment to recover possession of an undivided one-half of a tract of land situated in San Diego county, known as the "Rancho Valle de San José," for which a patent was issued by the United States on the 10th of January, 1880, to Sylvestre de la Portilla, and also an undivided twelve twenty-fifths of a tract of land situate in the same county, known as the "Rancho Valle de San José," for which a patent was, on January 16, 1880, issued by the United States to J. J. Warner. Judgment was rendered for the defendants. The plaintiffs moved for a new trial, which was denied. The latter prosecute the appeals herein from the judgment and order denying a new trial.

On the 16th of April, 1836, a grant was made to Sylvestre de la Portilla by N. Guiterrez, political chief, of the place called "Valle de San José," containing four square leagues. On the 8th day of June, 1840, a grant was made to José Antonio Pico by Juan B. Alvarado, governor of California, of the place called "Agua Caliente," to the extent mentioned in the plan accompanying the *expediente*. On the 28th day of November, 1841, a grant was made to J. J. Warner by Manuel Micheltorena, governor of California, of the place called "Valle de San José," containing six square leagues, more or less. The grants to Portilla and Warner were confirmed, and patents were issued to them severally, as above set forth. The grant to Pico was rejected. On the 6th of November, 1858, Portilla conveyed all his interest in the rancho to one Vicente S. de Carillo. Some time prior to 1856, say in 1854, J. J. Warner mortgaged his rancho Valley of San José to J. Mora Moss. Suit was brought to foreclose this mortgage in the district court for San Diego county. In this action a homestead was set apart by the court to Warner and wife. This homestead tract is described in the decree. A tract of a league in extent was set apart and directed to be sold under the Moss mortgage. This latter tract is described in the decree. It does not appear that the league was ever sold. This decree seems to have been entered in 1856. Surely, in the absence of proof, it may be conclusively presumed that Moss' debt was paid by Warner, and that this league was never sold. The homestead set apart included the whole of Warner's ranch, except the league above mentioned. This is manifest from the report of the commissioners, who set apart the homestead, and the order of the court confirming it.

On the 20th of November, 1858, the above-named Warner and his wife, Anita Warner, executed a mortgage to John Rains of all their interest in the land granted to him. The description of the land included in this mortgage is as follows: "All the right, title, and interest of the parties of the first part in and to that certain tract of land lying, being, and situate in the county of San Diego, California, known as the 'Valley of San José and Agua Caliente,' and being the lands granted to José Antonio Pico by Juan B. Alvarado, governor of the department of the Californias, by deed of grant of date of June 8, 1840, and to John J Warner by Manuel Micheltorena, governor as aforesaid, by deed of grant of date of November 28, 1844, reference being had for a more particular description to the several grants, *expedientes*, maps, and other papers on file in the office of the surveyor general of the United States for California, in the city of San Francisco, and in the office of the clerk of the district court of the United States for the Southern district of California, in the city of Los Angeles, forming the record of case No. 254 on the docket of the United States land commission, and of case No. 218 on the land docket of said district court: Together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging or in anywise appertaining." On the 5th of July, 1861, the above-named Carillo conveyed to John Rains the undivided one-half of the (Portilla) rancho, previously conveyed to him by Portilla. The mortgage of Warner and wife to Rains was subsequently foreclosed, and the mortgaged premises sold under the decree of foreclosure by George Lyons, sheriff of the county of San Diego, to Rains; and on the 18th of November, 1861, the sheriff aforesaid, in pursuance of the decree and sale to Rains, executed to him a deed of the mortgaged premises above mentioned. The description in the sheriff's deed of the property conveyed is as follows: "All the right, title, and interest of said defendants of, in, and to that certain tract of land lying and being situate in the county of San Diego, state of California, known as the 'Valle de San José and Agua Caliente,' and being the land granted to José Antonio Pico by Juan B. Alvarado, governor of department of the Californias, by deed of grant of date January 8, 1840, and to John J. Warner by Manuel Micheltorena, governor, as aforesaid, by deed of grant of date November 28, 1844; reference being had for a more particular description to the several grants, *expedientes*, maps, and other papers on file in the office of the surveyor general of the United States for California, in the city of San Francisco, and in the office of the clerk of the district court of the United States for the Southern district of California, in the city of Los Angeles, forming the record of case No. 254 on the docket of the late United States land commission, and of case No. 218 on the land docket of said district court; together with all and singular the tenements, hereditaments, and appurtenances thereunto belonging, * * *"

The mortgage of Warner and wife to Rains included the whole ranch granted to Warner; and Rains, under the decree of foreclosure, acquired title to the whole of it, and of this we have no doubt. The decree directs the whole to be sold and conveyed by the sheriff. The descriptions in the mortgage and sheriff's deed are given above. By the deed from Carillo and wife he was invested with the title to the undivided one-half of the Portilla ranch, and the legal title to Warner's ranch and the above one-half of the Portilla grant was in him when he died in November, 1862. These interests descended to his wife and children, unless the latter were divested of them by proceedings which will be hereafter referred to. Before Rains took the mortgage above mentioned from Warner and wife, he had, on the 16th of September, 1856, intermarried with Maria Merced de Williams. He died on the 17th of November, 1862, leaving surviving him his wife, above named, and five children, named Cornelia, (who is one of the plaintiffs,) Isaac, Robert, John, and Francisca,—the latter born after the death of her father. Isaac died in 1877, intestate, unmarried, and without issue. On the 21st of February, 1863, Maria Merced, the above-named widow of John Rains, commenced an action in the district court of the county of San Bernardino against E. K. Dunlap, administrator of John Rains, deceased, and her children above named, and others, in which she set forth her marriage with John Rains on the 16th of September, 1856; that Rains then had but an inconsiderable amount of property, which he afterwards expended; that Rains acquired money by the sale of her separate property; that on the 29th of November, 1858, he lent to J. J. Warner the sum of $1,800, to secure the payment of which he received from Warner and his wife a mortgage of certain property, describing it as follows: "All their right, title, and interest in and to that certain tract of land lying and being situate in the county of San Diego, Cal., known as the 'Valle de San José and Agua Caliente,' and being the lands granted to José Antonio Pico by Juan B. Alvarado, governor of the department of the Californias, by deed of grant of June 8, 1840, and to John J. Warner by Manuel Micheltorena, governor as aforesaid, by deed of grant of date November 28, 1844." The property and right included in said mortgage being all that part of said rancho "Valle de San José and Agua Caliente" lying to the north and east of the east and west and north and south lines drawn from the tree marked "W," mentioned in the complaint, instead of the one square league lying to the south and west of said two lines. The tree referred to, marked "W," is described as an oak, standing on the east and in contact with the rocks, forming the first rocky point on the south side of the meadow valley, which extends eastwardly from the rocky hill at San José Indian village to Buena Vista. (The above description is combined from the original and amended complaint, in accordance with what appears in the transcript.) Other property is mentioned in the complaint which it is not necessary to describe.

The complaint further avers that Rains proceeded in due course of law to foreclose this mortgage against Warner and the heirs of his wife, then deceased; that at the sale under the decree of foreclosure Rains became the purchaser, and thereafter in due time received the sheriff's deed for such premises. It was further averred that the money lent by Rains to Warner, and for which the mortgage was taken from Warner and wife, was the separate property of the then plaintiff, Maria M. Williams de Rains; that Rains paid no money for the property purchased at the sheriff's sale above mentioned, and that the amount paid was the amount found by the court due on the mortgage foreclosed; that no part of this money had ever been given to Rains by the plaintiff, his then widow, nor did it belong to him in any way; that she was informed by Rains that the sheriff's deed for the mortgaged property aforesaid had been executed to her as grantee. She avers that the property became her separate property, and asks that the court decree the property included in the aforesaid deed of the sheriff of San Diego county to be hers, as against the defendants, with the common general prayer for all other and further relief to which she may be entitled.

The district court of San Bernardino county found the facts as alleged by plaintiff in regard to this property, and decreed it to be her separate property; and it was further adjudged by same decree that defendant E. K. Dunlap, administrator of John Rains, deceased, execute and deliver to the plaintiff all necessary deeds, etc., to carry the decree into full effect. This decree was entered and filed on the 12th of March, 1863. On the next day the deed of the property described in the complaint was executed to plaintiff

Maria Merced, by the administrator, as required by the decree. On the 14th of March, 1863, the above-named Maria Merced conveyed to her children, Cornelia, Isaac, Robert, John Scott, and Francisca Rains, by deed, all of the estate above mentioned conveyed to her by deed of Dunlap, administrator, just above set forth. On the 2d of April, 1864, the aforesaid Maria Merced, widow of John Rains, commenced an action in the district court for the county of Los Angeles against Dunlap, in his individual capacity and also as administrator of John Rains, deceased, Robert S. Carlisle, individually and as trustee, Cornelia Rains, Isaac Rains, Robert Rains, John Scott Rains, Francisca V. Rains, and others as defendants. On the 26th day of November, 1864, on the affidavit of plaintiff's attorneys that the judge of the district court for the First judicial district, of which the county of Los Angeles formed a part, was disqualified from acting in the case by reason of consanguinity, on motion of said attorney the cause was removed for trial to the district court of the Third judicial district of Santa Clara county. No objection was made to this order. The papers in the cause were thereafter transmitted to the district court for the county last named, and filed therein on the 4th of January, 1865. No motion was made to remand this cause to the district court of Los Angeles county, and it remained for trial, and was tried in the court to which it had been by the order transferred.

On the 9th of May, 1865, an amended complaint was filed by the plaintiff, who had, since the commencement of the action, intermarried with José C. Carillo. The object of this suit was to have set aside the conveyance to her children as having been procured from her by fraud and undue influence, and also to set aside a power of attorney executed to Robert S. Carlisle, which she had revoked, and for an account from Carlisle, etc., and for general relief. The property averred to have been conveyed by the deed sought to be set aside by this suit is set forth in the complaint, and is described in full. It consists: *First*, of the Cucamonga ranch, situate in the county of San Bernardino; *second*, the Bella Union Hotel, situate in the city of Los Angeles; *third*, a lot in the city just mentioned, which was conveyed to Rains by Alice Flashner, by deed dated August 11, 1862; and, *fourth*, (we here insert the description in same words as in complaint:) "All that certain tract of land situate in the county of San Diego, state aforesaid, known as the 'San José del Valle and Agua Caliente,' same set apart as a homestead for Jonathan J. Warner and wife by decree of the district court of San Diego county on September 24, 1856, and known also as 'Warner's Rancho;'" *fifth*, certain personal property. The above is alleged in the complaint to have been decreed to be her separate property by the decree in the San Bernardino action. Dunlap, Carlisle, and the infant children of said plaintiff, by their guardian *ad litem*, all answered the complaint. The case was tried, and on the 27th day of May, 1867, a decree was made and entered setting aside the deed above mentioned made by plaintiff to her children as having been obtained by fraud, and it was ordered that the same should be delivered up and canceled; also setting aside the power of attorney to Carlisle. The decree then proceeds to distribute the property in the action between the plaintiff and her children, defendants above named. Certain property is distributed to the children, and adjudged to belong to them, and certain other property to the plaintiff as hers. The respective interests are clearly designated and described in the decree, and possession is awarded to each of the parcels so decreed to them. Among other parcels of land awarded to the plaintiff is one designated in the decree in words following: "*Second.* And also all that tract of land situate in the county of San Diego, state of California, and known as the 'Rancho San José del Valle,' (or Warner's ranch,) being the same rancho finally confirmed to J. J. Warner, and surveyed under instructions from the United States surveyor general of California by John C. Hayes, in July, 1859, and said survey was approved March 3, 1860, by T. W. Mandeville, United States surveyor general of California." On the 3d of December, 1868, Maria Merced Williams de Carillo executed to C. V. Howard, P. Beaudry, M. F. Coronel, J. G. Downey, and J. S. Garcia a deed of "all that certain tract of land or rancho situate in the county of San Diego, state of California, known by the name of 'San José del Valle' or 'Warner Ranch,' and also known by the name of 'San José o Tagui,' and being the same tract of land or rancho confirmed by the United States land commission and United States district court to J. J. Warner, in the case of J. J. Warner v. the United States, to the papers in which case reference is made for a more particular description." It is admitted that defendants succeeded to an undivided half of the Portilla grant by deed of V. S. de Carillo, executed on the 20th of February, 1869, to C. V. Howard et al., and is not involved in this suit. Of the children of Maria M. W. de Rains, above mentioned, Isaac died in 1877, intestate, unmarried, and without issue. It is said by counsel for plaintiffs that the interests of Robert, John, and Francisca, who married the plaintiff Gage, if any they had, became vested before the beginning of this action in the plaintiff just above named. Defendants claim title under the decrees above set forth, rendered in the San Bernardino and Santa Clara cases, and conveyances subsequently made.

It is averred by plaintiffs that the title under the Portilla grant was not embraced in the San Bernardino case. In this contention we cannot concur as to that portion of the Portilla grant which conflicted with the grant to Warner. The claim preferred by Mrs. Rains in this suit was for the whole of the

Warner ranch, except the Moss league, which league in the final survey was not awarded to Warner. The reference to the grant to Warner, and the homestead set off to him in the action of Moss v. Warner and wife, was mere matter of description to identify the land which she claimed. There was no intention to do what is most unusual and entirely unnecessary to deraign and set forth her chain of title in the complaint. The complaint means that John Rains bought this land with money which was part of plaintiff's separate estate; that it belonged to her in fee and should be conveyed to her. It states that the property included in the mortgage to John Rains is a certain part, viz., that set off as a homestead in the action of Moss v. Warner. That is the tract claimed by her in the action and so declared in the complaint. The word "right" connected with "property" in the complaint does not give a different meaning to what is claimed by the complaint. The language used amounts to stating that the right involved and claimed here is the right to the tract set apart as a homestead described in the pleading. The decree of the court and the deed of Dunlap, administrator, accord with this view, as will be seen by the reference to them. The complaint intended to challenge John Rains' right and title to this land, and to bring them to judicature, and this, we think, was done by the pleader. So that the parties claiming under Rains might deny by their answer her right to the land, and offer in evidence any title, whether derived from Portilla or any one else, to the land which would show the land to be a part of his estate. The title to the land was in controversy in this suit as between the personal representative and the children of John Rains on the one hand, and his widow on the other, and it was determined in favor of the widow, (plaintiff.) John Rains acquired his interest in the Portilla grant after his foreclosure at the sheriff's sale under the decree of foreclosure in the action to foreclose his mortgage taken from Warner and wife: and if, after Mrs. Rains obtained the deed of the administrator under the decree in the San Bernardino case, she had brought an action against John Rains to recover the land embraced in the decree, and he had set up against her his Portilla title, she might have defeated it, if not by the decree just above mentioned, by showing that the Portilla interest was acquired by him with money belonging to her as her separate estate.

In our judgment the decree under consideration conclusively determined that the land embraced in it belonged to Mrs. Rains, and that the estate of Rains had no title to it acquired from any source, whether Portilla, or Pico, or any one else. Under this decree in Mrs. Rains' favor she executed the deed to her children, under which plaintiffs herein claim. It is contended on their part that the judgment in the case tried in Santa Clara, setting aside this deed, is void for want of jurisdiction in the district court of Santa Clara county. This contention we propose now to consider. The objection made to the jurisdiction of the court is put on the ground that the judge had transferred the cause to the district court of a county—Santa Clara—which court was not the nearest court to Los Angeles county, where the like cause or objection for making the order did not exist. The same cause and objection here existed as to every county in the First judicial district; therefore it would have been error to transfer it to a court in a county in that district. The judge, then, had to select a court of a county not of the First district. The nearest district courts then were in the Third judicial district, at that time composed of the counties of Monterey, Santa Cruz, Santa Clara, and Alameda. Conceding that the county-seats of Monterey and Santa Cruz were nearer to Los Angeles county in a straight course than that of Santa Clara county, still, as the county-seat of the latter was nearer by the usually traveled route, or more accessible, might it not be reasonably concluded that the district court of Santa Clara was the nearest?

But, waiving this, we are of opinion that, conceding that the county-seat of Monterey or Santa Cruz was nearer than that of Santa Clara to Los Angeles county, the order sending it to the district court of the latter county was only error. We cannot see how it can be law that a judgment can be impeached collaterally and held void, because a judge has made an inconsiderable mistake in computing distances, or had selected a county-seat more readily accessible than the other in coming from Los Angeles, and holding it to be really the nearer on that account. The judge had jurisdiction to make this order under the statute then in force. He must determine what is the nearest court in administering the law. This determination was undoubtedly within his power, (St. May 6, 1854; St. 1864, p. 153; Hitt. Gen. Laws, par. 5600,) and if he sent it to a county some distance further than another by error of a miscalculation of distances it would be nothing more than an error, and should not render the judgment void. Conceding that this judgment might have been reversed on appeal, still it would not be void on collateral attack. The cases cited by the counsel for plaintiffs, (appellants here,) Burton v. Covarrubias, decided at the April term, 1865, (not reported;) People v. De la Guerra, 24 Cal. 73; Livermore v. Brundage, 64 Cal. 299, and People v. McGarvey, 56 Cal. 327,—are not at all in point. They are all on appeal or direct attack. No collateral attack was attempted in either case, and in every case except People v. McGarvey they were orders, not of transfer, but orders in the cause, involving judicial action of different kind than that of transfer, which the judge was expressly forbidden by statute from making. People v. McGarvey related to a criminal case transferred under a state of facts not allowed by the statute relating to such cases,—a statute entirely different from the act under which the judge proceeded in this case, as is apparent from the opinion in the case.

There was no appeal in the Santa Clara case. In fact, the adverse parties therein did not object to the order, did not move to vacate it, nor to remand the cause in the Santa Clara court, but acquiesced in the judgment. We do not think the contention of the appellants is sustainable. The judgment is not open to attack for the reason urged by them. The plaintiff in the case tried in Santa Clara county relied on the judgment recovered in the San Bernardino case, which, as we have seen, determined that the whole of the Warner ranch, except the Moss league, was hers, as against any title derived from any source, or any one else; and the decree in the Santa Clara case set aside the deed to her children, and determined certain land to belong in fee to the plaintiff therein, Mrs. Carillo, formerly Rains. It makes no difference that the decree assumed the form of a partition of the property involved in the cause between the plaintiff and her children. It set aside the deed to the children; and, conceding that the decree in other respects was void, it was not void so far as it set aside this deed. The Warner ranch, except the Moss league, then remained in her under the San Bernardino decree and the administrator's deed made in pursuance thereof. We do not think that it is averred in the complaint in the Santa Clara cause that the judgment in the San Bernardino cause was obtained and entered by collusion of any kind. The arrangement between Scott and Dunlap had relation to the deed executed after the judgment in the San Bernardino case to Mrs. Rains' children and the power of attorney to Carlisle, and not to the judgment. The findings in the Santa Clara case, if there were any, are not in the transcript, and the judgment therein makes no reference to any agreement between Scott and Dunlap. The point that this was averred to have been a collusive judgment is not well taken. The defendants acquired, before the commencement of the action, the title to an undivided one-half of the land patented to Portilla. This does not include the half conveyed to John Rains by Carillo and wife, by deed dated July 5, 1861. The above appears by stipulation. It was admitted on the trial that there is a league (the Moss league) of the land patented to Portilla, which is not included in the patent to Warner. Such is the meaning of the stipulation on page 362 of the transcript. All the land set apart as a homestead to Warner and wife with other land is included in the patent to Warner. As to the land included in the Warner patent, the defendants are entitled to recover it. This follows from what has been stated above.

The question as to that part of the land sued for outside of the patent to Warner, and embraced in the Portilla patent, demands further consideration. The Moss league, it is admitted by stipulation, is not included in the patent to Warner. The defendants acquired one-half of the land granted and afterwards patented to Portilla. The other half belonged to John Rains. He died intestate. This half was acquired during the coverture with his wife, Maria Merced; was therefore community property, and on his death passed, subject to the payment of the debts of the community, one-half to Maria Merced, his relict, and the other half to his children. Rains left five children, above named, one of whom, Isaac, died in 1877, then under age, intestate, unmarried, and without issue. Isaac's portion, inherited from his father, passed under the statute, share and share alike, to his brothers and sisters. The title to one-fourth of the land embraced in the Portilla patent thus vested in the surviving children of John Rains. This one-fourth passed to the plaintiffs prior to the commencement of this suit, and they are entitled to recover it.

Conceding that the contracts between Glassell, Smith & Patton and the plaintiffs (which are found by the court) are void, they are of no material significance in this action. If they were void, they cannot and have no effect on the title of plaintiffs. The plaintiffs may set them up against Glassell, Smith & Patton, if they should so elect when the former make any claim against them. We cannot see that defendants' rights are in any way enlarged by these contracts. If such contracts are void, they are no more than so much blank paper between the parties. They take away nothing from the plaintiffs, and add nothing to the rights of defendants. The contention of defendants on this point need not be further considered. It is dismissed from further notice as untenable.

For the foregoing views the judgment and order are erroneous as to the one-fourth the land included in the Portilla patent. They are therefore reversed, and the cause remanded for a new trial as to the one-fourth interest above mentioned. So ordered.

We concur: McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

In re GRIDER'S ESTATE. (No. 12,840.)[1]

(*Supreme Court of California.* April 22, 1889.)

DESCENT AND DISTRIBUTION—REMEDIES—LIMITATIONS.

1. A decree of distribution of a decedent's estate, entered by a probate court, is a nullity as to distributees not served with process, or appearing in the action, though it falsely recites such service.

2. The statute of limitations does not begin to run against an action by distributees of an estate against the devisees and legatees under the decedent's will, brought to determine the claims of all persons interested in the estate, as provided by Code Civil Proc. Cal. § 1664, until a final distribution is made.

3. The plaintiffs have five years after attaining their majorities to institute such an action.

[1] Reversed in banc. See 22 Pac. 908, 81 Cal. 571.

Department 2. Appeal from superior court, Lake county; RODNEY J. HUDSON, Judge.

Action by N. J. Grider and others, heirs and distributees of Henry C. Grider, deceased, against Sallie Gage, (*née* Grider,) widow and sole devisee and legatee of said decedent, and R. D. Merritt, who was alleged to claim some portion of the estate as the vendee of said widow, to determine the interests of all persons claiming to share in the estate. Judgment for defendants, and plaintiffs appeal.

McGee & Barnham, for appellants. *J. C. Bates*, for respondents.

THORNTON, J. On the 28th day of May, 1872, Henry C. Grider died seised of the lands which are involved in this proceeding. The deceased died testate, and his will was proved thereafter, in 1872, in the probate court, for the county of Lake. Grider left surviving him his widow, Sarah Grider, known as Sallie Grider, and three children, the plaintiffs herein, aged, respectively, at the time of his death, 14, 12, and 8 years. By this will the testator devised and bequeathed to his widow all his property, both real and personal, but made no mention therein of his children. This action is brought by the above-named children of the testator under section 1664, Code Civil Proc., to determine the interests of all the parties to the property of the estate. The petition or complaint alleged the foregoing facts, and further averred that one R. D. Merritt claims some interest in the estate. Merritt answered the petition or complaint, and set up a purchase from Sallie Grider of a certain parcel of land, which was a part of the property of the estate, and a conveyance to him of said parcel of land, a decree of partial distribution setting apart this land to him, and also set up the statute of limitations as a bar to the proceeding. The court heard the evidence, and found the following facts: "That the said Henry C. Grider died in the county of Lake, state of California, on or about the 28th day of May, 1872, of which county he was then, and had been for a long time prior thereto, a resident, leaving an estate therein of the value of $2,300, or thereabouts; that afterwards, to-wit, on or about the 24th day of June, 1872, a paper, purporting to be the last will and testament of the said H. C. Grider, which, upon the application and petition of Sallie Grider, widow of the said deceased, was admitted to probate by the honorable the probate court of said Lake county; that under said will the said Sallie Grider was duly appointed executrix thereof, and thereafter, on the 25th day of June, 1872, qualified as such executrix; that said last will of said deceased, by its terms, bequeaths and devises the whole of the property, both real and personal, of deceased to said Sallie Grider, but that in said last will and testament of said testator said testator wholly omits to provide therein for any or either of these plaintiffs, and that it does not appear therefrom that such omission, or that the omission of either of the plaintiffs, was intentional, and the plaintiffs allege that they, and each of them, are entitled to succeed and have the same share in said estate of the said testator as if he had died intestate, and plaintiffs aver that such omission was unintentional; that said deceased died seised and possessed of the following real estate, and the same formed, and now forms, a part of the said estate of the deceased, to-wit: The south ½ of the south-west ¼ of section 11, township 13 north, range 9 west, Mount Diablo meridian, containing eighty acres, also the following real estate, to-wit: Commencing at the south-west corner of said section 11, and running thence north twenty-five rods, (25;) thence west six and one-half (6½) rods; thence south twenty-five rods; thence east six and one-half (6½) rods to the point of beginning, one acre, 3½ rods." The court further found that by a decree entered in the probate court of Lake county, which is clearly a decree of partial distribution, the land involved herein was set apart to the above-named R. D. Merritt, and that this proceeding against Merritt was barred by his adverse possession of the above-named tract of land. It appears that the above decree was entered on the petition of said Merritt to the probate court.

We are of opinion that this decree is a nullity. It was entered without notice of the proceeding to the plaintiffs here, and for that reason is void as to them. It makes no difference that the court recites in its decree that notice was given to all parties. Such a recital, in the absence of notice, cannot give jurisdiction to the court. The court cannot, by declaring it has jurisdiction, invest itself with jurisdiction. It does not appear that there has been any final distribution of the estate of Grider. The statute of limitations does not commence running until there has been such a distribution. It further appears that this proceeding was commenced within five years after the plaintiffs herein attained their majority, and for this reason Merritt's possession, conceding it to have been adverse, invested him with no right to the land claimed by him The appeal from the judgment in this cause was entered too late, and such appeal is dismissed. The order denying a new trial is reversed, the judgment vacated, and the cause remanded for a new trial in accordance with the views expressed in this opinion. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J

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81 Cal. 540

FELTON *v.* MILLARD. (No. 11,696.)

(*Supreme Court of California.* April 22, 1889.)

LANDLORD AND TENANT.

1. In the California statutory action of unlawful detainer, evidence of title is inadmissible, though it is offered as having some weight on the question of the existence of a lease.

2. A notice to quit, purporting to be signed by

the landlord by attorney, is good, where the attorney had authority to sign it; no written authority being necessary, under Civil Code Cal. § 2309. The tenant in such case questions the attorney's authority at his own risk.

Department 2. Appeal from superior court, Alameda county; W. E. GREENE, Judge.

Action by C. N. Felton against T. W. Millard. Defendant appeals.

Mich. Mullany, for appellant. *H. G. Platt*, for respondent.

MCFARLAND, J. This is an action of unlawful detainer. The verdict and judgment were for plaintiff. Defendant appeals from the judgment, and from an order denying a new trial.

1. Counsel for appellant argues very strenuously and ingeniously that the evidence was not sufficient to establish the existence of a lease between plaintiff and defendant. But there certainly was evidence going directly to that point, and the question was fairly put to the jury. The nonsuit was properly denied.

2. Appellant objects to the validity of the notice to quit, because it was not signed by respondent personally; the signature being "C. W. FELTON, by H. G. PLATT, Att'y." But the notice purported to come from respondent. It was proven at the trial that Platt had authority to sign it; no written authorization was necessary, (Civil Code, § 2309;) and appellant questioned the authority (if he did question it) at his own risk.

3. The most important point in the case arises upon the refusal of the court to allow the introduction of certain evidence offered by defendant. It is averred in the complaint that from February 1, 1883, to November 10, 1885, defendant held the premises in controversy from year to year under a verbal lease from plaintiff; and that on said November 10, 1885, the said lease was terminated by mutual agreement of the parties. The answer denied that there ever had been any lease. This denial raised the main question of fact before the jury, and it was determined by them against the defendant. Defendant when on the stand, as a witness for himself, after denying the existence of any lease, testified that he had been in possession of the land since 1854. He then offered to prove certain affirmative matters set up in his answer, the gist or substance of which was that he was the owner of the land, and had been for over 29 years, and that plaintiff was merely a mortgagee under a deed from defendant absolute on its face, but intended as a mortgage. Objection to this evidence was sustained, and defendant excepted. Waiving the question whether defendant offered to prove the facts which he sought to get before the court by appropriate evidence, (Bostwick v. Mahoney, 73 Cal. 239, 14 Pac. Rep. 832,) still it is evident that what he wanted to prove was title, and title is not an issue in the statutory action of unlawful detainer. Mason v. Wolff, 40 Cal. 250; Reay v. Cotter, 29 Cal. 170; Fish v. Benson, 71 Cal. 437, 12 Pac. Rep. 454. Counsel for appellant contends very ingeniously (in substance) that he did not want to prove title for the purpose of proving title, but for the purpose of proving a fact which might have some weight in determining the question, Was there a lease? But the rule cannot be overcome in this indirect way. The position could be as well taken in any case of forcible entry and unlawful detainer, under the pretense that the fact of title might influence the determination of some other disputed fact, and thus the whole question of title be litigated in such an action. If a thing cannot be done, it matters not why one wishes to do it. We think that the court was right in excluding the evidence. Had it been admitted, plaintiff would no doubt have offered evidence tending to disprove defendant's alleged title. There are no other questions necessary to be noticed. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

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79 Cal. 17

CHAMPION *v.* WOODS. (No. 12,922.)

(*Supreme Court of California.* April 22, 1889.)

MISTAKE OF LAW.

Plaintiff, in an action for divorce from her husband, alleged in her complaint that there was no common property, and the decree made no reference to any. For 16 months prior thereto she had not lived with him. Three years and a half later, and after his death, she brought this action against his estate to recover her share of the community property, alleging that she was ignorant of the law, and had always relied upon her husband's statements, and that he had "systematically and persistently, during all the time of their residence in California, continuously represented, declared, and asserted to plaintiff that the property he owned, and had acquired since said marriage, was his sole and separate property." *Held*, that equity would give her no relief.

In bank. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

F. H. Black, for appellant. *J. B. Lamar* and *Walter A. Lamar*, for respondent.

PATERSON, J. On February 4, 1886, the plaintiff herein commenced an action in the superior court of Santa Clara county for a divorce. She alleged in her complaint that there was no common property. On February 18, 1886, a decree was entered therein dissolving the bonds of matrimony then existing between the plaintiff and her husband, Henry B. Champion, but the court made no reference in its decree to the property. This action was commenced May 16, 1888. Defendant is executor of the last will of Henry B. Champion.

The complaint alleges, in substance, that plaintiff and H. B. Champion intermarried in the state of Illinois on the 18th day of August, 1873; that her husband was intelligent, and well knew what was common and what was separate property in this state; that plaintiff, during all the time of her residence in this state, up to January, 1888, was ignorant of what was common and what was separate property, and of the fact that there existed any common property by reason of the marriage relation; that she always loved her husband, wholly trusted him, looked to him for instruction, believed him honest, reposed unbounded confidence in his integrity; that she and her husband came to the county of Santa Clara in the year 1877, where both parties continued to reside until his death, which occurred August 2, 1887; that they ceased to live together as man and wife on the 11th day of October, 1884, but in all business matters plaintiff retained full confidence in her husband's integrity, which confidence continued until his death; that in consequence of such confidence she wholly believed all he said concerning the property and property rights acquired by them after marriage; that her husband "systematically and persistently, and during all the time of their residence in California, continuously represented * * * to plaintiff that the property he owned and had acquired since said marriage was his sole and separate property and estate, and that there was no community property of said marriage;" that plaintiff had no interest therein; that all the property owned by him at the time of his death was acquired subsequent to the marriage, and is community property; that all of the representations aforesaid were false, and known by said deceased when made to be false, and they were made to plaintiff from time to time for the express purpose of causing her to believe the same, and she did believe them to be true; that when she filed her complaint she was wholly ignorant of the facts, and fully believed the property was the separate property of her husband; that in consequence of said false statements and confidence aforesaid, she caused to be inserted in the complaint an allegation that there was no common property; that the decree was entered February 18, 1886, but that the property rights of plaintiff were omitted from the decree wholly by reason of said false and fraudulent representations; that Henry B. died August 2, 1887, and left all the property to H. F. Woods, the defendant, as trustee, who has since been duly appointed executor of the last will and testament. The complaint then gives a description of the property claimed to be the community property, and concludes with a prayer for a decree canceling the decree in the divorce case so far as the same affects the property rights of plaintiff, for an adjudication that she is the owner of one-half of the property described, and for an injunction restraining the defendant from delivering said one-half to any other person than plaintiff, and for general relief. The defendant had judgment in the court below, a general demurrer to the complaint having been sustained, and plaintiff having declined further to amend her complaint. The question before us on this appeal is whether the complaint states facts sufficient to constitute a cause of action.

It is not claimed in the complaint that any misrepresentations were made as to the amount of property which had been acquired during the marriage. They were misrepresentations as to the rights of the parties with respect to the property,—misrepresentations of law. Generally speaking, deception as to matters of law affords no ground of redress or relief. There are exceptions. The rule does not apply to transactions between parties holding fiduciary or confidential relations; and where one who has had superior means of information possesses a knowledge of the law, and thereby obtains an unconscionable advantage of another, who is ignorant, and has not been in a situation to become informed, the injured party is entitled to relief, as well as if the matters represented were matters of fact. It is not sufficient, under any circumstances, that the party complaining was ignorant of the truth of the matter concerning which the representation was made, and that he believed it to be true. His situation may be such that he will be deemed in law to have knowledge of the facts, and barred from making complaint, though actually ignorant of the true state of facts. It is a general principle that if the means of knowledge be at hand, and equally available to both parties, and the subject-matter be open to inspection of both alike, and there be no fiduciary or confidential relation and no warranty of the facts, the injured party must show that he has availed himself of the means of information existing at the time of the transaction before he will be heard to say that he was deceived by the misrepresentations of the other party. The fraud must have been practiced under such circumstances as to leave a reasonable inference that the injured party was deceived, and if the circumstances attending the transaction are such as to put a reasonable person upon inquiry, there can be no presumption of deceit.

It seems quite incredible that the plaintiff, while engaged in a hostile action against her husband, could cherish such unbounded love and confidence in him as is set forth in the complaint. For a period of 16 months before she commenced her action for a divorce she was unable to live with him. His conduct had been such—he had so far forgotten his marriage vows—that she not only could not live with him, but she demanded that the bonds existing between them should be severed. With the improbability of the truth of plaintiff's statements, however, we have little to do in determining whether the facts are sufficient on demurrer; but a stale demand, under such circumstances, does not commend itself to a court of equity. The plaintiff severed all connection with her husband on October 11, 1884. This action was not commenced until about three years and a half thereafter. It is clear that the question of property was not overlooked in the divorce suit. There was inserted in the complaint an allegation "that there was no common property." It is not at all probable that the plaintiff drew her own complaint, and conducted her own case. The general rule is that the judgment of a court of competent jurisdiction, having jurisdiction of the subject and the parties, is conclusive upon the same parties in any other proceeding in law or in equity, unless reversed or set aside in some mode prescribed by law. Judgment may be attacked on the ground of fraud and misrepresentation, it is true, but relief will not be granted unless the party seeking the same has been free from negligence. If the judgment has been brought about through the carelessness of the injured party, he will not be relieved therefrom. Quinn v. Wetherbee, 41 Cal. 250. The relations of the plaintiff here with her husband were such that it was negligence, we think, on her part to rely upon him in a matter of so much importance as her property rights. Having determined that the bonds of matrimony must be dissolved, the first thought which would naturally occur to a person of ordinary caution and care would relate to the children, if there were any, and to the property. Plaintiff's failure to obtain independent advice and information was inexcusable carelessness. Something must have been said to her attorney about the property when drawing the complaint. That was the time and the occasion for consultation with her legal adviser as to her property rights. A simple question, propounded at that time, would have led to a different result. The fact alleged "that her husband systematically and persistently, during all the time of their residence in California, continuously represented, declared, and asserted to plaintiff that the property he owned and had acquired since said marriage was his sole and separate property," etc., was sufficient of itself to create suspicion in the mind of plaintiff, as a prudent person, and, when continued for several years after separation and divorce, to lead her to make some inquiry on the subject. We agree with the court below that "the complaint fails to show any equities entitling the plaintiff to relief." Judgment affirmed.

We concur: BEATTY, C. J.; WORKS, J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.

(78 Cal. 634)

FULMORE *v.* JENNINGS *et al.* (No. 11,788.)

(*Supreme Court of California.* April 22, 1889.)

RIPARIAN RIGHTS.

Below plaintiff's land, which borders on a river, there is an island, which by accretions has been extended up the river opposite plaintiff's land, so that with the accretion to the latter a narrow channel only separates them, and plaintiff's land is separated from the main channel by the narrow one and the island. Civil Code Cal. § 1014, declares that land formed by imperceptible degrees on the bank of a stream belongs to the owner of the bank. *Held*, that plaintiff is not entitled to extend his boundaries across the narrow channel and the accretion to the island to the main channel, but that the owner of the island is entitled to the accretion to it.

Department 1. Appeal from superior court, Humboldt county; JOHN J. DE HAVEN, Judge.

Action by Smith Fulmore against L. P. Jennings and others. Plaintiff appeals. Civil Code Cal. § 1014, provides that "where, from natural causes, land forms by imperceptible degrees upon the bank of a river or stream, navigable or not navigable, either by accumulation of material or by the recession of the stream, such land belongs to the owner of the bank."

P. F. Hart and *J. D. H. Chamberlin*, for appellant. *S. M. Buck* and *George D. Murray*, for respondents.

BEATTY, C. J. This is an action to recover land formed by accretion. Defendants had judgment in the superior court, from which, and from an order denying a new trial, the plaintiff appeals. The essential facts out of which the controversy arises, and upon which its solution depends, are these: Eel river flows westerly. Before reaching the ocean it divides into two channels, the main channel being on the north, and the smaller channel, known as "Eastlake's Slough," being on the south. Between these two channels is a body of swamp land of several hundred acres, called "Cock Robin Island." When the township embracing this portion of the river and Cock Robin island was surveyed by the United States surveyor, the south bank of Eastlake slough was meandered for some distance to the west of the eastern extremity of the island, to a point where it entered the swamp land. The north bank of the main river was also meandered. On the official plat of the township both channels of the river were delineated, and Cock Robin island was shown as swamp land. After this survey the grantors of plaintiff acquired from the United States land on the south bank of Eel river, a short distance east of the eastern extremity of Cock Robin island, the northern boundary of the subdivision so acquired being, of course, Eel river. The grantors of the defendants acquired from the state of California, as swamp land, Cock Robin island, their southern and northeastern boundaries being the two channels of Eel river, the main channel on the north and Eastlake slough on the south. In the course of years changes have occurred in these channels. The main channel of Eel river, from a point some distance above the lands of plaintiff, now flows considerably to the northward of plaintiff's lands, which, on the eastern side, have been correspondingly extended by accretion. But at the same time that this change has occurred Eastlake slough has been wearing away its south bank, and the point at which it divides from the main channel has been (gradually, as we understand the testimony) moving to the eastward; or, in other words, the eastern extremity of Cock Robin island, which like a wedge divides the two channels, has been gradually pushing up stream, as the result of natural accretion, until at the commencement of this action it covered the whole northern front of plaintiff's lands, interposing between them and the main channel of Eel river. It also appears that Eastlake slough has gradually diminished in size, and has become unnavigable for small boats, except at high tide, but at the same time there is evidence that it has at all times continued to be a distinct channel, conveying more or less water, and constituting Cock Robin island a real island. Upon this state of facts plaintiff contends that he is entitled to extend his east and west boundary lines northward across the narrow channel of Eastlake slough, and the eastern extremity of Cock Robin island, to the present bank of the main channel of Eel river, and to hold the land so included as accretion to his lands. The defendants, on the contrary, claim everything between the two channels, notwithstanding the insignificant size to which Eastlake slough has been reduced, as accretion belonging to them as owners of Cock Robin island. This is the entire controversy. We think that the superior court decided it correctly in favor of the defendants. The case falls exactly within the terms of section 1014 of the Civil Code, which is merely declaratory of the law as it has always been. Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.

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78 Cal. 637

DORLAND *v.* BERGSON. (No. 11,452.)

(*Supreme Court of California.* April 22, 1889.)

ASSESSMENTS FOR STREET GRADING.

1. The certificate of a county surveyor that he "has examined the work of curbs and macadam done on" certain streets, "and finds curbs to official grade and line," is insufficient to prove the establishment of an official grade.

2. The fixing of a definite height of a street in the city of San Francisco, at two points, does not establish the official grade between such points on an arbitrary straight line drawn between them.

3. The amount due for curbing cannot be segregated from the total amount assessed in gross against a lot for street improvements, so as to recover for that item alone.

Department 1. Appeal from superior court, city and county of San Francisco; CHARLES HALSEY, Judge.

J. M. Wood, for appellant. *Craig & Meredith*, for respondent.

PATERSON, J. Action to foreclose the lien of a street assessment. The assessment was for redwood curbs, furnished and laid on Eighteenth street, from the easterly line of Castro street to Diamond street, and for the macadamizing of the road-way thereof. The defendant relied upon the defense stated in his answer, that the grade of the street had never been officially established. The court found that the grade of that portion of Eighteenth street which forms the crossing of Eighteenth and Castro streets had been duly established, but that the grade of Eighteenth street, from the westerly line of Castro street to Diamond street, had never been officially determined or established. Plaintiff had judgment for the sum of $36.33, being the amount due for work done on the crossing, together with costs, and the land described in the complaint was adjudged to be subject to the lien in favor of the plaintiff for the amount due. It was further adjudged that as to the remainder of the sum demanded in the complaint, namely, for the work done on Eighteenth street, between Castro and Diamond streets, the plaintiff was not entitled to recover any portion thereof. To sustain the allegations of her complaint the plaintiff read in evidence the original assessment, diagram, warrant, and affidavit of demand and non-payment mentioned in the complaint, together with the indorsements thereon, showing that the same had been recorded. These documents were sufficient in form, and made a *prima facie* case in favor of the plaintiff. The plaintiff then rested her case. The defendants offered evidence "tending to show that the grade of Eighteenth street, from Castro to Diamond street, had never been officially or otherwise established." The clerk of the board of supervisors testified that he had made diligent search among the records of the board, and could find no order or ordinance of the board fixing or establishing the grade of the crossing of Eighteenth and Sherman streets, and that Sherman street, according to the assessor's books, is a street forming one of the boundaries of a block. Order No. 684, passed January 30, 1866, was produced by the witness, (this order established the official grade of the crossing of Eighteenth and Castro streets) and order No. 972, approved November 9, 1870, establishing the official grade of the crossing of Eighteenth and Diamond streets. The distance between Diamond street and Castro street is two blocks, Sherman street cutting Eighteenth street, midway between Diamond and Castro. There is nothing in the evidence to show that the official grade of the crossing of Eighteenth and Sherman streets has ever been established. The certificate of the county surveyor, upon which appellant relies in part, is dated August 5, 1876, and certifies that he "has examined the work of curbs and macadam done on Eighteenth street, from Castro to Diamond street, and finds curbs to official grade and line." This certificate manifestly is insufficient to prove the establishment of an official grade. It speaks only of curbs, and there is nothing in the record to connect it with the assessment upon which plaintiff relies. If it could be considered as evidence tending to show the establishment of a grade for curbs it would avail the plaintiff nothing, because the lot was assessed for two amounts only: First, "the sum of $105.26 rated at $0.84208 per foot fronting on said Eighteenth street for said work done in front thereof, and the further sum of $23.80, rated at $0.119 for its proportion of said work done on the crossing of Eighteenth and Castro streets." Demands were made for "payment of the said several sums so assessed thereon." The amount due for curbing, therefore, cannot be segregated from the total amount assessed against the lot. There is attached to the statement what purports to be an original profile from the office of the surveyor of the city and county of San Francisco, showing the profile of Eighteenth street, between Diamond and Castro streets. Counsel for appellant says that the blue line on the profile shows the elevation of the surface of the soil of the center line of the street, and that the red line shows the official grade. There is nothing upon the face of the profile to indicate this, and there is nothing in the testimony to explain the meaning of the lines appearing on the profile. Sherman street is not named in the profile. It is claimed by counsel for appellant that "the fixing of a definite height of a street at two points itself fixes the official grade between such two points to be an arbitrary straight line drawn between such points so established." But manifestly this cannot be correct. There is nothing in the record to sustain the contention, and any one familiar with the topography of the city and county of San Francisco must see at a glance that such a rule would be inapplicable to the streets thereof. It devolves upon the appellant to show error. No error is shown here. Judgment and order affirmed.

We concur: BEATTY, C. J.; WORKS, J.

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79 Cal. 166

PEOPLE *v.* DAVIDSON. (No. 12,414.)

(*Supreme Court of California.* May 8, 1889.)

HIGHWAYS—DEDICATION—TOLL-ROADS.

1. One who lays out a road over his land, and permits the public to use it on payment of tolls, under Civil Code Cal. § 523, thereby dedicates it as a public highway.[1]

2. No formal acceptance by the public of a dedicated highway is necessary; it is enough that the public travel over it.

3. Under Pol. Code Cal. § 2619, where a franchise to keep a toll-road has expired, the road thereupon becomes a free public highway, and the owner has no claim to compensation for the land covered by it.

Commissioners' decision. In bank. Appeal from superior court, El Dorado county; before Justice PATERSON.

Blanchard & Swisler and *A. P. Catlin*, for appellant. *Geo. A. Johnson*, Atty. Gen., *M. P. Bennett*, *S. C. Denson*, and *C. F. Irwin*, for respondent.

BELCHER, C. C. This action was brought by the attorney general, on complaint of El Dorado county, to have a road claimed by defendant adjudged to be a public highway, and to enjoin the defendant from demanding or taking toll from travelers thereon, or in any manner interfering with or obstructing travel over the same by the public. The case was tried by the court, and the findings and judgment were in favor of plaintiff. The defendant moved for a new trial, and, his motion being denied, appealed from the judgment and order. The material facts of the case are as follows: In 1861 the defendant constructed, in El Dorado county, a road about one and a half miles long, upon land of which he then had possession, and of which he subsequently acquired the title in fee. He constructed and has ever since maintained this road wholly at his own expense, for the purpose of using it as a toll-road; and after its construction up to the time of commencing this action the road was continuously used for public travel by foot passengers and passengers with animals and vehicles, without interference by defendant, except that he always claimed the right to demand and receive, and did demand and receive, tolls for the privilege of passing over it. In 1864 defendant became the owner of, and thereafter resided in, a house standing by the side of the road, on the front side of which the words "Toll House" were painted. Near the house he erected a sign on which there was an inscription headed, "Rates of Toll," and followed by a schedule of charges. That sign was kept up until July 8, 1878, and until that time defendant demanded and received from persons passing over the road tolls according to the rates shown on the sign. On the 8th of July, 1878, defendant made application to have the board of auditors of El Dorado county fix the rates of toll on his road, and thereupon the board made an order which reads as follows: "Now comes Thomas Davidson and asks the board that the rates of toll for his toll-road, commencing at the old mountain house and running to Buckeye flat, being about one and one-half miles in length, be fixed; whereupon the board fixes his rates of toll as follows," etc. After the making of this order defendant demanded and collected tolls from all persons passing over his road in accordance with the rates so fixed. No other order in reference to this road was made until the 2d day of February, 1886, when the board of supervisors of the county passed an order rescinding the aforesaid order of the board of auditors. For more than 25 years the road has been assessed to the defendant, and he has annually paid all state and county taxes levied thereon.

Upon these facts two questions arise: *First*, did the defendant dedicate his road to a public use? and, *second*, when his franchise expired, and he ceased to have a right to collect tolls on it, did it become a free public highway?

1. Since the adoption of the Codes, individuals have had the same right to construct and operate toll-roads as corporations. Civil Code, § 523. That defendant constructed his road for the use of the public is clear from his own statements. He testified: "The road was built by me for the purpose of accommodating travel and taking toll for such accommodation; that is, for the travel of the road. It was called 'toll,' and the

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[1] As to what constitutes a dedication of land to public use as a street, see City of Eureka v. Croghan, (Cal.) 19 Pac. Rep. 485, and note; In re Wayne Ave., (Pa.) 16 Atl. Rep. 631, and note; Town of Edenville v. Railway Co., (Iowa,) 41 N. W. Rep. 568, and note; Pierce v. Roberts, (Conn.) 17 Atl. Rep. 275, and note.

road we called a 'toll-road.' I allowed everybody to travel who would pay me toll. I never refused to allow travelers to travel on the road who would pay me toll." It is not necessary to inquire what was the *status* of the road, or what right defendant had to collect tolls thereon prior to July, 1878, when he obtained the order from the board of auditors fixing his rates; but after he obtained that order he undoubtedly did have the right to demand and receive tolls from all persons passing over the road. This right was a franchise, and made the road a legalized toll-road or turnpike. Such roads are public highways. They are constructed, like other public highways, for the convenience of the public, in the hope of profit to their proprietors, it is true, yet for a public purpose; and travelers have a right to use them on paying the specified toll. The law upon this subject is declared by the supreme court of Massachusetts as follows: "We think that a turnpike road is a public highway, established by public authority for public use, and is to be regarded as a public easement, and not as private property. The only difference between this and a common highway is that, instead of being made at the public expense in the first instance, it is authorized and laid out by public authority, and made at the expense of individuals in the first instance; and the cost of construction and maintenance is reimbursed by a toll levied by public authority for the purpose. Every traveler has the same right to use it, paying the toll established by law, as he would have to use any other public highway." Com. v. Wilkinson, 16 Pick. 175. Now, whether the road was dedicated by defendant to the use of the public was a question of fact to be determined by the trial court in view of all the evidence. The defendant testified: "It has never been my intention to dedicate it to the public as a highway, unless they indemnify me. I never did dedicate it to the public, unless permitting persons to travel over it by paying me a compensation was a dedication." Speaking of a plank-road, the supreme court of Illinois has said: "By the act of constructing it and opening it for use, and being used on payment of tolls, it was as emphatically dedicated to the public as it could have been by deed or dedication acknowledged and recorded. The elements of a complete dedication are found in the permitted use of the road by the public, and building it for such purpose, and the subsequent use of it by the public without denial or interruption." Craig v. People, 47 Ill. 487. This language is as applicable to toll-roads as plank-roads, and we think it is a correct statement of the law. It is claimed that the evidence must not only show a dedication or abandonment of the road, but also an acceptance of it by the public as a public highway. But no formal acceptance was necessary; it was enough that the public used the road for the purpose of travel. The finding, therefore, that there was a dedication, was authorized, and must be sustained.

2. The Political Code, § 2619, provides that "whenever the franchise for any toll-bridge, trail, turnpike, plank or common wagon road has expired by limitation or non-user, such bridge, trail, turnpike, plank or common wagon road becomes a free public highway, and no claim shall be valid against the public for right of way, or for the land or material comprising such bridge, trail, turnpike, plank or common wagon road." As we have seen, the defendant had a franchise and was authorized to collect tolls on his road until February, 1886, when the board of supervisors made the order rescinding the order of the board of auditors. Then his franchise "expired by limitation," and his road became a free public highway. It is claimed for appellant that before his road can be declared a free public highway he must be paid an equitable sum for his interest in it. But by his own acts, and presumably with full knowledge of the law, appellant turned over to the public the use of his land for a road, and vested in the public an irrevocable easement. It is not a case, therefore, where private property is sought to be taken for public use without just compensation. In some of the states compensation is made to toll-road owners upon the expiration of their franchises, but in those states it is expressly provided by law that such compensation shall be made. In this state there is no such provision, and section 2619, supra, expressly declares to the contrary. We think that section conclusive upon this question.

3. The action was properly brought on complaint of the county, the complaint stated a cause of action, and the findings were justified by the evidence. We advise, therefore, that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

Mr. Justice PATERSON did not participate in the decision of the above cause.

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79 Cal. 171

PEOPLE *v.* O'KEEFE. (No. 12,398.)

(*Supreme Court of California.* May 8, 1889.)

Commissioners' decision. In bank. Appeal from superior court, El Dorado county; before Justice PATERSON.

Blanchard & Swisler and *A. P. Catlin*, for appellant. *Geo. A. Johnson*, Atty. Gen., *M. P. Bennett*, *S. C. Denson*, and *C. F. Irwin*, for respondent.

BELCHER, C. C. This action, like People v. Davidson, ante, 538, (No. 12,414, this day decided,) was brought to have a road adjudged a public highway, and to enjoin the defendant from collecting tolls thereon, or in any way interfering with travel over the same. The road is in El Dorado county, and about six miles long. It was constructed on public land in 1860 by a corporation which was duly organized for that purpose, and was named the "Placerville Turnpike Company." The time fixed by the corporation for the continuance of its existence was 19 years and 5 months, commencing August 1, 1860, and ending January 1, 1880. The road was known as the "Placerville Turnpike," and on the 3d day of December, 1860, the board of supervisors of the county made an order fixing the rates of toll to be charged for passing over it. Similar orders were afterwards made in November, 1863, in November, 1864, in November, 1865, in May, 1873, in June, 1878, and in July, 1879. On the 2d day of February, 1886, an order was made by the board of supervisors rescinding all orders theretofore made, and fixing rates of toll on the road. From the time the road was completed until the making of the last-named order the road was continuously used by the public and tolls were collected thereon according to the rates fixed by the board. In 1873 the defendant became the owner of a majority of the stock of the Placerville Turnpike Company, and thereafter he had the whole management and control of the road. The road continued to be assessed to the company, but the defendant paid the taxes levied thereon. Since 1873 the defendant has obtained the title in fee to a strip of land 40 feet wide, and a mile long, over which the road passes. Upon these facts the appellant makes the same points as were made in People v. Davidson. That case is decisive of this, and upon its authority the judgment and order here appealed from should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

Mr. Justice PATERSON did not participate in the decision of the above cause.

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78 Cal. 645

PEOPLE *ex rel.* DUNN, State Comptroller, *v.* BURNS *et al.* (No. 12,705.)

(*Supreme Court of California.* April 22, 1889.)

APPEAL—DISMISSAL.

1. Where, pending an appeal, a stipulation is filed in the appellate court, from which it appears that the judgment has been satisfied, the appeal will be dismissed, and it is immaterial that the appeal is from an order denying a motion for a new trial, as well as from the judgment, as a reversal of the order would cause a reversal of the judgment.

2. Such a stipulation, being made in the appellate court, will be considered on a motion to dismiss the appeal, though it is not in the transcript of the record.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; C. H. GAROUTE, Judge.

Action by the people of the state of California *ex rel.* John P. Dunn, state comptroller, against D. M. Burns and others, upon the official bond of said Burns as secretary of state. Judgment for defendants, and plaintiff appeals.

George A. Johnson, Atty. Gen., *Langhorne & Miller*, and *E. R. Bush*, for appellant. *F. E. Baker* and *Joseph Hutchinson*, for respondents.

FOOTE, C. The plaintiff had judgment, but moved for a new trial, which was refused. From the order made in the premises this appeal is taken.

It appears, among other things, from a stipulation filed by the attorneys in the cause in the appellate court, "that on the 31st day of January, 1888, the defendants Freeman and Schardin paid into court the amount of the judgment for principal, interest, and costs entered on said 31st day of January, 1888, set out in the transcript; that thereafter, on the 12th day of March, 1888, plaintiff's attorneys of record received said moneys from the clerk of said court, and receipted therefor, and satisfied said judgment by indorsement of satisfaction upon the margin of the record thereof." Upon this it is now claimed by the respondents that the appeal must be dismissed. The attorneys for the appellant in opposition to that argue that the stipulation cannot be considered, because it is no part of the transcript on appeal. This view might have force if the stipulation had been made in the court below, and not in the supreme court. The admission being made, as it is, in the appellate court, we see no reason why it should be disregarded. The judgment, being satisfied, "has passed beyond review," for the satisfaction thereof "is the last act and end of the proceeding." Morton v. Superior Court, 65 Cal. 496, 4 Pac. Rep. 489. The fact that the appeal is taken from the order denying a new trial makes no difference, as a reversal of that order would necessarily carry with it a new trial and reversal of the judgment, which cannot be had after it is satisfied by the party in whose favor it was rendered. If, as we gather from the briefs of counsel for appellant, they have relied solely upon the point that the appeal could not be dismissed from anything appearing in the stipulation, and have, therefore, not availed themselves of the presentation of facts which they might otherwise have done, and which might perchance place the matter in a different light, it may be that upon a proper showing, before the going down of the *remittitur* an opportunity might be afforded to relieve them of the force of the stipulation. As the case now stands, we advise that the appeal be dismissed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reason given in the foregoing opinion the appeal is dismissed.

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79 Cal. 44

AHERN *v.* MCGEARY *et al.* (No. 11,669.)

(*Supreme Court of California.* April 24, 1889.)

NEGLIGENCE—WHO LIABLE—APPEAL.

Where action is brought against the owner of a building and an independent contractor for damages alleged to have been caused by the negligence of the latter in doing some work on the building at the instance of the owner, the contractor cannot complain of the granting of a nonsuit to the owner.

Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Catherine Ahern, administratrix of the estate of John Ahern, deceased, against John McGeary, Thomas Adam, and Millard Kibbe, to recover damages for the death of the deceased, caused, as it was alleged, by the negligence of the defendants in removing a flag-pole from a building, owned by Adam & Kibbe. Judgment was given against McGeary, and he appeals.

Robert Ash, for appellant. *Sullivan & Cole*, and *McAllister & Bergin*, for respondents.

THORNTON, J. The nonsuit was properly refused as to McGeary. The evidence shows clearly that he was an independent contractor to take down the flag pole or staff; that it was carelessly taken down, in consequence of which it fell on John Ahern, who was on the street, and killed him. The appellant, McGeary, has no concern with the nonsuit which was granted as to the defendants, Adam & Kibbe, and cannot urge such ruling as error. If there was any error at all in this ruling, it did not affect him. We find no error in the record. Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

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78 Cal. 556

GREEN *v.* SUPERIOR COURT OF SAN FRANCISCO. (No. 20,514.)

(*Supreme Court of California.* April 24, 1889.)

Dissenting opinion. For opinion of the court, see 21 Pac. Rep. 307.

PATERSON, J. (*dissenting.*) It seems to me that my brothers have fallen into error in assuming that the offense with which this petitioner stands charged is not an "infamous offense" within the meaning of our constitution, simply because it is a misdemeanor. The question whether an offense is an "infamous offense" or not does not depend upon the nature or extent of the punishment. It is the nature of the crime, not the punishment, which makes it infamous. At common law persons convicted of petty larceny, and whipped, were held incompetent witnesses because infamous, but, no matter how infamous the punishment, unless it was inflicted for a capital offense, a crime against nature, or for forgery, perjury, or some other species of *crimen falsi*, infamy did not attach. Pendock v. Mackinder, Willes, 665; Co. Litt. 6*b*, note 1; U. S. v. Porter, 2 Cranch, C. C. 63; State v. Gardner, 1 Root, 485; People v. Whipple, 9 Cow. 708. There are no authorities to the contrary, and there is no doubt that at common law a conspiracy to "falsely and maliciously indict another for any crime, or to procure another to be charged or arrested for any crime," which is the charge against this petitioner, was an infamous offense. It is infamous in fact, infamous in law. 1 Greenl. Ev. § 373, note and cases cited therein. In New York and some other states the term "infamous crime," when used in any statute, is defined by statute to include only such offenses as are punishable with death, or by imprisonment in the state-prison. No such construction has ever been put upon the term in this state. We are therefore bound to presume that it is used in the constitution and in the laws in the same sense that it was used at common law. Pol. Code, § 4468; U. S. v. Block, 4 Sawy. 214; Lyford v. Farrar, 31 N. H. 315. The constitution of 1862 provides that "no person shall be held to answer for a capital or otherwise infamous crime, except in cases of * * * petty larceny, * * * unless on presentment or indictment of a grand jury." That rule is referred to, and is re-enacted, by the new constitution, with the exception that prosecutions may now be had by information. Article 1, § 8. The constitution of the United States is almost identical in language with our own on this subject. It provides: "No person shall be held to answer for a capital or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except," etc. Article 5, Amendments. It has been decided by the national courts that this "amendment to the constitution of the United States prohibits any proceeding other than by indictment in all cases of infamous crimes, whether they are misdemeanors or not." U. S. v. Block, supra. In that case Judge DEADY said: "The word 'infamous,' as used in the fifth amendment, must be taken in the sense in which it was used and understood at the common law from which it was taken. That is the sense in which it was used and understood by those who made and adopted the constitution and the amendments to it. Bains v. The Schooner, 1 Baldw. 558. As has been shown at common law, this term was only applicable to certain crimes, which from their nature implied a total want of truth in the person committing them, without reference to the fact of whether they were otherwise distinguished as felonies or misdemeanors. Neither was it the punishment, but the nature of the act constituting the crime, which made it infamous. *Ex delicto non ex supplicio emergit infamio.* * * * The following have been determined to be such crimes: 'Forgery, perjury, subornation of perjury, suppression of testimony by bribery, or conspiracy to procure the absence of a witness or other conspiracy to accuse one of a crime, and barratry.'" But it is useless to examine the authorities upon the question whether the distinction between crimes infamous and those which are not infamous depends upon the grade of the offense—whether a misdemeanor or a felony. The provision of the constitution of 1862, which we have quoted above, expressly excepts from the class of offenses designated as infamous crimes "cases of petty larceny." Here is a clear recognition of the fact that there were infamous offenses in this state which were misdemeanors, for petty larceny itself, one of the cases excepted, is a misdemeanor; and this provision is re-enacted in section 8, art. 1, of our present constitution.

If I am correct in saying that the infamy of the crime with which this petitioner stands charged does not depend upon the question whether it is a felony or a misdemeanor, and that it is to be considered as it was at common law, an infamous offense,—and such seems to me to be the clear letter of the constitution in the bill of rights,—then there is no machinery by which a prosecution can be had in the police court, and that court has no jurisdiction. A statute conferring jurisdiction upon an inferior court without making provision for a procedure therein consistent with the constitutional rights of the citizen is abortive and void. Thomas v. Bibb, 44 Ala. 723. If it be conceded that the legislature might provide for prosecutions in police courts by indictment or information, it is sufficient to say that it has not done so. If this court has ever said that the form of procedure by which an offense is prosecuted is immaterial, (*i. e.*, with or without a preliminary examination by magistrate or grand jury,) such decision is to be regretted, and should be overruled; for it not only violates the plain letter of the constitution, but deprives the citizen of one of the most valuable rights guarantied to him by the constitution itself. It was never intended by those who framed the constitution, or by those who adopted it, to give to inferior courts the power to try a citizen for an offense of so grave a nature simply upon an affidavit. The right to be free from prosecutions for such offenses, except after an examination by a grand jury, or a committing magistrate, after opportunity to be heard before the latter, is a valuable right, and one that the framers of all constitutions have preserved to the citizen. A judgment of conviction in cases like the one before us not only subjects the defendant to a heavy fine and imprisonment, but deprives him forever of "the privileges of an elector in this state." Const. art. 2, § 1. But I cannot read Ex parte Wallingford, 60 Cal. 103; or Gafford v. Bush, Id. 149, so as to construe it as it is construed in the leading opinion. The question before the court in Ex parte Wallingford was whether the superior court had jurisdiction in cases of petit larceny. It was held that it had not. As we have shown above, cases of petit larceny are expressly excepted from the operation of article 1, § 8, of the constitution, and this is what was decided in Ex parte Wallingford, nothing more. That case does not sustain the contention of the petitioner here, but, as I read it, it is by implication an authority directly to the contrary; for the court there said: "Whether or not there are any misdemeanors included within the provisions of section 115, which are required by the provisions of the constitution to be prosecuted by indictment or information, need not be determined in this case. But it is clear that there is nothing in the constitution which prohibits the legislature from requiring the crime of petit larceny to be otherwise prosecuted. * * * It will thus be seen that cases of petit larceny are expressly excepted from the constitutional provision prescribing the mode of prosecution, and are left to the regulation of the legislature." Here is a clear intimation that there are classes of misdemeanors for which the constitution has prescribed the mode of prosecution. In Gafford v. Bush the question was whether the superior court had jurisdiction of an indictment charging a person with keeping open a saloon on Sunday. No one contended in that case that the crime charged was an infamous offense, and, of course, as the penalty was a fine not exceeding $500, or imprisonment not exceeding six months, or both such fine and imprisonment, it was held that the legislature had properly invested the justice's court with jurisdiction. In that case the questions considered and decided by the court in Ex parte Wallingford were affirmed, and the court there, too, seems to intimate that it was not intended to be left to the legislature to vest jurisdiction in other courts than the superior courts in all misdemeanors, but only "in a certain class or classes of minor offenses, * * * for by it the superior courts would be left to attend to cases of a more important character, and they would not consume time in trying persons charged with petty offenses, to the neglect of matters of a graver nature." With the expediency of the constitutional provision under consideration we have nothing to do. It may be true that it will be difficult in some cases to determine whether the offense charged is an infamous offense or not; but that is a matter for future consideration. It is often difficult to tell whether a given matter is a matter of law or of fact, but the difficulty in determining the matter does not affect the distinction.

It is claimed that the justice's court has heretofore been given jurisdiction of these offenses. I have been unable to find any statute in support of this contention. It is true, as claimed, the legislature has attempted to confer upon the police court, by the act of 1871–72, jurisdiction in all misdemeanors where the penalty is a fine of $1,000, or imprisonment for one year, or both fine and imprisonment; but such an attempt cannot override a plain constitutional provision. The language of the constitution is: "Offenses heretofore required to be prosecuted," etc. Prior to the adoption of that provision, as we have shown, the constitution of 1862 required all infamous crimes, except petit larceny, to be prosecuted by presentment or indictment. Without considering any other of the points made by the respondent, it seems to me clear that the jurisdiction to try the offense with which the petitioner stands charged must rest in the superior court, at least until some machinery is provided for a prosecution by indictment or information in the police court.

MILLER *et al.* *v.* BUTTERFIELD. (No. 8,617.)

(*Supreme Court of California.* April 24, 1889.)

CONTRACTS—CONSTRUCTION.

1. Plaintiffs and defendant entered into the following contract: "We, the undersigned, agree to share equal in any mine we may buy or find from this date. I [defendant] offset my time against my board with" plaintiffs. Signed, etc. *Held,* that under the contract plaintiffs were to board defendant while prospecting, and that, as to any mines discovered and located by him pending the agreement, all were to be equal tenants in common; also as to mines bought; but this only on condition that all should contribute equally to the purchase price. Where plaintiffs soon after the date of the contract became insolvent, and were unable to board defendant, who thereafter purchased certain mining property with his own funds, and without any offer of contribution from plaintiffs, they were not entitled to any interest in such property.

2. Parol evidence was inadmissible to enlarge, extend, or otherwise vary the contract; and any subsequent contract, whether written or parol, with respect to the management or disposal of the property to be acquired, was wholly immaterial.

In bank. Appeal from superior court, Mono county; MARCUS P. WIGGIN, Judge.

P. Reddy, (*McAllister & Bergin,* of counsel,) for appellant. *Robert M. Clark, Kittrell & Owen,* and *T. W. W. Davies,* for respondents.

BEATTY, C. J. September 24, 1879, the parties to this action entered into the following agreement in writing "We, the undersigned, agree to share equal in any mine that we may buy or find from this date. I, G. W. Butterfield, offset my time against my board with O. Miller and J. M. Miller. G. W. BUTTERFIELD, J. M. MILLER, ORRIN MILLER." At the time of the execution of this agreement plaintiffs were keeping a hotel in Bodie, a mining town, and defendant was a miner and prospector. The plaintiffs were in financial difficulties, and in less than three weeks their hotel was closed, and their business broken up, by the action of their creditors. They did not and could not thereafter board the defendant, and no mines had been discovered or located up to the time their hotel was closed. Meantime, however, defendant had commenced negotiations for the purchase of the mining properties, or some of them, which are in controversy here, and he did subsequently effect purchases with money procured upon his own individual credit, and advanced by him alone. The plaintiffs did not and could not contribute, and never offered to contribute anything towards the fund with which these interests were purchased. The conveyances were made to the defendant, and he claimed to be the sole owner. The plaintiffs thereupon commenced this action, alleging the formation of a partnership between them and defendant on the 24th of September, 1879, to locate, buy, and sell mines on joint account, and praying dissolution, accounting, and conveyance to them of their interest in the mines acquired by defendant in his own name subsequent to the date mentioned. The findings and decree of the superior court were in favor of plaintiffs, from which, and from an order denying his motion for a new trial, defendant appeals. On the trial in the superior court plaintiffs introduced in evidence the written agreement above quoted, and also, against the objection of defendant, parol testimony, not only as to the circumstances surrounding the parties at the time of the execution of the written agreement, but also as to what the parties understood or intended it to mean, and as to the subsequent conversations between the parties to the effect that they would sell and share the proceeds of the mines acquired in pursuance of the agreement.

Whether the finding of the superior court that there was a partnership was based upon a construction of the writing, read in the light of the circumstances surrounding the parties at the time of the execution, or upon the parol testimony as to the real meaning of the parties, and their subsequent talk about selling the mines, does not clearly appear, but we think that in any view the finding was erroneous. The true construction of the contract appears to be this: that the Millers were to board Butterfield while he employed his time prospecting, and that as to any mines discovered and located by him (found) pending the agreement, and while it was performed by them, all were to be tenants in common with equal shares. As to mines bought, the parties were also to be tenants in common, with the like interest, but this only upon the condition (necessarily implied) that they should contribute equally to the purchase fund. Neither was obliged by the agreement to contribute to the purchase of any particular mine, selected by one or both of the others, though each may have been entitled to the opportunity to so contribute, and to share in the purchase. Certainly they could not, one or more of them, allow another to make a purchase with his own funds, and at his own risk, and, without being obliged to reimburse him in case of loss, claim the advantages of the bargain in case of gain. This being the proper construction of the written contract, parol evidence was inadmissible for the purpose of enlarging, extending, or otherwise varying it; and any subsequent contract with respect to the management or disposal of the property to be acquired, whether in writing or by parol, was wholly immaterial. Conceding, without deciding, that a subsequent parol contract to sell the property acquired in pursuance of the written contract, and to divide the proceeds in stipulated proportions, might have bound the parties, the question, and the only material question in this case, still remains, what property was so acquired? We think that the fact that the defendant alone provided the funds for the purchase of the properties in controversy; that the plaintiffs not only did not, but could not, and were in no wise bound to, contribute any share of the purchase money,—is fatal to their claim to an interest in such properties. Ordered therefore, that the judgment and order appealed from be reversed, and cause remanded.

We concur: Works, J.; Paterson, J.; McFarland, J.; Thornton, J.; Sharpstein, J.

(79 Cal. 45)

Oakland Paving Co. *v.* Barstow *et al.*

(No. 11,972.)

(*Supreme Court of California.* April 24, 1889.)

Street Contracts—Time of the Essence.

1. A contract for street work, entered into prior to January 1, 1880, when the new constitution of California went into effect, could lawfully be extended as to the time of completion after that date.

2. Section 6 of the Oakland "street law" (St. Cal. 1863-64, p. 333) provides the city marshal "shall fix the time for the commencement of the work under all contracts entered into by him, which work shall be prosecuted with due diligence from day to day thereafter to completion, and may extend the time so fixed from time to time under the direction of the city council." *Held*, that this does not, under the principle of *expressio unius*, etc., deny the power of extending the time of completion of such contracts.

Department 2. Appeal from Superior court, Alameda county; E. M. Gibson, Judge.

J. H. Brewer, (*A. L. Rhodes*, of counsel,) for appellants. *J. C. Martin* and *C. T. H. Palmer*, for respondent.

McFarland, J. This is an action brought by a contractor to enforce a lien for street work done in the city of Oakland. Judgment went for plaintiff, and defendants appeal from the judgment and from an order denying a new trial. The contract was entered into between the plaintiff and the city marshal in December, 1879. A time for the completion of the work was mentioned in the contract. This time was extended, or attempted to be extended, twice during the year 1880 by the city council and marshal. The work was completed within the time as extended, but not within the time originally mentioned in the contract. Appellants' main contentions are: *First*, that after January 1, 1880, when the new constitution went into full effect, there was no power in the city, or any of its officers, to extend the time for the completion of street work; *second*, that, under the city charter itself, neither the city council, nor marshal, nor both, had power to grant such extension; and, *third*, that no such extension was ever actually given.

1. As the contract was made before January, 1880, it was not impaired or affected by the new constitution. The granting of the extension of time was not a novation or new contract; it was merely a pursuance of the original contract under rights existing by virtue of the law under which it was made. The extensions were made before the original time, or the time given in the first extention, had elapsed. The case of Bank v. County of Franklin, 9 Sup. Ct. Rep. 159, cited by appellants, differs in many respects from the case at bar.

2. The contention that the charter gives no power to extend the time for the completion of a contract rests (in addition to the claim that Conlin v. Seamen, 22 Cal. 547, and Houston v. McKenna, Id. 551, were wrongly decided) on the attempted application of the maxim *expressio unius*, etc., to the latter clause of the first sentence of section 6 of the Oakland street law. St. 1863-64, p. 333. Said clause is as follows: "Said marshal shall fix the time for the commencement of the work under all contracts entered into by him, which work shall be prosecuted with due diligence from day to day thereafter to completion, and may extend the time so fixed from time to time under the direction of the city council." It is argued that the words "so fixed" refer only to "commencement;" and that, as the power to extend the time for the commencement of the work is expressed, therefore the power to extend its completion must be held to be excluded. But, in the first place, it is not entirely clear that the construction contended for is the correct one. It would, no doubt, be the strict, grammatical construction; but the language undoubtedly leaves the impression that the law-maker, when using it, had the intent to do something more than to merely give power to extend the commencement of the work. If that had been his sole purpose, the words concerning the extension of time would naturally have immediately followed those about the commencement of the work; whereas they are placed after the clause requiring the prosecution of the work with due diligence from day to day thereafter to "completion." The last two lines of the sentence seem to contemplate a condition of things existing after the work had been commenced, and a time when it would be folly to speak of extending the "commencement" of that work. At all events, the true construction of the clause is so doubtful that if the power to extend the completion of the work can be fairly gathered from other parts of the statute, then it would be straining a rule beyond its breaking point to hold such power to be excluded by said clause by virtue of the said maxim invoked by appellants. And we think that the power to extend the time for the completion is clearly given in other parts of the statute. It is to be observed that the statute does not provide that there shall be inserted in the contract any stated time for the completion of the work. The provision is merely that the work "shall be prosecuted with due diligence from day to day thereafter to completion," and must be done "under the direction, and to the satisfaction, of the marshal." Section 6. The marshal, therefore, (at least with the concurrence of the council,) had full control of the time within which the work should be completed. He need not have inserted in the contract any definite time at all for the completion of the work; and, to say that this power did not include the power to extend the time when he had inserted a definite pe-

riod, is to say that the greater does not include the less. Throughout the statute the council and marshal are given the most plenary general powers over all matters relating to street work, and it is expressly provided that "the marshal of said city is hereby authorized, in his official capacity, to make all written contracts, and receive all bonds authorized by this act, and to do any other act, either expressed or implied, that pertains to the street department under this act." Section 6. Moreover, the general power to extend the time for the completion of the work was settled and declared in the two cases of Conlin v. Seamen and Houston v. McKenna, above noted. The statutory provisions before the court in those cases, with respect to the point under discussion, were almost identical with those of the Oakland street law, except that they did not include the clause above quoted about the extension of time.

3. The third contention of appellants is that the resolutions adopted by the council, and the indorsements made on the contract by the marshal, do not contain sufficiently apt language to create extensions of the time to complete the work. We think, however, that this view is over critical, and that the language used clearly expresses the intention to grant the extensions, and is amply sufficient to work that result. We do not see anything more in the points made that requires special notice. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

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79 Cal. 65

In re DOLAN'S ESTATE. (No. 12,968.)

(*Supreme Court of California*. April 26, 1889.)

EXPRESS TRUSTS—VALIDITY.

Testatrix devised land in trust to pay certain debts and legacies out of the income therefrom, and directed that after they were so paid the whole income should be given to her son J., for life. At his death the land was to vest in the trustee in fee. Civil Code Cal. § 857, provides for an express trust to receive the rents and profits of land, and to apply them to the use of any person for life, under certain legal rules. Section 863 provides that every valid trust in real property shall vest the whole estate in the trustee, subject only to the execution of the trust, but that the beneficiaries may enforce the performance of the trust. *Held*, under said sections, that the devise created a valid trust, vesting no estate in J. except the right to receive the income of the land, and that it was error to decree that he was entitled to the possession of the land for life.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Petition by Michael Dolan and John Quale, executors, etc., of Margaret Dolan, deceased, for distribution and settlement of the estate. There was a decree ordering certain real estate to be delivered to one James Dolan for life, the will being construed to entitle him thereto. Michael Dolan appeals.

Matt I. Sullivan, for appellant. *Taylor & Craig*, for respondent.

BELCHER, C. C. Margaret Dolan executed her last will in April, 1877, and died in December following. The will was duly admitted to probate, and in it is found the following language: "*First*. I give, devise, and bequeath to my son Michael Dolan, in trust for the following purposes, that certain house and lot, No. 317 Stockton street, in the city and county of San Francisco, etc. (1) I direct that my said son Michael shall, from the rents, issues and profits of said house and lot, pay and discharge the mortgage now on the same, as soon after my death as the income will justify. (2) That as soon as said mortgage shall have been paid and satisfied, as aforesaid, I desire and intend that from the rents and profits of the said property each of my daughters, Celia Jordan, wife of John Jordan, and Margaret Platt, of Australia, British Colonies, shall receive the sum of four hundred dollars ($400.) (3) Also, from the same source, the sum of one hundred dollars ($100) to Sister Frances McEnnis, for the use and benefit of the orphans under her charge. (4) After the aforesaid application of the emoluments of the said property shall have been made, I direct that the whole of the income of said lot and building be given to my son James Dolan during the term of his natural life, and after his death the same to vest in my son Michael Dolan, in fee." In due time the executors of the will filed their petition for a decree of distribution of the property of the estate. The court acted on the petition, and by its decree distributed the whole income of the house and lot mentioned to James P. Dolan, who is admitted to be the James Dolan named in the will, during the term of his natural life; and it then "ordered that a life-estate in said real property vest in said James P. Dolan, and that said executors transfer the possession of said real estate forthwith, to said James P. Dolan, and that he retain possession of the same, free from the control of said John F. Quale and Michael Dolan, or either, as executors or trustees, for and during the term of his natural life." From this decree Michael Dolan has appealed, and the only questions presented relate to that part of the decree which gives to his brother, James P., a life-estate in and a right to the possession of the said property.

As we read the will, it gave the property to Michael Dolan in trust to collect and receive the rents and profits thereof and to use them—*First*, to pay the mortgage on the property; *second*, to pay the legacies to Celia Jordan and Margaret Platt; *third*, to pay the legacy to Sister Frances McEnnis; and, *fourth*, to pay all the residue thereof to James Dolan during his natural life. This was an express trust, and was authorized by law. See section 857, Civil Code, which provides as follows: "Express trusts may be created for any of the following purposes: * * * (3) To receive the rents and profits of real property, and pay them to or apply them to the use of, any person, whether ascertained at the time of the creation of the trust or not, for himself or for his family during the life of such person, or for any shorter term, subject to the rules of title 2 of this part." If we rightly construe the will, James Dolan did not take a life-estate in the property or right to its possession. This is shown by section 863, Civil Code, which declares that "except as hereinafter otherwise provided, every express trust in real property, valid as such in its creation, vests the whole estate in the trustees, subject only to the execution of the trust. The beneficiaries take no estate or interest in the property, but may enforce the performance of the trust." And see Estate of Delaney, 49 Cal. 76. It follows that the decree of distribution should be reversed and the cause remanded with directions to the court below to modify its decree in accordance with this opinion.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and cause remanded, with directions to the court below to modify its decree in accordance with this opinion.

(79 Cal. 74)

DONNELLY *v.* HUFSCHMIDT *et al.* (No. 11,948.)

(*Supreme Court of California.* April 26, 1889.)

NEGLIGENCE—DAMAGES.

1. Defendants, who had been repairing a house, by permission of a person in charge, left a box on the premises in a pathway leading from the door of the house to a slop-hopper. *Held,* that they were responsible to a tenant living in the house, who, in going along the pathway to the hopper, after dark, in the performance of household duties, fell over the box, and was injured.

2. Expenses incurred for medicine, nurse hire, and doctor's bills may be recovered in an action for personal injuries, though the bills have not been paid at the time of the trial.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Mary A. Donnelly against Louis Hufschmidt and others. Judgment was given for plaintiff, and defendants appeal.

A. P. Needles, (*T. M McEntee,* of counsel,) for appellants. *M. Cooney* and *Henry H. Reid,* for respondent.

THORNTON J. This is an action to recover damages for a personal injury alleged to have been suffered by plaintiff in consequence of the negligent conduct of the defendants. The defendants were engaged to repair a range in a building in which the plaintiff lodged, as tenant and occupant of a room. The defendants completed the work late in the afternoon, and by permission of a person in charge left on the premises a box of tools and a box of cement, the contents of which they had been using in repairing the range. They placed the box of tools in a passageway of the house, and the box of cement in the yard. The plaintiff had occasion to make a pot of tea, and for that purpose she went from the room where she lodged to the kitchen, as she had a right to do, to procure a teapot. She found some tea leaves in the pot which she wished to get rid of, and for that purpose went out into the yard to empty them into a slop-hopper. Night had come on and when she went into the yard it was dark. There was a pathway to the hopper from the door of her exit from the house, and she was going, as she testified, straight from this door to the hopper, when she came in contact with the box of cement, over which she fell and received the injury for which this action is brought. Verdict and judgment passed in plaintiff's favor, and this appeal is prosecuted by defendants from the judgment, and an order denying their motion for a new trial.

It is urged that defendants were guilty of no negligence for which they were responsible to the plaintiff. If the defendants left the box in the pathway to the hopper, along which plaintiff had to go to reach the hopper, and she fell over it, we are of opinion that they were guilty of negligence for which they were responsible. There is some conflict in the evidence on the point whether defendants put the cement box in this pathway or not, but the jury in finding against defendants must have affirmed that they did place it in the way mentioned, and we cannot on that ground interfere with their verdict. Nor can it be held that the defendants owed no duty to the plaintiff. The defendants were bound so to exercise their rights as not to interfere with the rights of others. Needham v. Railroad Co., 37 Cal. 417. They owed the duty to the plaintiff to do her no injury in the employment of their own legal rights. We have examined the charge of the court and the request to charge asked by defendants and refused, and find no error in the rulings of the court. The court properly directed the jury that the plaintiff had the right to recover the amount, if any, expended by her for medicine and nurse hire, and did not err in refusing to instruct the jury that "nothing should be allowed plaintiff by way of damages for expenses incurred for nurse hire, medicines, and doctor's bills, unles actually paid" by her The object of damages is to give compensation for loss for the injury sustained. The medical man was employed as a direct consequence of the injury. The obligation to pay the surgeon for his services still rests on the plaintiff, and compensation for the detriment she has suffered could not be complete unless she was placed in a position to discharge herself from this obligation. Her failure to pay may have resulted from the hurt occasioned by defendants. The law allows such recovery by plaintiff for the reason that the acts of defendants superinduced the incurring of the obligation, and the duty to discharge it is imposed by law on defendants. We find no error in the record. Judgment and order affirmed.

I concur: SHARPSTEIN, J.

MCFARLAND, J. I concur. The only doubt which I had in the case was as to the point whether plaintiff could recover for her doctor's bill without having first paid it, upon which point counsel throw no light. The law is, I think, that a plaintiff, in such a case, cannot prove he has incurred a physician's bill under an allegation that he had paid it. Ward v. Haws, 5 Minn. 440, (Gil. 359;) Pritchet v. Boevey, 1 Cromp. & M. 775; Jones v. Lewis, 9 Dowl. 143; 1 Sedgw. Dam. (7th Ed.) p. 197, note *a*. But I do not find the rule to be established that he cannot recover for such a bill, though only incurred where that fact is averred in the complaint. And I think that the better reason is with the position taken in the opinion of Mr. Justice THORNTON. The complaint in this case has a sufficient averment that the expense was incurred.

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3 Cal. Unrep. 83

MARTIN v. SPLIVALO *et al.* (No. 11,938.)

(*Supreme Court of California.* May 3, 1889.)

APPEAL—REVIEW—PRESUMPTIONS.

Where none of the pleadings or proceedings in the court below prior to judgment appear in the transcript, and the evidence is not brought up, the judgment must be presumed to be right.

Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

A. D. Splivalo, for appellants. *Houghton & Reynolds*, for respondent.

WORKS, J. This is an appeal from a money judgment recovered by the respondent against the appellants. The record shows no errors. None of the pleadings or proceedings in the court below, prior to the judgment, appear in the transcript, and the evidence is not brought up. In this condition of the record we must presume that the judgment appealed from was right. Judgment affirmed, with 10 per cent. damages.

We concur: BEATTY, C. J.; PATERSON, J.

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3 Cal. Unrep. 83

HAAS v. WHITTIER *et al.* (No. 12,927.)

(*Supreme Court of California.* May 6, 1889.)

NEW TRIAL—OBJECTIONS TO VERDICT.

An order granting a new trial, applied for on the ground that the evidence was insufficient to justify the verdict, will not be reversed unless a manifest abuse of discretion appears.

In bank. Appeal from superior court, Los Angeles county; W. P. GARDINER, Judge.

Action by Abe Haas, assignee in insolvency, against W. F Whittier and others. Judgment was rendered for defendants, and the plaintiff obtained an order for a new trial.

Barclay, Wilson & Carpenter, for appellants. *Graves, O'Melveny & Shankland* and *Chapman & Hendrick*, for respondent.

WORKS, J. This is an appeal from an order granting the respondent a new trial. One of the grounds of the motion was that the evidence was insufficient to justify the verdict. Without attempting to review the evidence, or to determine what weight should be given to it, which will be within the province of the lower court on a second trial, it is sufficient to say that the evidence was such that this court will not set aside the order granting a new trial. Such an order will not be reversed unless a manifest abuse of discretion appears. Gerold v. Brunswick, 67 Cal. 124, 7 Pac. Rep. 306. No such abuse of discretion appears in this case. Order affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

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79 Cal. 159

MORAN *et al.* v. ROSS. (No. 12,658.)

(*Supreme Court of California.* May 6, 1889.)

EMINENT DOMAIN—RAILROADS.

1. Under Code Civil Proc. Cal. § 1238, providing that real estate may be condemned for railway and other purposes, and Civil Code, § 1001, authorizing any person without further legislation to acquire private property for any purpose specified in said section 1238 by consent of the owner or by condemnation proceedings, a private individual may cause land to be condemned for railway purposes.

2. Const. Cal. art. 1, § 14, providing that private property shall not be taken or damaged for public use without just compensation, and that no right of way shall be appropriated to the use of any private corporation until compensation shall have been made, irrespective of any benefit from any improvement proposed by such corporation, does not restrict the condemnation of land to railways under the control of corporations.

3. Const. Cal. art. 12, § 22, providing for a railroad commission having power to establish rates of charges for "railroad and other transportation companies," and imposing penalties on any "railroad corporation or transportation company" refusing to conform to the regulations of such commission, applies to all persons engaged in transportation, whether as corporations or individuals.

4. If said constitutional provision applied to corporations alone it would not limit the power to construct and operate railroads to corporations alone.

5. The fact that the right to construct and operate railways and to condemn land for right of way is conferred on corporations by statute does not prevent an individual from exercising similar powers.

6. In proceedings by private individuals to condemn land for railway purposes it is not error to refuse to permit defendant to prove that the general line of plaintiffs' projected road was first located by a railroad corporation, and that some of it on a different portion of the line was actually built.

7. In such proceedings, there being no allegation in the answer that fences and cattle-guards would be necessary to be constructed in case the railway should be built, it is not error to fail to find upon that question.

In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

Action by Charles Moran and others, partners under the firm name of Moran Bros., to condemn land of A. E. Ross for railway purposes. Judgment for plaintiffs, assessing the compensation to be paid at $260, and defendant appeals. Const. Cal. art. 12, § 22, provides for the appointment of a railroad commission having power to regulate the charges of "railroad or other transportation companies." It further provides that any railroad corporation or transportation company refusing to comply with the rules shall be fined as therein stated.

Goodwin & Davis, for appellant. *Spencer & Raker*, for respondents.

WORKS, J. Action to condemn lands for the right of way of a railroad, brought by the respondents as partners. Judgment for the plaintiff. Motion for a new trial denied. Defendant appeals.

The main contention of the appellant is that the right to condemn real estate for railroad purposes can only be exercised by corporations, and that proceedings for that purpose cannot be maintained by private individuals. The right of eminent domain is inherent in the state, and not conferred by the constitution. 1 Wood, Ry. Law, § 223; Cooley, Const. Lim. 647; Mills, Em. Dom. § 1. But the power of the state to condemn land for public uses must, in the main, be exercised by agents; and for that reason this power may be delegated by the legislature of the state either to corporations or individuals who act as such agents, and under legislative control. Mahoney v. Water-Works, 52 Cal. 161; 1 Wood, Ry. Law, § 223; Cooley, Const. Lim. 653, 666; In re Kerr, 42 Barb. 119; Canal Co. v. Archer, 9 Gill & J. 479; Beekman v. Railroad Co., 3 Paige, 44; Whiteman v. Railroad Co., 2 Har. (Del.) 514; Mills, Em. Dom. § 13. Whether an improvement is of sufficient importance to justify the exercise of the right of eminent domain is a question for the legislature to determine, subject only to the requirement that such improvement shall be for the public benefit, and not for private purposes. Mahoney v. Water-Works, 52 Cal. 161; Cooley, Const. Lim. 657; 1 Wood, Ry. Law, § 224; Beekman v. Railroad Co., 3 Paige, 44; Mills, Em. Dom. §§ 10, 22. Railways are a species of public highways, and as such have uniformly been held to be public improvements to which the right of eminent domain attaches, although they may be constructed by private corporations or individuals, and operated for the emoluments to be derived therefrom by the operators. Mills, Em. Dom. § 14; 1 Wood. Ry. Law, § 226; Railroad Co. v. Caldwell, 31 Cal. 368. This right of eminent domain need not be specially granted in every instance, but may be delegated by general laws to every person who shall comply with the terms upon which the right is given. 1 Wood, Ry. Law, § 224.

The question presented in this case, therefore, is whether the privilege of exercising this right has been delegated, in this state, to individuals as well as to corporations. The Code of Civil Procedure provides for what purposes real estate may be condemned, among which is that of railroads. Code Civil Proc. § 1238. And the terms upon which the right may be enforced, and the manner in which it shall be exercised, are provided for in the following sections. Id. §§ 1241, 1263. The Civil Code provides: "Any person may, without further legislative action, acquire private property for any use specified in section 1238 of the Code of Civil Procedure, either by consent of the owner or by proceedings had under the provisions of title 7, part 3, of the Code of Civil Procedure; and any person seeking to acquire property for any of the uses mentioned in such title is 'an agent of the state,' or a 'person in charge of such use,' within the meaning of those terms, as used in such title. This section shall be in force from and after the 4th day of April, 1872." Civil Code, § 1001. These provisions of the Codes, taken together, confer upon private individuals the right of eminent domain in this class of cases, in plain and unequivocal terms.

But counsel for appellant contend that under section 14, art. 1, of the constitution of this state the right can only be exercised by two classes of persons, viz., municipal and private corporations. The section of the constitution referred to provides: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation, which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." Their position, as we understand it, is that this is a "disabling provision," and contemplates the taking of rights of way by the two classes of persons named and those only. The first clause of the section: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner," applies to all persons, and is in entire harmony with the provisions of the Codes above cited. The latter clause applies to private corporations, and imposes upon them an additional requirement. The argument of counsel amounts to simply this: The constitution provides that a right cannot be exercised by a corporation except upon certain conditions; therefore it cannot be exercised by a private individual at all. This seems to us to be entirely illogical and without force. The constitution does not assume to provide for what uses or purposes private property may be condemned, nor by whom. These matters are left entirely to the legislature, to be determined and regulated by statute, and the Codes contain ample provision therefor.

But it is said that section 22, art. 12, of the constitution, providing for a railroad commission, is only applicable to corporations, and therefore private individuals cannot construct and operate such roads. If the section referred to were confined to corporations, the conclusion contended for would not follow; but in our judgment the control of the railroad commission, as provided for, is not confined to corporations. It extends, by its terms, to railroad corporations and "transportation companies." This should be construed to extend the supervision of the commission to all persons engaged in the business of transportation, whether as corporations, joint-stock companies, partnerships, or individuals; and so it has been construed by legislative enactment. The act organizing and defining the powers of the board of railroad commissioners provides: "The term 'transportation companies' shall be deemed to mean and include: *First*, all companies owning and operating railroads (other than street railroads) within this state; *second*, all companies owning and operating steamships engaged in the transportation of freight or passengers from and to ports within this state; *third*, all companies owning and operating steam-boats used in transporting freight or passengers upon the rivers or inland waters of this state. The word 'company,' as used in this act, shall be deemed to mean and include corporations, associations, partnerships, trustees, agents, assignees, and individuals." St. 1880, pp. 45, 48, § 14. Thus the power and supervision of the railroad commission has been extended to all persons owning and operating railroads, whether the section of the constitution referred to has that effect or not.

The fact that the right to construct and operate railroads is given by statute to railroad corporations, and the right of way therefor is granted to them by statute, is relied upon as supporting the appellant's position. This argument is much like the other. The claim is that because the right is expressly given by statute to corporations it cannot be exercised by any one else, unless the right is conferred in the same way. But this does not follow. A corporation is a creature of legislation. Its rights, powers, and duties are conferred and defined by statute. Without such statutory authority it could not exist, or transact any business. This is not so of a private individual. He may construct and operate a railroad on his own land, or on the land of another, without statutory license. If the necessity of condemning the lands of another arises, in order to construct the road, he must have constitutional or statutory authority to entitle him to proceed. This authority is given him, in express terms, as we have seen, by the Codes. The cases of Mahoney v. Water-Works, 52 Cal. 161, and Railroad Co. v. Raymond, 53 Cal. 223, are relied upon by the appellant as sustaining his position. There is language in the former of these cases to the effect that a proceeding to condemn lands for the purposes of water-works could only be commenced and continued by a corporation, but a decision of that question was not necessary to a decision of the case, and it is quite clear that it was not carefully considered, if considered at all, and no authority is cited, or reason advanced, in support of such a doctrine. The latter case does not bear upon the question presented here. The point made there was that work-shops for repairing and safely keeping the cars and locomotives of a railroad were not part of such railroad, or a public use, and therefore section 1238 of the Code of Civil Procedure did not authorize the condemnation of land upon which to erect such buildings. This court held that the use for which the land was sought to be condemned was within section 1238, and as a reason for so holding it was stated that railroad companies were authorized by other sections of the Code to construct such buildings as a necessary part of their roads.

The defendant offered to prove that the general line of the road described in the complaint was first located by a certain railroad corporation, and that a part of it had been built by said company. The evidence was excluded, and this is urged as error. There was no error in this ruling. The mere fact that some one had at some time in the past located the line of the road, and had actually built on such line on a different part thereof from that for which the respondents were seeking to condemn, was immaterial.

It is also claimed that the court failed to find upon the issue as to the necessity for fences and cattle-guards along and upon defendant's lands. The court did find the cost of good and sufficient fences on each side of the road, and of cattle-guards, but not whether the same were necessary or not. In this respect the findings are like the answer, which failed to allege that such fences and cattle-guards were necessary. As no such issue was made by the answer, the failure to find upon it was not error. Judgment and order denying new trial affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.

MORAN *et al v.* FARLEY. (No. 12,657.)

(*Supreme Court of California.* May 6, 1889.)

WORKS, J. The facts and points made in this case are the same as Moran v. Ross, (No. 12,658, *ante*, 547,) this day filed, and for the reasons stated in the opinion in that case the judgment and order appealed from herein are affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.

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79 Cal. 82

CARTER *v.* HOPKINS *et al.* (No. 12,967.)

(*Supreme Court of California.* April 29, 1889.)

RESULTING TRUSTS—NONSUIT.

1. Plaintiff sued to establish a resulting trust in defendant in certain land alleged to have been purchased by plaintiff's intestate and conveyed to the defendant by deed absolute on its face, but under the agreement to hold the same in trust for said intestate. Defendant answered, admitting such purchase, but averring that he had purchased intestate's interest in his life-time, and had paid him

therefor by conveying to him certain other lands. The only evidence on the question was defendant's admissions, which agreed substantially with the allegations of his answer, and were coupled with the claim of absolute ownership under purchase from intestate; payment being made by means of the conveyance of the land mentioned in the answer. The deed conveying the latter tract recited a pecuniary consideration. *Held*, that a nonsuit was properly granted, the evidence showing the trust to have been extinguished by the conveyance last mentioned.

2. A motion for a nonsuit on the ground that plaintiff "has failed to prove a single allegation of his complaint" is sufficiently definite as to the reasons thereof.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by John W. Carter, special administrator, etc., of Thomas T. Bouldin, deceased, against Rufus C. Hopkins, Margaret A. Hopkins, his wife, and the San Francisco Savings Union, to declare the defendant Rufus C. Hopkins to hold a certain lot in the city of San Francisco in trust for plaintiff, and to require him to convey the same to him. The substantial allegations of the complaint are that on March 27, 1862, Bouldin, on the eve of departure from this state to the state of Virginia, purchased the land described in the complaint from John P. and Hannah Holden; but, instead of taking the legal title in his own name, the deed was made out to defendant Rufus C. Hopkins, who thereupon held the legal title as trustee of a resulting trust in behalf of Bouldin, who had furnished the entire purchase money. It is also alleged that before leaving California Bouldin constituted Hopkins his agent in other matters. That Bouldin returned to San Francisco in 1868, and that Hopkins never disputed the trust relation, nor Bouldin's right to the property, until shortly prior to the latter's death, in April, 1873. It is also claimed that Hopkins had, in violation of his trust, sold a portion of the land to Jeremiah and Daniel Callaghan, and had mortgaged a portion to the defendant San Francisco Savings Union. That the rents, issues, and profits, and the value of the use and occupation for which Hopkins should be made accountable, is $250 per month from the date of purchase; and, finally, that John W. Carter, the plaintiff, at the commencement of this action, was appointed the special administrator of the estate of said Thomas T. Bouldin, deceased. The complaint was filed April 15, 1874. By the amended answer of Rufus C., and his wife, Margaret Ann, Hopkins, it is admitted that Bouldin furnished the entire purchase price ($2,000) for this land at the time of its purchase from the Holdens. Defendants also admit the conveyance of part of the land to the Callaghans, and the execution of the mortgage to the San Francisco Savings Union, but aver such conveyance and mortgage to have been for the sole use and benefit of Bouldin, prior to the alleged purchase by R. C. Hopkins of Bouldin's equitable estate in the land. It is also admitted that R. C. Hopkins has been in the possession of the greater part of the land, but it is claimed that he was compelled to expend large sums of money for street assessments, and in defending against adverse claimants; and it is averred that on September 2, 1869, Bouldin and Hopkins had a full settlement of all money transactions up to that date. And, finally, it is alleged that on the 3d of September, 1872, Bouldin and R. C. Hopkins had a full settlement of their mutual claims and interests in the land, and that at that time Hopkins purchased from Bouldin all the latter's equitable interest in the land, paying him therefor by a conveyance of certain land in San Bernardino county, in this state.

The evidence introduced by plaintiff, besides certain proof as to the rental value of the premises sued for, and the authority of plaintiff to sue, consisted of the deed by Holden and wife to Hopkins, conveying the land in controversy, and the deed set up in defendant's answer conveying to Bouldin the land in San Bernardino county. The latter deed recited a consideration of $1,500. The plaintiff himself testified to certain conversations with defendant Hopkins concerning the premises. Part of his testimony was as follows: "I have had some talk with the defendant Rufus C. Hopkins. * * * I have heard him make statements in regard to what he claimed to be his rights in the property in controversy. He said that Thomas T. Bouldin purchased this property, and put the title in his, Hopkins', name, because he, Bouldin, was about to leave the state at the time, and that there had been various transactions between them; and that finally it culminated in his buying Bouldin's interest in 1873, and in his giving Bouldin, among other things, this piece of land in San Bernardino county, described in the answer; that, prior to 1873, he, Hopkins, had deeded this San Bernardino land to Bouldin, but that there had never been any deed of conveyance from Bouldin to Hopkins of Bouldin's interest in the land in this city in controversy here; but that he, Hopkins, claimed that Bouldin's interest in the land in this city, in controversy, was a part of the consideration though not therein mentioned, for his deed to Bouldin of the San Bernardino land; and through these transactions Hopkins claimed to be sole owner, and entitled to the possession, of the property in controversy, and that Bouldin had no further interest in it. He, Hopkins, never at any time offered to reconvey the property in controversy. He declined to do so, saying the property was his; that he did not owe Bouldin anything. He, Hopkins, never claimed to have, nor did he ever show me, any deed or conveyance whereby Bouldin's equitable or other interest in the property in controversy was conveyed to him, Hopkins. In addition to being Bouldin's agent in the management of the property in controversy during Bouldin's absence, Hopkins was Bouldin's general agent while the latter was away. Hopkins collected moneys for Bouldin, and sent moneys to him. Bouldin had an agent named Hubbard, with whom he did more or less business in San Joaquin county. Hubbard would send Bouldin's money to Hopkins, and the latter would forward this money to Bouldin. I don't know about Hopkins receiving money for Bouldin from others than Hubbard; but I may say that Hopkins was Bouldin's general agent here, and looked after all his affairs." No other testimony bearing upon the trust relations was introduced, and defendants moved for a nonsuit because plaintiff "had not proved a single allegation of his complaint." A nonsuit was granted accordingly, and plaintiff appeals.

J. P. Langhorne, for appellant. *Mhoon & Flournoy* and *J. F. & Wm. A. Stuart*, for respondents.

PER CURIAM. The grounds on which the nonsuit was asked were sufficiently stated. They are equivalent to the statement that the plaintiff had failed to prove a single allegation of his complaint. The plaintiff's attorney no doubt understood what was meant by the statement made by the attorney for the defendants, viz., that the plaintiff had not proved a single material allegation of the complaint. We cannot say that the nonsuit was erroneously granted for the reason that the grounds on which it was asked were not stated with the precision and definiteness that the law required. Conceding that a resulting trust was established as to the lot in the city and county of San Francisco, the court is of opinion that this trust was extinguished by the conveyance by Hopkins to Bouldin of the land in the county of San Bernardino, and that the statute of frauds does not require a conveyance by Bouldin to Hopkins of his equitable interest in the San Francisco lot. Judgment affirmed.

(79 Cal. 69)

FIRST NAT. BANK OF OAKLAND *v.* WOLFF.

(No. 11,965.)

(*Supreme Court of California.* April 27, 1889.)

ALTERATION OF INSTRUMENTS — MATERIALITY OF ALTERATION.

1. After the signing of an accommodation note, dated at "Oakland," and payable to the "First National Bank of this city," and after its delivery to B., the one for whose accommodation the note was made, the words "of Oak'd" were inserted after the words "First National Bank." The rate of interest, which was left blank by the maker, was filled in, and the words "Receipt No. 124" were written at the end of the note; the purport of such words being that the receipt was a security for the payment of the money for which the note was executed. *Held* that, if the insertion of the rate of interest was unauthorized, the note would bear interest at the legal rate; that the other insertions did not affect the meaning of the note; and, the insertions being innocently made, the note was not avoided.[1]

2. In an action on the note by a bank, which had discounted it for B., against W., as the maker, the latter denied the execution of the note, and B. was charged with forgery. *Held*, that it was proper to examine B. with reference to the ownership, acquisition, and disposition of certain grain, which it appeared from the note had been pledged as security for its payment.

3. It was proper to ask the president of the plaintiff as to whether he had ever made any inquiry with reference to what had become of the grain pledged as security for the note.

4. But it was error to allow evidence of a conversation between B. and the defendant with reference to the note, after it had been acquired by the plaintiff, in the absence of any representative of the bank.

5. One may testify as to the reputation of a witness for truth and honesty, although he may never have heard such reputation discussed.

6. The allowing a witness to be called by the defendant to testify as to the signature to the note after plaintiff had put in his rebutting testimony was a matter within the discretion of the trial court, and will not be interfered with.

7. The failure of the clerk to enter judgment on the verdict within 24 hours after it was rendered, as required by Code Civil Proc. Cal. § 664, does not affect the validity of the judgment afterwards entered, the injunction of the statute being merely directory.

Department 2. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Action by the First National Bank of Oakland against A. Wolff on a promissory note, purporting to be signed by the defendant. The latter denied the genuineness of the signature. Questions asked of one Bennett, for whose accommodation the note was alleged to have been executed, with reference to the ownership, acquisition, and disposal of certain grain which it appeared had been pledged as security for the payment of the note, were objected to by plaintiff. The testimony of one D. Stuart, with reference to the reputation of Bennett for truth and honesty, was struck out, on the ground that he had never heard such reputation discussed. The allowing one Gumpel to testify, as an expert for defendant, with reference to the genuineness of the signature of the note after defendant had rested and plaintiff had introduced his rebutting testimony, was objected to.

Wm. R. Davis and *Wm. Lair Hill*, for appellant. *Metcalf & Metcalf*, for respondent.

THORNTON, J. Action by plaintiff against defendant on a promissory note. Verdict and judgment passed for defendant. The appeal is prosecuted by plaintiff from an order denying its motion for a new trial. The execution of the note was denied by the defendant, and the main issue was whether or not the note sued on was or was not a forgery. The note, as offered in evidence, was in these words: "$2,000. Oakland, Cal., Oct. 27, 1882. One day after date, without grace, for value received, I promise to pay to the First National Bank in this city, to First National Bank of Oak'd, or order, two thousand dollars, payable in gold coin, with interest thereon in like gold coin from date until paid, at the rate of 9 per cent. per annum, payable monthly in advance. Secured by grain in Hayward's warehouse. No. Receipt No. 124. A. WOLFF." The plaintiff's contention is that the note was signed by Wolff as an accommodation to R. H. Bennett, who received the money on it on the 28th of October, 1882, from the plaintiff. When signed by Wolff the words "of Oak'd" were not in it, and the rate of interest was left blank. Bennett testified that the note was signed and handed to him by defendant with rate of interest left blank, for the reason that they did not know what rate the bank would charge, and that he was empowered by Wolff to fill up the blank with the rate agreed on. He so informed the bank, and after some conversation with one of the officers of the bank the rate of 9 per cent. per annum was agreed on, and the blank was so filled in by Bennett or at his instance. At the end of the note was written by Bennett "Receipt No. 124." The insertion of the words "of Oak'd" was immaterial. The form of the note used showed that the bank was the First National Bank of Oakland. The note was dated at "Oakland" and the form used contained the words, "at the First National Bank of this city." This could mean no other bank than the First National Bank of Oakland, and therefore the insertion "of Oak'd" added nothing to the note that it did not mean before and was immaterial. The words "Receipt No. 124" were no part of the note, and did not affect its meaning in any way. The purport of these words was that the receipt No. 124 was a security for the payment of the money for which the note was executed. We cannot see that they were material, or affected the note in any way. If Bennett had authority from defendant to fill up the blank with the rate of interest, the insertion of the rate was not at all improper, and would bind defendant. If he had not such authority, and Wolff signed the note, and delivered it to Bennett to raise money on it, it bore interest at the legal rate, and the insertion of it would not render the note void. We are of opinion that the insertions were innocently made and that the note was not avoided by them, for the reason above stated.

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[1] On the general subject of the effect of unauthorized alterations of written instruments, see Burrows v. Klunk, (Md.) 17 Atl. Rep. 378; Croswell v. Labree, (Me.) 16 Atl. Rep. 331; Evans v. Lawton, 34 Fed. Rep. 233, and note; Hill v. Nelms, (Ala.) 5 South. Rep. 796.

From the note itself it appears that it was secured by grain in Hayward's warehouse as collateral. The receipt, the number of which was appended to the note, called for 1,198 sacks of wheat stored in the warehouse above stated. It is averred in the complaint that the security above mentioned had, without any act or default of plaintiff, become valueless; that the grain of which the security consisted had since the delivery of the note to plaintiff been, without the act or fault or consent of plaintiff, removed from the warehouse to places unknown to plaintiff; that this grain was at the time of the commencement of this action the subject of litigation between persons not parties to this action, and it was there claimed to be owned by persons unknown to the plaintiff, other than those who had asserted their claims by such claims or actions. On the trial Bennett was asked several questions in relation to this grain, which were objected to. The objections were overruled, and the plaintiff, by its counsel, reserved exceptions. We can see no good reason why the questions or the answers to them were not properly admitted in evidence. All of them had relation to the transaction, and were relevant to the issues joined in the cause.

We find no error in the ruling as to the question put to Moody, the president of the plaintiff bank, as to making inquiry about the grain which purported to have been pledged to secure payment of the note. But in our judgment the court erred in allowing the introduction of Wolff's conversation with Bennett about the note in suit, which took place after the bank had acquired the note sued on, and when no one representing the bank was present. The court also erred in striking out the testimony of D. Stuart. The witness was competent, and his testimony admissible. The allowing Gumpel to be called at the stage of the trial at which he was introduced as a witness, was a matter within the discretion of the court below, with which this court is not authorized to interfere. Barkly v. Copeland, 74 Cal. 1, 15 Pac. Rep. 307. The failure of the clerk to enter judgment on the verdict within 24 hours after it was rendered was not error. The injunction of the statute (section 664, Code Civil Proc.) in that regard is directory only, and does not affect the legality or validity of the judgment afterwards entered. Further, if the plaintiff felt aggrieved by the failure of the clerk to enter the judgment within the time designated by the statute, he might have moved the court for an order directing him to do so, which no doubt would have been granted. Moreover, we cannot see how the plaintiff was in any manner injured by the delay of the clerk in entering the judgment. We find no other errors than those above pointed out, but for those the order denying plaintiff's motion for a new trial is reversed, and the cause remanded, that a new trial may be had in accordance with the views expressed in this opinion. So ordered.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

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3 Cal. Unrep. 81

MAIR *v.* FORBES *et al.* (No. 11,431.)

(*Supreme Court of California.* May 1, 1889.)

NEGOTIABLE INSTRUMENTS — ACTIONS ON — COMPLAINT.

An answer in an action by one claiming to be a *bona fide* indorsee for value before maturity of a bill of exchange drawn on and accepted by defendants' testator, denying on information and belief that the drawer of the bill ever transferred it to plaintiff by indorsement or otherwise, as alleged in the complaint, that it was ever delivered to plaintiff, that he paid any value therefor, or that he was ever the *bona fide* holder or owner thereof, puts in issue plaintiff's title to the bill, and it is error to render judgment in his favor without proof of title.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Hugh Mair against Charles Forbes and Mary A. Forbes, executor and executrix of the will of Alexander Forbes, deceased, upon a bill of exchange alleged to have been drawn by Robert Knox on said Alexander Forbes, for £500, and accepted by the latter. The complaint alleged that said Knox, for value, and before maturity, indorsed and delivered the same to respondent, who was the holder and owner thereof, and that the defendants refused to pay it when due. Defendants answered, denying that the said Knox transferred the bill to plaintiff by indorsing the same as alleged in the complaint, or in any other manner. They denied that the bill was ever delivered to plaintiff, that he paid any value therefor, or that he was ever its *bona fide* holder or owner. These denials were made upon information and belief. There was judgment for plaintiff, and defendants appeal.

Henry E. Highton, for appellants. *Rosenbaum & Sheeline*, for respondent.

BEATTY, C. J Action upon bill of exchange against executors of deceased acceptor. The pleadings are verified. Judgment was rendered in favor of the plaintiff on the pleadings; defendants excepting. We think the answer was sufficient to raise an issue as to the ownership of the bill, and consequently that the rendition of the judgment without any proof of plaintiff's title was error. Judgment reversed, and cause remanded.

We concur: WORKS, J.; PATERSON, J.

(79 Cal. 95)

Ex parte LEWIS. (No. 20,522.)

(*Supreme Court of California.* April 30, 1889.)

EXTRADITION—INTERSTATE.

A warrant issued by the governor of a state for the apprehension of a fugitive from another state recited that the demand of the governor of the latter state was accompanied by the necessary complaint, information, affidavits, and warrants, showing that the person demanded stood charged with the crime as represented by the demanding governor; that he had fled from justice, and taken refuge in the former state; and that said papers were certified by the demanding governor to be authentic. *Held*, that the warrant sufficiently appeared to have been issued on proper evidence.

Petition by Peter R. Lewis for a writ of *habeas corpus* to obtain his release from an alleged illegal imprisonment.

Charles F. Hanlon, for petitioner. *George A. Rankin*, *contra*.

WORKS, J. This is an application for a writ of *habeas corpus*. The ground upon which it is claimed that the petitioner is illegally imprisoned is that he is held under a warrant of the governor on an alleged requisition of the governor of the state of Colorado, and that the warrant and such requisition are each and both illegal, in that no copy of any indictment found, nor any copy of any affidavit made before a magistrate of any state or territory, charging the petitioner with having committed treason, felony, or any other crime, either certified as authentic by the governor of the state of Colorado, or at all, has ever been produced to the governor of the state of California. The officer having the petitioner in charge makes return that he holds the petitioner by virtue of a warrant issued by the governor of this state, which warrant is made part of his return, and recites, among other things: "Whereas, it has been represented to me by the governor of the state of Colorado that Peter R. Lewis stands charged with the crime of fraudulent conveyance, committed in the county of Arapahoe, in said state, and that he fled from the justice of that state, and has taken refuge in the state of California; and the said governor of Colorado having, in pursuance of the constitution and laws of the United States, demanded of me that I shall cause the said Peter R. Lewis to be arrested and delivered to Charles A. Hawley, who is authorized to receive him into his custody, and convey him back to the said state of Colorado; and whereas, the said representation and demand is accompanied by a complaint and information, affidavits and warrant of arrest, whereby the said Peter R. Lewis stands charged with said crime, and with having fled from said state, and taken refuge in the state of California, which are certified by the governor of the state of Colorado to be authentic," etc. The facts thus recited are not disputed, and we think they show a sufficient foundation for the warrant. Writ denied.

We concur: BEATTY, C. J.; THORNTON, J.

(3 Cal. Unrep. 84)

DALMAZZO *v.* DRYSDALE *et al.* (No. 12,956.)

(*Supreme Court of California.* May 15, 1889.)

APPEAL—ASSIGNMENT OF ERRORS.

Where an appellant fails to point out any error in the order or judgment appealed from, within the time allowed him to file briefs, the supreme court will not examine the record, but will affirm the decision of the trial court.

In bank. Appeal from superior court, San Diego county; E. PARKER, Judge.

John M. Lucas, for appellants. *John D. Works* and *Harry L. Titus*, for respondent.

BEATTY, C. J. This case was submitted without oral argument on briefs to be filed, the appellants to file the first brief. The time allowed appellants to file their brief has elapsed, no brief has been filed by appellants, no extension of time has been asked, and respondent moves for affirmance of the judgment and order appealed from. Where appellant fails to point out any error in the judgment or order appealed from, the court will not look into the record for the purpose of discovering error. Judgment and order affirmed. *Remittitur* forthwith.

(79 Cal. 84)

People *v.* Van Ness *et al.* (No. 11,621.)

(*Supreme Court of California.* April 29, 1889.)

Conversion by Public Officer.

1. Where a public officer has in his custody money belonging to the state, and in a letter to the state comptroller denies that he ever had any such money, and refuses to pay any to the state, such denial and refusal are sufficient evidence of a conversion of the money as of the respective dates of its receipt.

2. The statute of limitations of four years, (Code Civil Proc. Cal. § 337,) applicable to an action on an official bond to recover moneys received belonging to the state, does not begin to run until the end of the officer's term.

3. Fees collected without legal authority by the commissioner of immigration, in his official capacity and under color of law, belong to the state, and not to him.

Department 2. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

Van Ness & Roche, for appellants. *Geo. A. Johnson*, Atty. Gen., and *Langhorne & Miller*, for respondent.

Thornton, J. Action on the official bond of the defendant Van Ness as commissioner of immigration of the port of San Francisco. The bond on which this action was brought bears date the 11th of January, 1876, on which day it was signed by Van Ness as principal, and Henry Barroilhet and Leland Stanford as sureties, was approved by the governor on the next day, and filed and recorded on the next day in the office of the secretary of state. Van Ness held the office of commissioner of immigration from the 7th day of January, 1876, to the 21st of January, 1880. During the incumbency of Van Ness his official bond was by an act of the legislature approved March 25, 1876, reduced from $25,000 to $2,500. Van Ness, subsequently to this amendment, filed an official bond in the sum of $2,500, which was approved by the governor, and filed in the office of the secretary of state on the 8th day of May, 1876. This last bond was signed by Van Ness and Barroilhet and one Moulder as sureties on the 12th day of April, 1876. During Van Ness' incumbency, from March 25, 1876, to the end of his term, he collected and received in his official capacity under the statute, as "the 70 cents" or capitation tax allowed by it, the sum of $28,353.64, and of this amount he collected:

From March 25, 1876, to April 12, 1876....	$1,284 50
From April 12, 1876, to May 8, 1876........	2,648 10
Total from March 25, 1876, to May 8, 1876....................................	$3,932 60

Van Ness was entitled to a salary of $4,000 per annum during his incumbency of office, which amounted in the whole to $15,277.78. Of this amount his salary from March 25, 1876, to May 8, 1876, amounted to $477.18. The remainder of salary was received during the subsequent period of his term of office.

The action, as will be observed, is brought on the bond first executed in January, 1876, and it is contended that there never has been any breach of that bond. The court held that during the period extending from the 25th of March, 1876, to the 8th of May, 1876, Van Ness received of the capitation tax above mentioned the sum of $3,932.60; that the salary of Van Ness during the period above mentioned amounted to the sum of $477.18, and that his office expenses during the same period of time amounted to $336.30; that Van Ness was entitled to retain those last two mentioned sums out of the amount $3,932.60 collected by him; that the amount remaining after deducting the sum above mentioned for salary and office expenses, amounting to $3,118.32, was prior to the 8th of May, 1876, and to the filing of the bond filed on that day, appropriated and converted to his own use by Van Ness, and that none of said last-named sum was held by Van Ness on the said 8th of May, 1876. The condition of the bond was that Van Ness in his official capacity should well, truly, and faithfully execute the duties of the trust, and perform all the official duties required of him by law. That one of the duties assumed by Van Ness, as commissioner, was to keep the moneys collected by him, after making the deductions above mentioned, as the moneys of the state, to be paid over to the proper officer of the state at the proper time, we think there can be no doubt, and that a conversion of such moneys by him was a breach of his bond we entertain as little doubt.

It is urged that there is no evidence of any such conversion. We think there is. On the 21st of February, 1883, John P. Dunn, the comptroller of state, in his capacity of comptroller, wrote to Van Ness requiring him to render immediately to the comptroller's office a statement of his account as commissioner of immigration, giving in detail the receipts from all sources during his (Van Ness') incumbency in office. In the same letter Van Ness was required to pay at once into the state treasury all moneys held by him belonging to the state. To this letter Van Ness wrote in reply on the 10th of March, 1883, that he had no property or moneys of the state in his possession, and had had none during his term of office or incumbency. Here was a denial that he had ever had any moneys in his hands collected by him for the state during his term of office, and a refusal to pay any sum into the state treasury. The admitted facts show the collections by Van Ness as above stated. The evidence shows a denial by Van Ness of any right of the state to the moneys collected by him as the trusted officer of the state. This is a conversion, within the rules of law on that subject. His declaration in his letter to Dunn was a denial of any right in the state, and a plain manifestation of the exercise by him of dominion over this money in defiance of the right of the state. We are of opinion that the court was fully sustained by the evidence in finding as a fact that there was a conversion of this money by Van Ness. See Dodge v. Meyer, 61 Cal. 420; Liptrot v.

Holmes, 1 Ga. 381; Cobb v. Dows, 9 Barb. 242.

But it is argued that there was no conversion prior to 8th May, 1876. We think the court below was justified in holding that the money was converted by Van Ness as fast as received. He says in his letter above quoted that he has never collected or had in his possession any money as belonging to the state, and it is manifest that he all along regarded that the money collected by law belonged to him. We are of the opinion that the evidence justified the court below in finding that a conversion by Van Ness of the moneys for which judgment herein was rendered was made prior to the 8th day of May, 1876. There was no delivery of the second official bond executed by Van Ness and sureties until the day on which it was approved by the governor. Sacramento Co. v. Bird, 31 Cal. 74. We cannot see how there could have been any delivery until that date. The bond was not in a condition to be delivered until that date. Prior to that time it was inchoate and imperfect as a bond. Like every other deed, that bond was not operative until delivery. It follows that the parties to the second bond were not liable for any breach until after its delivery. There could have been no breach of this bond until after it was delivered on the 8th of May, 1876, but there was a breach of the bond sued on.

This action was not barred by the statute of limitations. Taking the view most favorable to defendants, the statute did not commence running until the close of Van Ness' term of office on January 21, 1880. This action was commenced on the 23d of April, 1883. As this action was on a bond, the period required to effect a bar was four years. Code Civil Proc. § 337. The action, it will be perceived, was brought in less than four years from the date of its accrual in January, 1880. Van Ness, during his term of office, paid into the state treasury the sum of $1,135. This sum was a part of the moneys collected by him in pursuance of the provisions of section 2965, Pol. Code, as construed by him, for administering oaths to masters of vessels when making the reports required by section 2949, Pol. Code. It was collected prior to the 8th of May, 1876. This sum ($1,135) was collected by Van Ness in his official capacity and under color of office. There was no authority of law for collecting any such moneys of the ship-masters. It is now contended by Van Ness that as this money was collected by him without legal sanction he had a right to retain it as his own, and as he did not retain it, but paid it into the treasury, he should have been credited with it by the court below, and that the amount should be deducted by this court from the amount of the judgment. We cannot give our sanction to this contention. The money, having been collected under color of office, should have been paid into the state treasury, and did not belong, in any view, to Van Ness, and he had no right to retain it. He only did his duty in paying it over to the state. It belonged really to the ship-masters of whom it was collected; but the state, in whose and by whose authority it was pretended to have been collected, was the proper custodian of such moneys. The record is free from error. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.

(79 Cal. 77)

READ *v.* BUFFUM. (No. 11,913.)

(*Supreme Court of California.* April 29, 1889.)

ASSIGNMENT—RATIFICATION—PLEADING.

1. An assignment of an account for goods manufactured and sold by a corporation, made in its name by its secretary, who has general charge of its letters and orders for goods, is invalid, in the absence of other proof of his authority to make it.

2. A ratification of such assignment by the directors, pending action on the account by the assignee, will not avail the plaintiff, as he must recover, if at all, on a cause of action accruing before its commencement.

3. A denial of the allegation of such assignment, made upon information and belief, is sufficient to raise the issue as to the validity of the assignment mentioned.

Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by John H. Read against W. M. Buffum on an account alleged to have been assigned by the California Powder Works to plaintiff. Defendant denied, on information and belief, that the account was in fact assigned. Verdict and judgment for plaintiff, and defendant appeals, as does also Solomon Lewis, an intervenor.

Franklin P. Bull, for appellant. *George Lezinsky*, (*Eisner & Platschek*, of counsel,) for intervenor and appellant. *Pillsbury & Blanding*, for respondent.

SHARPSTEIN, J. The plaintiff sues as the assignee of the California Powder Works, a corporation, for money alleged to be due for goods, wares, and merchandise sold and delivered by said corporation to the defendant. The defendant in his answer denies the allegation of his indebtedness to said coporation, and denies the assignment of said alleged indebtedness to the plaintiff. And as a further and separate answer, and as a defense to said action, alleges: "That at all the times stated in said amended complaint the defendant was, and is now, a resident of the territory of Arizona, and has not at any of said times been within the state of California; that defendant purchased between the 7th day of April, 1882, and the 20th day of May, 1883, at the territory of Arizona, certain goods, wares, and merchandise which are alleged in the said amended complaint to have been purchased by said defendant from the said California Powder Works at the city and county of San Francisco." He further alleges that the action is barred by certain provisions of the laws of the territory of Arizona, and by the provisions of sections 339 and 361 of the

Code of Civil Procedure of this state. One Solomon Lewis filed a complaint in intervention, to which the plaintiff filed an answer. Upon the issues raised by the pleadings the parties proceeded to trial, and John F. Lohse was called and sworn as a witness for plaintiff. He testified that he was secretary and treasurer of the California Powder Works, and had been secretary since 1865, the commencement of the company. Counsel for plaintiff then offered in evidence the following document: "Board of Trade of San Francisco. In the matter of W. M. Buffum & Co., Jerome, A. T. Dated San Francisco, May 29, 1885. In consideration of $1, and other good and valuable consideration to us severally paid by the assignee next hereinafter mentioned, the receipt whereof is hereby acknowledged, we hereby sell, assign, and transfer to John H. Read our claims and demands against the first above-named, in the amounts hereinafter set forth, and we severally authorize said assignee to enforce the payment of the same by legal remedies or otherwise, for his use and benefit. Witness our hands, with the several amounts of said claims and demands placed opposite thereto: THE CALIFORNIA POWDER WORKS, per JOHN F. LOHSE, Secretary, $2,379.53." This was shown to the witness, who testified that the signature was his. The defendant objected to the said evidence, on the ground that the said document purports to convey an account against W. M. Buffum & Co., whereas this action is an action against W. M. Buffum, and therefore does not prove the assignment of any amount against the defendant in this suit. The objection was overruled, and the defendant excepted. Plaintiff's counsel then asked the witness if there was any action of the board of directors approving that assignment. Witness answered there was. He was requested to read it, and read as follows: "Mr. Payton introduced the following resolution, namely: 'Resolved, that the assignment of this company on May 29, 1885, by the secretary, under the direction of the president, to John H. Read, of the claims and demands of the company against William M. Buffum, doing business under the name of "William M. Buffum & Co.," be, and the same is hereby, approved, ratified, and confirmed.' Said resolution, being seconded by Mr. Luning, was unanimously carried." Witness testified that he read from the records of the corporation, and that the claim referred to was the one in suit. Plaintiff then offered in evidence the said document and resolution, to which the defendant objected, on the ground that said document purports to convey an account against W. M. Buffum & Co., whereas this is an action against W. M. Buffum, and therefore does not prove the assignment of any account against the defendant in this suit. The objection was overruled, and the defendant excepted. Witness then testified that the goods were sold in Arizona, or in San Francisco, and shipped from the latter place; that they were sold and shipped to defendant by order. Witness produced one of the orders, which he said was a sample of the others; that payments were made by checks sent from Arizona to the company here. On cross-examination witness stated that he had charge of all the letters and orders of the company, and that everything was under his control. He further testified that all the goods were shipped direct from San Francisco by order of defendant. Plaintiff here rested, and defendant moved for a nonsuit on the grounds—*First*, that there had been no assignment to him proven by the plaintiff in this action of the claim of the California Powder Works, alleged in the complaint; *second*, that it had not been proven by the plaintiff that the goods sued on in the complaint were sold to the defendant at the city of San Francisco. The motion was denied, and the defendant excepted. Defendant then moved for a continuance of the trial, on the ground that he had not had an opportunity to prepare for the trial, and was therefore unable to produce any testimony. The motion was denied, and the defendant excepted. Defendant offered no testimony, whereupon the court rendered its decision and ordered judgment for plaintiff, and against defendant, as prayed in plaintiff's complaint. Defendant moved for a new trial, which was denied, and the appeal is from the judgments and the order denying the motion for a new trial.

In order to maintain his action, it was necessary for the plaintiff to allege an assignment to him by the California Powder Works of the claim sued on. And the denial of that allegation by the defendant cast the burden of proving it upon the plaintiff. This he attempted, and failed to do. The secretary of the company who executed the assignment on which plaintiff relies is not shown to have had any power to make it. The ratification of the board of directors was not given until after the commencement of the action,—too late to avail the plaintiff anything, as he could not recover for a cause of action accruing after he commenced his action.

We think the form of denial sufficient to raise an issue upon the allegation of the complaint as to the fact of assignment. It is a form authorized by the Code, and we think this a case in which it might properly be employed. This, in our opinion, constitutes the only error disclosed by the record. Judgment and order reversed.

We concur: MCFARLAND, J.; THORNTON, J.

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79 Cal. 130

CARR *v.* QUIGLEY. (No. 9,531.)

(*Supreme Court of California.* May 1, 1889.)

PUBLIC LANDS—MEXICAN GRANTS.

Act Cong. July 2, 1864, § 4, (13 U. S. St. at Large 358,) amended act July 1, 1862, by providing that the grant of land therein made to a railway company should not impair any homestead or other lawful claim, "nor include any government reservation" within such donation. Plaintiff acquired title under the patent issued pursuant to said act, and sued defendant for the possession of a part of the land. At the date of the act a Mexican grant included in the limits of such donation was *sub judice*, having been confirmed successively by the land commissioners and the supreme court of the United States, but its limits were not fixed by official survey until afterwards, and the land sued for was not within the boundaries as so fixed. *Held*, that the whole tract included within the exterior boundaries of the Mexican grant was a "government reservation," within the meaning of said act, and that the patent passed no title to the land in controversy. Following 57 Cal. 394, 16 Pac. Rep. 9, and Doolan v. Carr, 8 Sup. Ct. Rep. 1228. PATERSON, J., dissenting.

In bank. Appeal from superior court, Alameda county; A. M. CRANE, Judge.

On rehearing. Former opinion 16 Pac. Rep. 9. Action by W. B. Carr against John Quigley, for the recovery of certain land. The United States government, by acts Cong. July 1, 1862, (12 U. S. St. at Large, 489,) and July 2, 1864, (13 U. S. St. at Large, 358,) granted to the Western Pacific Railroad Company certain lands, of which that sued for is claimed to be part. The latter act provided specially, in section 4, that neither it, nor the former act to which it was an amendment, should impair any homestead or other lawful claim, or "include any government reservation," within the limits of the grant. The Western Pacific Railroad Company became consolidated with the Central Pacific, which obtained a patent for the land in question, February 28, 1874; the patent recited the exception of reserved lands from the operation of the acts. The Central Pacific Railroad Company conveyed to the plaintiff. A trial was had, and judgment rendered for plaintiff. The defendant offered to prove that the land sued for was included in the Mexican grant Las Pocitas at the time the land included in the railroad grant was withdrawn from entry, etc.; that the Las Pocitas tract was then *sub judice*, and that the limits were not definitely fixed at that time; and that hence the patent was unauthorized and void as to any land included therein. This evidence was rejected, but on appeal the supreme court reversed the judgment, holding that the land sued for, if within the limits of said grant, was "a government reservation," within the meaning of the act of July 2, 1864, and hence did not pass by the patent. 57 Cal. 394. A new trial was granted, at which it appeared that the land in controversy was included in the exterior limits of said grant as confirmed by the land commissioners, as provided by the various acts of congress, and that their decision was affirmed by the district and supreme courts of the United States. It also appeared that no final survey was made and approved, so as to definitely fix the rights of the claimants of the grant until 1871, and that the land sued for was not embraced in the tract as finally surveyed. Judgment was rendered for the defendant, and plaintiff appeals.

Shafter, Parker & Waterman, for appellant. *Michael Mullany*, for respondent.

THORNTON, J. We regard the contention of appellant, Carr, in this case as settled by the decision of the supreme court of the United States in Doolan v. Carr, 125 U. S. 618, 8 Sup. Ct. Rep. 1228, and by the decisions of this court made prior to the judgment in Doolan v. Carr, viz. Carr v. Quigley, 57 Cal. 394, and McLaughlin v. Head, 63 Cal. 208. The same points were presented in Doolan v. Carr that are presented in this case and with reference to the same Mexican grant of Las Pocitas. The only difference is that in Doolan v. Carr the points arose and were presented on an offer of testimony, and here they arise on the proof of the facts which Doolan offered to prove in his suit against Carr. In our judgment there is no error in the record, and the judgment and order must be affirmed. So ordered.

We concur. SHARPSTEIN, J.; MCFARLAND, J.; WORKS, J.

BEATTY, C. J., (*concurring.*) I concur in the judgment of affirmance upon the sole ground that what is here decided has become, by virtue of the decision on the former appeal, (57 Cal. 394,) so far as this court is concerned, the law of the case.

PATERSON, J., (*dissenting.*) Doolan v. Carr, cited by Mr. Justice THORNTON, seems upon its face to be decisive of this case, and, were it not for other and more recent decisions of the national courts, I should entertain no doubt that the contention of appellant herein had been settled by the decision in the first case above named. In U. S. v. McLaughlin, 127 U. S. 428, 8 Sup. Ct. Rep. 1177, the supreme court of the United States considered the different kinds of Mexican grants, and reviewed at length the case of Newhall v. Sanger, 92 U. S. 761, and Railroad Co. v. U. S., Id. 733, upon which Doolan v. Carr was largely based. The court there held that "grants of quantity, as of one or more leagues within a larger tract, described by what are called 'outside boundaries,' are 'floats,' to be located by the consent of the government before they can attach to any specific land, like the land-warrants of the United States, and that in the case of floating grants it was only 'the quantity actually granted which was reserved during the examination of the validity of the grant;' the remainder was at the disposal of the government as a part of the public domain. If within the boundaries of a land-grant made in aid of a railroad, such land grant would take effect, except as to the quantity of land or float actually granted in the Mexican grant. If that quantity lying together was left to satisfy the grant, the railroad company would be entitled to patents for the odd sections of the remainder. * * * The government (Mexican) retained the right of locating the quantity granted in such part of the larger tract described as was fit, and the government of the United States succeeded to the same right; hence the government might dispose of any specific tracts within the exterior limits of the grant, leaving a sufficient quantity to satisfy the float. * * * There is really nothing in the decision of Newhall v. Sanger in conflict with the views here expressed, because the court did not have before it the case of a floating grant."

It seems to me that Las Pocitas must be regarded as a "float," within the meaning of that term as used in the decisions. The grant by the Mexican government to Livermore was of a certain tract of land known by the name of "Las Pocitas," designated and described as follows: "Bounded on the north by the Lomas de las Cuevas; on the east by the Sierra de Buenos Ayres; on the south by the dividing line of the establishment of San José; and on the west by the rancho of Don José Dolores Pacheco,—containing in all two square leagues, a little more or less, provided that the quantity be contained within the said boundaries; and, if less than that quantity be found to be contained therein, then that less quantity and all of said described tract of land." In an official letter to the register and receiver of the San Francisco land-office, dated May 3, 1873, Hon. Willis Drummond, commissioner of the United States land-office, referring to the description of land in the grant, says: "This grant recites that 'whereas, Don José Noriega and Robert Livermore have petitioned for their own benefit, and that of their families, the place known by the name of "Las Pocitas," which is in the Willow Grove de la Agua, so far as the mountain range of Buenos Ayres and the hills of Las Cuevas,' I have thought proper to grant them said place. The land of which donation is made is of two leagues, a little more or less, as the *diseno*, annexed to the proceedings with its respective limits, explains. The judge who shall give possession will give the same to be measured agreeably to ordinance in marking the boundaries, leaving the excess which might result to the nation for such uses as may be deemed convenient." "The grant, being a part of the Mexican archives, is a public document," of which we take notice. Byrne v. Alas, 74 Cal. 637, 16 Pac. Rep. 523.

The grant has always been treated as a float. It was so considered by Livermore himself, the donee. It has been so treated by the land-officers, by the courts, and by all persons interested in a determination of its location and boundaries. It has never been contended by any one, as I understand it, that the grant was for all the land contained within the natural "outside boundaries" of the *diseno* mentioned in the grant. The land in controversy is within the outside boundaries, but is not included in the tract finally set off, patented to, and accepted by the donees named in the grant. It is therefore the same in character as that which was under consideration in U. S. v. McLaughlin, supra. Counsel for respondent contends that the only question before the court in U. S. v. McLaughlin was as to the eastern boundary line of the grant. In this I think he is mistaken. After finding that the grant did not extend east of the Jack Tone road, or the edge of the hills commencing near the same, the court said: "This result would dispose of the present case with regard to nearly all the land in question therein, but as some of it lies west of said road in range 7, and as the railroad land grant extends to the west of said road, it will be necessary to examine the other question referred to, namely: If the lands in controversy did lie within the exterior limits of the Moquelamos grant, and if the title of the railroad company did accrue while that grant was under consideration in the courts, did those facts prevent the railroad land grant from taking effect?" And the court there decided that in the case of floating grants "it was only the quantity actually granted which was reserved during the examination of the validity of the grant; the remainder was at the disposal of the government as part of the public domain;" that, if there was left sufficient to satisfy the grant, "the railroad company would be entitled to patents for the odd sections of the remainder;" that, "if the government has the right to say where it (the grant) shall be located, it certainly has the right to say where it shall not be located, and, if it sells land to a third person at a place within the general territory of the original grant, it is equivalent to saying that the quantity due to the original grantee is not to be located there. In other words, if the territory comprehended in the outside limits and bounds of a Mexican grant contains eighty leagues, and the quantity granted is only ten leagues, the government may dispose of seventy leagues without doing any wrong to the original grantee."

The case before us is one which may, and probably will, go to the supreme court of the United States. Therefore the decision of that court is binding and conclusive upon us on the questions which have been decided by it. I am led to the conclusion that the supreme court of the United States, when this case is presented to it as fully as it is presented here,—that is, upon the evidence, and not upon a broad and sweeping offer, as was the case of Doolan v. Carr,—will hold that the Las Pocitas is a "float," by a decision of the circuit court of the United States for the Northern district of California, in U. S. v. Curtner, 38 Fed. Rep. 1, (decided February 4, 1889.) In that case it was held that the Las Pocitas was a "float;" that "the railroad company, by the acts of 1862 and 1864, had a valid grant to every odd section of land within twenty miles on each side of the road, and within the exterior bounds of the Las Pocitas grant, not embraced within the two leagues, as it was finally located," and not reserved, etc.; that the decision in Newhall v. Sanger has been materially limited in its operation by the recent decision in U. S. v. McLaughlin. In this decision of the circuit court Mr. Justice FIELD, who participated and acquiesced in the decisions in Doolan v. Carr and U. S. v. McLaughlin, concurred. It seems to me quite clear either that the record in Doolan v. Carr was not such as to indicate the true character of the Las Pocitas grant,—that the offer of proof made therein was too broad to present the question whether the grant was in fact a float,—or that that question was overlooked, or not presented for the consideration of the court therein. In view of the decisions of the national courts in U. S. v. McLaughlin and U. S. v. Curtner, supra, I do not think that the decision of this cause on the former appeal can be regarded as the "law of the case." It is useless to apply a rule of decision which will not be regarded by the higher tribunal. Belcher v. Chambers, 53 Cal. 635. I think therefore that the judgment and order should be reversed.

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79 Cal. 103

PACIFIC COAST RY. CO. *v.* SUPERIOR COURT OF SAN LUIS OBISPO CO. (No. 13,226.)

(*Supreme Court of California.* May 1, 1889.)

APPEAL—NOTICE—SERVICE.

Code Civil Proc. Cal. § 974, providing that a notice of appeal from a justice to a superior court shall be served on the adverse party, is complied with by service on the manager of a corporation, for the corporation itself, as such notice is analogous to a summons which, under section 411, may be served on the managing agent of a corporation, the terms "manager" and "managing agent" being synonymous.

In bank. Petition for writ of *certiorari*.
E. P. Cole, for petitioner.

BEATTY, C. J. The only question presented by the petition herein is whether the superior court had jurisdiction on appeal from a justice's court to hear and determine a case in which petitioner was defendant and respondent; and this depends upon the question whether in that case the notice of appeal was served on the petitioner. The petitioner is a corporation, and in the action referred to was represented in the justice's court by an attorney at law, a resident f the county-seat of San Luis Obispo, but the plaintiffs, instead of serving their notice of appeal on said attorney, served it on the "manager" of petitioner. The statute provides (Code Civil Proc. § 940) in case of appeals to this court that the notice of appeal shall be served by the party appealing on the adverse party or his attorney. In case of appeals from justices' courts to the superior court it is provided (Id. § 974) that the notice of appeal shall be served on the adverse party, no mention being made of an attorney. It might be contended, on a very strict construction of the law, that service on an attorney would not give jurisdiction, and it may be that in this case the plaintiffs served their notice on the party, rather than on the attorney, in order to be on the safe side. Certainly, we think, a safe course was pursued. Service on the adverse party is unquestionably sufficient in any case, and there can be no doubt that the superior court had jurisdiction of the appeal here, unless it should be argued that in case of a corporation there can be no service except upon its attorney. But the statute providing for service of summons upon corporations allows the service to be made on "the president or other head of the corporation, secretary, cashier or managing agent thereof." Id. § 411, subd. 1. Notice of appeal is strictly analogous to summons, and performs the same function. It is the process for bringing the adverse party before the court; and it must be held that service of such notice on a corporation can be made in the same manner as a summons is served. If it be claimed that, though the statute allows service on a "managing agent," it does not authorize service on the manager of a corporation, we answer that "manager" means "managing agent," and can mean nothing else. Writ denied.

We concur· MCFARLAND, J.; THORNTON, J.; SHARPSTEIN, J

79 Cal. 115

RANDALL *v.* DUFF *et al.* (No. 11,343.)

(*Supreme Court of California.* May 1, 1889.)

MORTGAGES—FORECLOSURE—REDEMPTION.

1. An innocent mortgagee of land fraudulently conveyed to his mortgagor by an attorney in fact of the owner, must take notice of a suit brought by the latter's heirs against the fraudulent grantee to declare the latter a trustee for their benefit, a *lis pendens* notice having been filed pursuant to Code Civil Proc. Cal. § 409, before the commencement of an action to foreclose. Following 19 Pac. Rep. 532.

2. Under Civil Code Cal. § 2903, providing that any one having an interest in property subject to a lien may redeem before his right to do so is foreclosed, and Code Civil Proc. § 379, allowing any one to be made a party defendant to an action, who claims an interest in the controversy adverse to that of plaintiff, or who is necessary to a complete determination of the question therein involved, said heirs are not barred from redeeming by a foreclosure sale in an action to which they were not parties, brought by such mortgagee after the filing of the *lis pendens.* Following 19 Pac. Rep. 532.

In bank. On rehearing. Former opinion, 19 Pac. Rep. 532.

Wilson & Wilson and *J. D. H. Chamberlain*, for appellants. *Horace L. Smith, E. W. McKinstry*, and *S. M. Buck*, for respondent.

BEATTY, C. J. A rehearing was granted in this case after a decision by the court in bank reversing the judgment and order of the superior court. The opinion of Mr. Commissioner HAYNE, upon which our decision was based, is reported in 19 Pac. Rep. 532. With the exception that it does not show distinctly the fact that the action of Duff v. Duff was commenced and notice thereof filed prior to the commencement of either of the foreclosure suits, under which respondent is a purchaser, that opinion contains a full and accurate statement of the facts out of which the controversy arises, and we refer to it for a statement of the case presented by the record before us.

For the purpose of such further discussion of the propositions advanced in the petition for, and argument upon, the rehearing, as we deem necessary, the matter may be simplified by stating the case in its essential form; that is to say, divested of the complicated and confusing details arising out of changes of interest among the parties to the transaction and their successors, the different parcels of land, mortgages, etc. So stated, the case is this: William Duff gives his father a power of attorney to sell and convey his land, which is recorded. His father fraudulently and without any consideration conveys the land by deed, reciting a valuable consideration, to Robert Duff. Robert records his deed, and thereupon mortgages the land to Ritchie to secure money advanced by him in good faith under the belief that the title is, as it appears to be, in Robert. William Duff thereupon commences an action against Robert to have him declared a trustee, and to compel a reconveyance, and at the same time files notice of *lis pendens.* After the commencement of this action, and after notice of *lis pendens* filed, Ritchie commences his action to foreclose his mortgage, making Robert alone a party, and entirely ignoring William, the real owner of the estate mortgaged. Decree of foreclosure follows, and sale and conveyance of the mortgaged premises to Randall, who (the action of William against Robert still pending) commences this action against William to quiet his title. William, by cross-bill, sets up all the facts, as here stated, and prays affirmative relief. The question is whether, upon findings showing this state of facts, Randall is entitled to a decree cutting off the right of William Duff to redeem the land. We held in our former opinion, and we still think, after the fullest consideration of the arguments advanced on the rehearing, that such decree was erroneous. In substance, our decision was that, as between William and Robert Duff, the title to the land remained in William, but that as to Richie, the innocent mortgagee, he acquired, by estoppel, and not otherwise, a valid lien upon William Duff's estate in the land, and thereby became entitled to the same protection as if the land had been in fact, as it was in appearance, the property of Robert Duff. But we held that the suit of William against Robert to establish and enforce the trust, and the filing of notice of *lis pendens* therein before foreclosure by Ritchie, entitled William Duff to be made a party to the foreclosure suit, and that his right to redeem could not otherwise be barred. Upon rehearing, counsel for respondent very earnestly combated these propositions, contending that they are not only contrary to law, but to natural justice and equity; that they work a grave hardship and injustice to the respondent here, and establish a rule which will seriously impair the value of mortgage securities. We think that no part of this contention is sustained.

Nothing that we have said implies that a *bona fide* mortgagee is not as fully entitled as a *bona fide* purchaser to the protection of the principle upon which our recording acts are based, but we do not think anything is gained to the argument by calling a "mortgagee" a "purchaser." Admitting that he is a purchaser, he is a purchaser *pro tanto* only. What he bargains for and pays for he gets, and that is a lien merely,—a right to subject the mortgaged premises to sale in order that he may be paid his debt out of the proceeds. But this right he has upon condition that he shall proceed by action to foreclose against all parties having an interest in the mortgaged estate subject to the lien whose right of redemption he wishes to cut off. No one thinks of denying that a subsequent grantee or incumbrancer of the mortgaged premises, whose conveyance is recorded, must be made a party to the foreclosure suit in order to bar his right of redemption. Nor does any one at this day assail the justice or the expediency of the law which secures to him the opportunity of contesting the validity and extent of the prior lien, and of having his right established in the surplus proceeds of the sale. But the mortgagee is in just as full a sense a purchaser as to subsequent grantees and incumbrancers as he is with respect to a person having a prior, undisclosed interest in the estate mortgaged; and it would be just as fair to argue that it is unjust to require a *bona fide* mortgagee to make a subsequent purchaser, by recorded conveyance, a party defendant to his foreclosure suit, as it is to say that it is unjust to compel him, after notice of the true state of the title, to make a party of the real owner of the estate upon which he has secured a lien by estoppel, merely because such owner has for a time, without any fault or intended wrong, allowed the property to stand in the name of the fraudulent mortgagor. There is no greater hardship, no heavier burden, cast upon the mortgagees in one case than in the other. And how it can be claimed that the security of the mortgagee is impaired in one case, and not in the other, by giving the known owner of the mortgaged estate an opportunity to be heard in the action and to redeem from the sale, or to receive the surplus of the proceeds, is something that we have utterly failed to comprehend. On the other hand we can see very clearly how the grossest injustice may be done in many cases, and must be done in this case, if the law were as respondent contends it is. Suppose a case by way of example: A. has an estate worth $10,000. He borrows of B. $1,000, and to secure the debt gives B. a conveyance in form absolute, receiving back a separate defeasance. B. records his deed. A. fails to record his defeasance. B. thereupon borrows $5,000 from C., who *bona fide* receives and records a mortgage of the estate. A. subsequently records his defeasance, and gives C. actual notice of the true nature of the transaction between him and B. before the debt to C. becomes due. Upon the reasoning of counsel for respondent, such notice to C., actual and constructive, does A. no manner of good. C. is a *bona fide* purchaser. He has got a lien on A.'s estate, but A. has no right to be made a defendant in foreclosure, no right to redeem, no right to the surplus proceeds of the sale, or what is the same thing, no means of enforcing such right. B., of course, has no interest in questioning the amount of C.'s claim, or the extent of his lien, no interest in redeeming from sale an estate which confessedly he must yield up to A.; and, if he receives any surplus from the sale, A. has no means of enforcing a claim to it. Certainly such a result is neither equitable nor reasonable, but, on the contrary, is absurd and gratuitously unjust. No principle of equity, no consideration of public policy, sanctions such a result; and if it be the best that the courts of California can attain in view of the positive provisions of the Codes, it must be admitted to be a serious reproach upon our legislation. Happily, in our opinion, our laws are subject to no such imputation. By section 2903 of the Civil Code it is provided that "every person having an interest in property subject to a lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed." By section 379 of the Code of Civil Procedure it is provided that "any person may be made a defendant who has or claims an interest in the controversy adverse to the plaintiff, or who is a necessary party to a complete determination or settlement of the question involved therein."

Now, can it be denied that in the case before us William Duff, or, in the case supposed, A., has an interest in the property, (and in the identical title and estate) subject to the lien? And, if not, how can it be denied that he has a right to redeem up to the time such right is foreclosed? And how can it be foreclosed except by an action to which he is a party? It seems clear to us that in these provisions of the Codes the "innocent mortgagee" is plainly told that the true owner of the estate subject to his mortgage may be made a party to his action to foreclose, and that, in order to bar his right to redeem, he must be made a party Of course the literal effect of these provisions is, to some extent, limited and controlled by other sections of the Codes, and by other legal principles. By a clause of section 726, Code Civil Proc., the claims of subsequent grantees, etc., may be disregarded if they fail to record their conveyances; but this exception does not apply to William Duff, because he is not of the class defined. He does not hold any conveyance under the mortgagor; it is his estate that is mortgaged by the fraud of another. If this were the only exception to the rule preserving to all parties interested in the estate mortgaged a right to redeem until the right is foreclosed, it would seem to follow that the right of William Duff to redeem his estate would have been kept alive notwithstanding a foreclosure by Ritchie, without notice, actual or constructive, of his right. But there is another exception to the rule, or, rather, the rule is subject to the operation of the principle of estoppel; and, if Ritchie had foreclosed without notice of William Duff's interest in the mortgaged estate, the foreclosure would have cut off his right of redemption for precisely the same reason that the mortgage subjected his estate to a lien,—for the reason, that is to say, that no man can be allowed to mislead another to his injury. But Ritchie did have notice of William Duff's rights before he commenced his action to foreclose. The action of Duff v. Duff had been commenced, and notice of *lis pendens* filed. This was constructive and sufficient notice to Ritchie and to the respondent of his rights in the property affected. Code Civil Proc. 409. Ritchie was an incumbrancer, and Randall was a subsequent purchaser of the estate or property affected; and Ritchie, in commencing his action to foreclose, was taking a step towards the purchase of the estate then remaining in William Duff, and he was therefore bound to make him a party if he desired to cut off his right of redemption.

After all that has been said here and in the opinion of Commissioner HAYNE, it seems almost superfluous to refer explicitly to the point urged by respondent originally and upon the rehearing: that William Duff could not be a party to Ritchie's suit to foreclose, because he claims the mortgaged estate by a title paramount and hostile to the title of the mortgagor. The doctrine upon which this objection is based is stated in section 1440 of Jones on Mortgages, and it applies, as will be seen, only where the title of the defendant is paramount to the claim of both mortgagor and mortgagee. Here the title of William Duff, although in a certain sense paramount and adverse to that of Robert Duff, the nominal mortgagor, is not paramount to the claim of the mortgagee, but, on the contrary, is clearly subject to the lien of the mortgage. Instead of having no interest in the suit, (which is the only reason the holder of an adverse title is held to be not a proper party to an action to foreclose,) he is as directly and vitally interested as if he himself had with his own hand, and in his own name, executed the mortgage to Ritchie; for, as the case is, it is just as true as it would have been in the case supposed that it is his estate and title that is mortgaged.

In closing we call attention again to the fact that for convenience and brevity, we have omitted mentioning some of the actual parties to the transactions herein referred to, and that what we have said of William Duff is to be understood as applying to his successors, the plaintiffs in Duff v. Duff, and the appellants here; and that what is said of Ritchie applies also to Fiebig, the other mortgagee. We adhere to the conclusion reached in our former opinion, and, upon the grounds therein and here stated it is ordered that the judgment and order appealed from be reversed, and the cause remanded.

We concur: SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

(79 Cal. 200)

LORING v. STUART. (No. 12,881.)

(*Supreme Court of California.* May 18, 1889.)

HUSBAND AND WIFE—SEPARATE ESTATE.

1. Where a husband leaves his wife on account of domestic infelicity, and during his absence determines never to resume marital relations with her, but to provide for his family when necessary, and the wife and children live together, supported by her exertions, this is a separate living, within the meaning of Civil Code Cal. § 169, providing that the wife's earnings, "while she is living separate from her husband," are her separate property.

2. Real property, purchased by a married woman in her own name, partly with her separate funds, and partly with money borrowed by her for that purpose, becomes in part her separate estate, and in part community property; and where she gives a mortgage on the whole tract, whatever

separate interest she has may be foreclosed, and it is not for her to object that the decree directs the sale of the whole tract.

3. When a motion for a nonsuit states no grounds therefor, it is not error to overrule it.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. Myres, Judge.

J. M. Fulweiler, for appellant. *Wallace & Prewitt* and *Grove L. Johnson*, for respondent.

Belcher, C. C. Action to foreclose a mortgage. Defense, that the defendant was a married woman when she executed the mortgage, and that the mortgaged property was community property, and the mortgage therefore void. The court found that at the date of the mortgage, and for more than ten years prior thereto, defendant was the wife of one Robert Stuart, but that she and her husband had lived separate and apart from each other for nearly two years, and that the mortgaged premises were the earnings of defendant while so living separate from her husband, and were her separate property. Judgment was entered foreclosing the mortgage, and from that judgment and an order denying her a new trial defendant appealed. The only points made for a reversal are that the court erred in not granting a nonsuit, and that the findings as to the defendant's living separate from her husband, and as to the mortgaged property being the earnings of defendant while so living, were not justified by the evidence.

1. It does not appear from the record that any grounds for the nonsuit were stated, and for that reason the first point cannot be sustained. It has long been settled that when a motion is made for a nonsuit, without stating the grounds upon which it is made, it is not error to overrule the motion. Kiler v. Kimbal, 10 Cal. 268; People v. Banvard, 27 Cal. 470; Sanchez v. Neary, 41 Cal. 485.

2. There was testimony tending to show that the defendant had been living separate from her husband for nearly five years when the case was tried. It appeared that the parties were living together in Rocklin, Placer county, in April, 1883; that in that month he went away to Forest City, in Sierra county, and had ever since resided there; that she continued to live in Rocklin, and had kept boarders, and done other work to support herself and children; that she had never visited him nor he her, though he had twice passed through Rocklin; that he had written several letters to her and the children, and had three or four times sent small sums of money to the children. He testified: "The immediate cause of my leaving Rocklin was domestic infelicity, and such infelicity has not been healed by reconciliation. I do not intend to resume intimate marital relations with my wife, but my intentions in that regard did not exist on the 1st of January, 1885. It is only within the past six months that I fully determined in my own mind not to resume intimate marital relations with my wife again, but I have never ceased, nor do I intend to cease, performing my obligations to my family, while I have strength to do so. I left my wife, and did not inform her when, if ever, I would return, and did not acquaint my wife about my future intentions as to living with her." We think this shows a "separate" living within the meaning of section 169 of the Civil Code,[1] and that the judgment cannot be reversed on this ground.

3. The defendant testified that in September, 1884, she made a contract to purchase the mortgaged premises for $300, and that she paid the purchase price, and took a deed for the property in her own name on the 9th of January, 1885; that she borrowed $225 of the purchase money, and made the balance by keeping boarders; that she executed the note and mortgage in suit to secure payment of the $225 borrowed and other money owing by her to the mortgagee. Now, conceding that the borrowed money was community property, still it appears that a part of the purchase money was the defendant's earnings, and her separate estate. In Schuyler v. Broughton, 70 Cal. 282, 11 Pac. Rep. 719, it was held that real property purchased by a married woman in her own name, partly with money belonging to her separate funds, and partly with money borrowed by her for that purpose, becomes in part the separate property of the wife, and in part community property. In such a case, it was said, the wife becomes a tenant in common of the land with her husband in the proportion that the separate funds paid by her bear to the whole purchase price. Under this rule defendant owned at least a part of the mortgaged premises and had a right to execute the mortgage. This being so, whatever separate interest defendant has in the property may be sold under the decree of foreclosure, and it does not lie in her mouth to object that the decree directs the sale of the whole property, and is therefore too broad. We find no errors in the record, and advise that the judgment and order be affirmed.

We concur: Foote, C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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79 Cal. 173

Brooks *v.* Fischer. (No. 13,134.)

(*Supreme Court of California.* May 17, 1889.)

Municipal Corporations—Charters.

1. Const. Cal. art. 11, § 8, relating to the adoption of city charters, provides that the charter shall "be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment, and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city." *Held*, that it is

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[1] Sec. 169. The earnings and accumulations of the wife, and of her minor children living with her or in her custody, while she is living separate from her husband, are the separate property of the wife.

not necessary that the resolution of approval be in the form of a bill passed in the ordinary manner, and approved by the governor. The constitution (article 4, § 1) does not make the governor a part of the legislature.

2. Under the constitutional provision that city charters must be "consistent with and subject to the constitution and laws of this state," a charter will not be held invalid *in toto* because a few of its provisions may conflict with general statutes.

In bank. Petition for writ of prohibition.

W. T. Baggett and *J. Marion Brooks*, *pro se*, for petitioner. *Chas. McFarland*, *Chapman & Hendrick*, and *Haynes & Mitchell*, for respondent. *S. D. Woods*, *amicus curiæ*.

WORKS, J. This is a petition for a writ of prohibition to prevent the defendant from proceeding to act as assessor of the city of Los Angeles. The petition alleges, among other things: "(1) That on the 20th day of October, 1888, the qualified electors of said city ratified a charter for the government of said city, framed as provided by section 8, art. 11, of the constitution of the state of California, and thereafter, to-wit, on the —— day of ——, 1889, a resolution was introduced in the senate of the state of California (the legislature being then in session) entitled 'Senate Joint Resolution No. 2,' purporting to be a resolution approving the aforesaid charter; that a majority of the members elected to the senate, and a majority of the members elected to the assembly, voted in favor of said resolution on the 23d day of January, 1889. (2) Said charter was never submitted to the legislature of the state of California for its approval or rejection, as provided by section 8, art. 11, of the constitution; that neither the said resolution nor the said charter was ever read on three several days in each house, nor was either declared a case of urgency; that neither said resolution nor said charter was ever presented to the governor of the state of California for his approval or rejection, nor were they or either of them signed or approved by said governor. (3) That the powers and duties of the city assessor, in relation to the assessment of property prescribed by the laws existing prior to the framing of the aforesaid charter, were other than, and essentially different from, the powers and duties provided in said aforesaid charter. (4) That notwithstanding that said charter has never been submitted to the legislature for its approval or rejection, and never presented to, and signed and approved by, the governor, the said defendant, as city assessor, without, and in excess of, the duties and powers conferred by prior laws, threatens, and is now proceeding, to assess all taxable property in said city, according to and by virtue of the provisions of said charter, and not otherwise, and particularly the property of your petitioner, notwithstanding his attention has been called to excess of jurisdiction." The prayer of the petition "is for an alternative writ of prohibition, commanding the defendant to refrain from further proceedings in the matter specified herein until the further order of the court, and to show cause before this court, at a time and place specified in the writ, why he should not be absolutely restrained from any further proceedings in said matter."

It will be seen by the allegations of the petition that the sole question presented is as to the validity of the charter of the city of Los Angeles. Two objections are made to the charter: (1) That it was not legally adopted; (2) that it is inconsistent with the general laws.

1. It is conceded that the charter was adopted by the legislature by a joint resolution passed by a majority of the members elected to both houses of the legislature, and it is claimed on the part of the petitioner that this is not sufficient, but that it must have been adopted by a bill, passed after the necessary readings provided for in the enactment of a law, and approved by the governor. The constitution, so far as it relates to the action of the legislature, provides that the charter shall "be submitted to the legislature for its approval or rejection as a whole, without power of alteration or amendment, and, if approved by a majority vote of the members elected to each house, it shall become the charter of such city." Const. art. 11, § 8. It is contended by the petitioner that the term "legislature," as here used, means the law-making power, and includes the governor; and incidentally it is contended that, so far as the enactment of laws is concerned, the governor is a part of the legislature. The language of the constitution referred to is peculiar. It provides—*First*, for submission to the legislature for its approval or rejection; *second*, that if approved by a majority vote of the members elected to each house, it shall become the charter of said city. This does not, in terms, require any action on the part of the governor, but expressly provides that immediately upon its being approved by a majority of the members of the two houses of the legislature, it shall become the charter of the city. The governor is not, in fact, a part of the legislature. The constitution provides: "The legislative power of this state shall be vested in a senate and assembly, which shall be designated 'the legislature of the state of California.'" Id. art 4, § 1. It will be seen, therefore, that the legislature is one thing, and the law-making power of the state another. It does not follow that because in other parts of the constitution, as contended by counsel for the petitioner, the term "legislature," so far as it applies to the enactment of laws, includes the governor as a part of the law-making power; that such is the effect of the language above quoted with reference to the adoption of city charters. The language of the section itself clearly shows a different intention. It provides for the submission to the legislature, which does not necessarily include the governor, and provides in express terms that the proposed charter shall become effective upon its being approved by the members of that

body. It seems to us that this language is so plain and unequivocal that it cannot call for a construction by this court. It is enough that the constitution has so provided. This being the effect of the constitution, it seems to us to be wholly immaterial whether the charter was approved by the legislature by a bill in the regular form, or by way of a joint resolution. Its approval was clearly indicated, as is conceded by the petitioner, and this, it seems to us, was enough.

2. The further objection is that the charter, if properly adopted, must be held to be invalid for the reason that it is in conflict with the general laws of the state. Under the provisions of the constitution the charter to be framed for a city government must be "consistent with and subject to the constitution and laws of this state." It is contended by the petitioner that certain provisions of the charter are inconsistent with existing general laws, and particularly that it is in conflict with the general law with reference to the improvement of streets. It may be that certain of its provisions are inconsistent with present laws, and that so far it cannot be effective as against such laws, but this is a matter that it is unnecessary for us to determine. It is enough to say that the whole charter cannot be held to be invalid because of the fact that a few of its provisions may conflict with general statutes now in force. For these reasons we are of the opinion that the petition should be denied, and it is so ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.; MCFARLAND, J.; PATERSON, J.

In re STRAND. (No. 20,539.)

(*Supreme Court of California.* May 17, 1889.)

In bank.

W. T. Baggett and *J. Marion Brooks*, for petitioner. *Charles McFarland*, for respondent.

PER CURIAM. This is an application for a writ of *habeas corpus*, and presents the same questions decided in Brooks v. Fischer, ante, 652, (opinion filed May 17, 1889.) On the authority of that case the writ is denied.

BARRY *v.* MURPHY *et al.* (No. 11,754.)

(*Supreme Court of California.* April 24, 1889.)

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

W. H. Webb and *Jas. A. Wall*, for appellant. *N. A. Dorn* and *W M. R. Parker*, for respondents.

THORNTON, J. The determination of this suit turns on the proper location of the point called the "Bolsita," mentioned in the deed executed by Juan B. Castro to the plaintiff. The court below in its findings fixed it a point 61.50 chains west of the end of the first course in the deed above mentioned, with a course north 72 deg. west. Upon an examination of the testimony we are convinced that the court found the point correctly, and properly rendered judgment for defendant. Judgment and order affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

(79 Cal. 178)

PEOPLE *v.* OREILEUS. (No. 20,499.)

(*Supreme Court of California.* May 18, 1889.)

FORMER JEOPARDY—CONSTITUTIONAL LAW.

1. Pen. Code Cal. § 1021, provides that, if the defendant was formerly acquitted on the ground of variance between the indictment or information and the proof, it is not an acquittal of the same offense. Section 1165 provides that, if there be an acquittal for such variance as may be obviated by a new information, the court may detain the prisoner till such information is preferred. Defendant was charged with felonious assault, and the proof showed an assault on a person having an entirely different name from the one alleged in the indictment, and who had never been known by the alleged name, and a verdict of not guilty was ordered, and a new information preferred. *Held*, that defendant has not been once in jeopardy, notwithstanding section 956, providing that, where an offense involving the commission of a private injury is in other respects sufficiently described to identify the act, an erroneous allegation as to the person injured is not material.

2. Sections 1021 and 1165 are not in violation of the constitutional provision that "no person shall be twice put in jeopardy for the same offense."

In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

J. E. Jarrett, for appellant. *Geo. A. Johnson*, Atty Gen., for the People.

McFARLAND, J. The information charges the defendant with, and he was convicted of, an assault with a deadly weapon upon the person of one Trinidad Sanchez. He appeals from the judgment, and from an order denying him a new trial. In addition to the plea of "not guilty" appellant also pleaded a "former acquittal" and "once in jeopardy," and upon these two last-named pleas the jury, under the instructions of the court, found "for the people." Upon these pleas, and the verdict thereon, the only point made by appellant arises. It appears that a former information had been filed against appellant, charging him with an assault with a deadly weapon upon one Fernida Lunies at the time and place alleged in the second information. Upon his trial on the first information it appeared that the assault was committed on Trinidad Sanchez, and it did not appear that the latter was ever known or called by the name of Fernida Lunies, or by any other name than Trinidad Sanchez. When the prosecution rested, "upon motion of defendant's counsel, and under instructions of the court, the jury rendered the appended verdict: 'We, the jury, find the defendant not guilty by reason of a variance between the information and the proof.'" Thereupon the court ordered that the defendant be detained in custody, to the end that a new information or indictment might be preferred against him. Under this state of facts appellant contends that the verdict at the second trial, on the special pleas, should have been "for the defendant." Section 1021 of the Penal Code provides that "if the defendant was formerly acquitted on the ground of variance between the indictment or information and the proof, * * * it is not an acquittal of the same offense." And section 1165 provides that if there be an acquittal for such variance, which may be obviated by a new information, the court may order the detention of the defendant in order that such new information may be preferred. The main argument of appellant is that the variance which subjects a defendant to a second trial must be material, and that in the case at bar it was not material. But waiving the question whether appellant, after having procured a verdict of not guilty by reason of a variance, can be heard to say that the variance was not material, the point must be decided against him upon authority. Where there is a slight mistake in the spelling of the name of the injured person, or where such person is known by two or more names, or, perhaps, where the name in the indictment and the name proved are so similar in sound that the rule of *idem sonans* would apply, in such cases the variance would not probably be held to be fatal to the conviction. People v. Leong Quong, 60 Cal. 107; People v. Leong Sing, 19 Pac. Rep. 254; People v. Cummings, 57 Cal. 88. But we have not been referred to any case where a defendant charged in an indictment with having committed a felonious assault upon a certain named person has been held to have been properly convicted upon proof showing an assault on a person having an entirely different name from the one stated in the indictment, and where he had never been known by the alleged name, or had any association with it whatever. And the question was definitely settled by this court in People v. McNealy, 17 Cal. 333, and People v. Allen, 61 Cal. 140, against the contention of appellant. We are aware of the provision of section 956, Pen. Code, to the effect that where an offense, involving the commission of a private injury, is described with sufficient certainty in other respects to identify the act, an erroneous allegation "as to the person injured" is not material. But that provision was specially called to the attention of this court, and commented on, in People v. McNealy, supra. It is, perhaps, not impossible to describe an assault with sufficient certainty, although the name of the person assaulted be not given; but in the case at bar, as in the McNealy Case, there was no such "sufficient certainty." Really, the most important underlying question in the case (not discussed by counsel) is whether the provisions of sections 1021 and 1165, above referred to, are in violation of the provision of the constitution that "no person shall be twice put in jeopardy for the same offense." But they were held in People v. McNealy, supra, not to be in conflict with the constitution. Judgment and order affirmed

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J

(3 Cal. Unrep. 85)

BRYAN *v.* TORMEY. (No. 11,873.)[1]

(*Supreme Court of California.* May 20, 1889.)

QUIETING TITLE—PRESUMPTIONS—BONA FIDE PURCHASERS.

1. A complaint to quiet title alleged that plaintiff was the owner and in possession of the property. The findings were that plaintiff was the owner, but that defendant was in possession, and judgment was rendered that plaintiff's title be quieted, and that defendant be removed from possession. Under Code Civil Proc. Cal. § 380, the action may be maintained by one not in possession. *Held* that, though the judgment was in direct contradiction to the complaint, it would be modified on appeal so as to omit the part relating to possession, and would be thus affirmed, without costs to either party.

2. M. took possession of land in 1861, claimed it as his own, cultivated it regularly, and paid all the taxes. After 11 years he sold to his brother, who took possession, improved the property, and paid the taxes. After five years he conveyed to plaintiff's testator, who took possession, exercised acts of ownership, and held possession till 1881. M. knew of his brother's possession, and knew that he sold to plaintiff's testator, and that the latter was in possession and improving the property, and made no claim to the land, or any protest, till about 1880, when he discovered there was no deed on record of the original conveyance by himself. He then gave a deed of the land to defendant. *Held*, that there was a presumption of title in M.'s brother, which was not rebutted by the fact that he originally entered under an oral contract of purchase, or by the fact that there was no deed on record conveying to him.

3. In view of such presumption, it is immaterial that declarations of M. that he had conveyed to his brother were erroneously admitted in evidence.

4. Defendant knew that M. was not in possession when he conveyed to him, and there was no evidence, except the presumption arising from the deed, that defendant gave any consideration for the land. He knew that M.'s brother had conveyed the land as if it was his own. He did not make inquiries of the occupants of the land, and, although he heard that there was a deed from M. to his brother, there was no evidence that he made any inquiries of M. about it, but he made inquiries of the widow of M.'s brother, and searched the records. *Held*, that defendant was not a *bona fide* purchaser.

5. The pleadings having alleged that plaintiff was the owner in fee of the property, a finding that he was the owner in fee is sufficient to show that fact, though there are probative facts stated tending to show the contrary, but which are not necessarily inconsistent with the fact of plaintiff's ownership; especially where the findings further state that defendant never had any title or interest in or to said land.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Stanly, Stoney & Hayes, for appellant. *W. H. L. Hart* and *Aylett & Cotton*, for respondent.

HAYNE, C. Action to quiet title to certain land in the town of Berkeley. Both parties claim through one John Mathews, in whom the title stood of record until August

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[1] Reversed in banc. See 24 Pac. 319, 84 Cal. 126.

13, 1880, when he conveyed to the defendant, who was his son-in-law. The plaintiff's position is that, prior to the conveyance to the defendant, John Mathews had conveyed to his brother, Peter Mathews, through whom she claims. The trial court gave judgment for the plaintiff, and the defendant appeals. Several points are made by the learned counsel for the appellant, but we deem it sufficient to notice the following:

1. It is contended that the complaint does not support the judgment. The complaint alleges that the plaintiff was the owner and in possession of the property, while the findings are that the plaintiff was the owner, but that the defendant was in possession; and the judgment is that the plaintiff's title be quieted, and that the defendant be removed from possession. The findings and judgment, therefore, so far as the possession is concerned, are in direct contradiction of the complaint. It is obvious that the plaintiff cannot have a judgment in direct contradiction of her complaint. Von Drachenfels v. Doolittle, 19 Pac. Rep. 518. But the right to have the title quieted does not, under our statute, depend upon the plaintiff's possession. The action may be maintained by one out of possession. Code Civil Proc. § 380; Hyde v. Redding, 74 Cal. 493, 16 Pac. Rep. 380. And its character is not changed by the circumstance that the defendant is or is not in possession. Polack v. Gurnee, 66 Cal. 266, 5 Pac. Rep. 229, 610. The judgment may therefore be modified by leaving out the part relating to the possession; and, inasmuch as this was "an apparent error which the counsel for appellant might have corrected below by specific motion for that purpose, we think it not equitable to tax the costs to the respondent." Cassin v. Marshall, 18 Cal. 692; Noonan v. Hood, 49 Cal. 293.

2. It is argued that the findings do not show that the legal title was in plaintiff's testator. It was alleged, however, that the plaintiff is "the owner in fee" of the property, and the finding is in the same language. The allegation that the plaintiff is the owner of the property is of an ultimate fact. Payne v. Treadwell, 16 Cal. 242; Garwood v. Hastings, 38 Cal. 217; Ferrer v. Insurance Co., 47 Cal. 431; Miller v. Brigham, 50 Cal. 615; Rough v. Simmons, 65 Cal. 227, 3 Pac. Rep. 804; Thompson v. Spray, 72 Cal. 534, 14 Pac. Rep. 182; Heeser v. Miller, 19 Pac. Rep. 375; Souter v. Maguire, ante, 183. The findings are sufficient if they follow the language of the pleadings, (Hihn v. Peck, 30 Cal. 286,) or if they make a definite reference to the pleadings, as has been held in numerous cases. Hence the finding as to the ownership in fee is sufficient, and shows that the legal title was in the plaintiff. Murphy v. Bennett, 68 Cal. 528, 9 Pac. Rep. 738; McLeran v. Benton, 73 Cal. 344, 14 Pac. Rep. 879. And its force is not destroyed by the finding of certain probative facts tending to show that the legal title is in the defendant. It may be conceded that where the probative facts found are necessarily inconsistent with the finding of the ultimate fact, the latter may be treated as a mere conclusion. But where the ultimate fact inferred does not necessarily result from the probative facts found, these latter are not sufficient as a finding, taken by themselves, (Emmal v. Webb, 36 Cal. 204; Biddel v. Brizzolara, 56 Cal. 381, 382; Knight v. Roche, Id. 18; Packard v. Johnson, 57 Cal. 183, 184; Younger v. Pagles 60 Cal. 520,) and are controlled by a finding of the ultimate fact, (Barrante v. Garratt, 50 Cal. 114; Edwards v. Bank, 59 Cal. 148.) This must necessarily be so; for the function of findings is to establish the facts with certainty, and not to deal in probabilities. In the case before us the finding of the defendant's chain of title is not necessarily inconsistent with the plaintiff's ownership; for it may be that John Mathews conveyed to his brother Peter before he "made a deed" to the defendant, (Smith v. Acker, 52 Cal. 219,) which, as stated below, is what must be taken to be true upon the evidence. This conclusion is strengthened by the finding that the defendant "never had any estate, right, title, or interest in or to said land, or any part thereof."

3. It is urged that there is no evidence that John Mathews ever conveyed the property to his brother Peter, except certain declarations of John to the general effect that he had done so; and that the admission of such declarations against defendant's objections was erroneous. There was no direct evidence of the conveyance in question, and we think it possible that the admission of said declarations was error. See Thompson v. Lynch, 29 Cal. 191; Tompkins v. Crane, 50 Cal. 480. But, assuming this to be so, we think that the error was immaterial, because, upon the undisputed facts of the case, it must be presumed that such a conveyance was made. A presumption may supply the place of direct evidence; and, if not controverted, a court or jury is bound to find in accordance therewith. Code Civil Proc. § 1961; Leviston v. Ryan, 75 Cal. 294, 17 Pac. Rep. 239; Speegle v Leese, 51 Cal. 415. The question, then, is whether upon the facts shown by the record a presumption arises of a conveyance from John to Peter Mathews; and we think that it does arise from the long continued possession of the plaintiff's predecessors in interest, and their open and notorious acts of ownership over the property. "Possession," says Angell in his work on Limitation, "by the law of England and of this country, or *quasi* possession, as the case may be, is *prima facie* evidence of property and of a seisin in fee. The longer the continuance of the possession, and the absence of the disturbance of it, the greater is the length to which courts of justice will go in supporting the conclusion that there was a legal origin for it; and, in order to render the title of the possessor complete, they will presume collateral facts, as livery of seisin, execution of deeds, etc., agreeably to the

maxim, *ex diuturnitate temporis, omnia præsumuntur solemnitur esse acta.*" 5th Ed. § 4; and see Code Civil Proc. § 1963, subd. 12.

The doctrine as to presumption of grants is usually applied in cases of easements. But it is not confined to such cases. In the language of STORY, J., delivering the opinion in Ricard v. Williams, 7 Wheat. 109: "A grant of land may as well be presumed as a grant of a fishery, or of common, or of a way. Presumptions of this nature are adopted from the general infirmity of human nature, the difficulty of preserving muniments of title, and the public policy of supporting long and uninterrupted possessions. They are founded upon the consideration that the facts are such as could not, according to the ordinary course of human affairs, occur, unless there was a transmutation of title to, or an admission of an existing title in, the party in possession." And the doctrine was applied as to the land itself in a recent and well-considered case in the supreme court of the United States, in which it was distinctly held that the presumption was not a mere inference of fact,—in other words, that it was not necessary for the court or jury to believe that a conveyance was in fact executed,—the court, per FIELD, J., saying: "It is sufficient if the evidence leads to the conclusion that the conveyance might have been executed, and that its existence would be a solution of the difficulties arising from its non-execution," (Fletcher v. Fuller, 120 U. S. 547, 7 Sup. Ct. Rep. 667,) and the authorities fully sustain this proposition.

What period, then, is sufficient to raise the presumption? From the nature of the case, there ought to be no fixed and absolute period. See 120 U. S. 550, 7 Sup. Ct. Rep. 675. Each case is to be governed largely by its own circumstances. But there are certain analogies which may aid in arriving at a conclusion. In the case of easements, the period usually adopted in the older states is 20 years, which was in analogy to the statute of limitations. In this regard BRONSON, J., delivering the opinion of the court of errors, said: "The modern doctrine of presuming a right by grant or otherwise to easements and incorporeal hereditaments, after twenty years of uninterrupted adverse enjoyment, exerts a much wider influence in quieting possession than the old doctrine of title by prescription, which depended on immemorial usage. The period of twenty years has been adopted by the courts in analogy to the statute limiting an entry into lands; but, as the statute does not apply to incorporeal rights, the adverse user is not regarded as a legal bar, but only as a ground for presuming a right either by grant or in some other form." Parker v. Foote, 19 Wend. *312; and see Edson v. Munsell, 10 Allen, 568.

In California the general statute of limitations for actions concerning real property is five years. We are not at present prepared to say that the presumption of a grant would usually be raised after so short a period in cases where the statute did not apply. It is not necessary to express an opinion upon that point, and we express none. But the fact that the period of the statute of limitations has been shortened is not ground for lengthening the period usually accepted in other states as sufficient to raise the presumption of a grant; nor is the fact that the country is comparatively new, and titles correspondingly unstable, a reason for dispensing with safeguards preserved in older communities. We think, therefore, that uninterrupted possession of land for 20 years or thereabouts, under proper conditions, is sufficient to raise a presumption of a grant, where that is required to make out the occupant's title.

The undisputed facts bring the case within this principle. Peter Mathews took possession of the property in 1861, and he and his successors in interest continued in the open and notorious possession, exercising acts of ownership and control, until the ouster by the defendant in 1881, a period of about 20 years. During the time of his possession Peter Mathews claimed the property as his own. He regularly and annually cultivated it, raising the usual crops for his own use and benefit, and paid all the taxes. See, in this regard, 120 U. S. 553–555, 7 Sup. Ct. Rep. 677, 678. After 11 years he sold and conveyed to others, who in turn took and kept possession, improved the property by laying it out in lots, opening streets, planting trees, etc., and paid all the taxes. After five years they conveyed the property to the plaintiff's testator, who continued in possession, exercising acts of ownership and control, until he was ousted by the defendant, in 1881. During all this time John Mathews knew of the condition of affairs. He knew of Peter's possession. He knew that Peter had sold and conveyed the land to others. And he knew that the grantees were in possession, and improving the property. But he made no claim to it. He saw what was going on without one word of protest, or any sign of dissent, until about the time that he ascertained that there was no deed of record. These circumstances seem to us to be sufficient to raise the presumption of title in Peter; and in addition it is to be remembered that at the time of the trial the mouths of both brothers were closed by death.

It is quite true that the presumption is rebuttable. But we see nothing in the record which rebuts it. The fact that Peter originally entered under a verbal agreement of purchase from John does not make against it. See 120 U. S. 545, 546, 7 Sup. Ct. Rep. 673. In view of the other facts, it increases the probability that a deed was subsequently made. Nor does the fact that there was no record of such a deed overcome the presumption. Aside from other reasons, it was in evidence that at the time in question "it was a very common thing to find some deed, in a deraignment of title, not recorded. People were very careless, and they had been prior to that, about recording their deeds." Nor do we see anything in the circumstances adverted to by the appellant's counsel which overcome the presumption.

4. The defendant was not a *bona fide* purchaser for value. Counsel do not lay stress upon this aspect of the case; and we deem it sufficient to say in the first place that the defense is not set up in the answer. Eversdon v. Mayhew, 65 Cal. 167, 3 Pac. Rep. 641. The answer denies notice, but it does not assert, either affirmatively or negatively, that the defendant was a purchaser for value. Nor is there any evidence (other than the presumption of consideration from the writing) that he paid anything for the deed. In the next place, he admits that he knew that his grantor was not in possession, and that he knew that Peter had conveyed the property as if it was his own. These circumstance were sufficient to put him on inquiry. Yet he says in his evidence: "I did not go to see the people who were occupying the ground before the deed was made to me by John Mathews, nor did I ask them any questions;" and further on he says: "I didn't go and ask Mrs. Mathews before I took my deed, because I was not in that locality." And, what is more remarkable, he does not say that he inquired about the existence of the deed from the only person then living who must have known about the fact, viz., his own father-in-law, John Mathews himself. Even after the execution of the deed, and when, according to his own account, "it was dinned into my ears that there was a deed, —that John Mathews had made a deed to Peter Mathews,"—although he went to Peter's widow about it, and had the records carefully searched, he does not say that he asked the only man who could give him the information he wanted. The other points made do not require special notice. We therefore advise that the judgment be modified by striking out the part relating to the recovery of possession by the plaintiff, and that, as modified, it and the order denying a new trial stand affirmed, without costs of appeal to either party.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by striking out the part relating to the recovery of the possession by the plaintiff, and that as modified it and the order denying a new trial stand affirmed, without costs of appeal to either party.

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79 Cal. 188

HILL *v.* CITY CAB & TRANSFER CO. *et al.*

(No. 11,676.)

(*Supreme Court of California.* May 20, 1889.)

JUDGMENT—ACTION ON.

Where it is proved in an action on a judgment that there was no service of summons on, or authorized appearance by, defendant, when the judgment was recovered, plaintiff cannot recover on the ground that defendant does not show a meritorious defense to the original action.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action on a judgment by William Hill against the City Cab & Transfer Company and several others. Judgment for plaintiff, and C. G. Jones, one of the defendants, appeals.

J. C. Bates, for appellant. *Thompson & Thompson*, for respondent.

BELCHER, C. C. This was an action upon the judgment of a court of general jurisdiction. The defendant pleaded in defense that said judgment had been obtained without service upon him, or any authorized appearance on his behalf. The court below found these facts to be true, but rendered judgment against defendant upon the ground that he did not show that he had a meritorious defense to the original action. We think that this was error.

It is true that a court of equity will not give relief against a judgment unless it be shown that the complainant had a defense upon the merits. Equity, in such case, will simply hold its hand, and leave the parties to their rights at law. It is also true that at law a defendant cannot collaterally assail a judgment unless it be void on its face. This was held after careful consideration in Carpentier v. Oakland, 30 Cal. 439, and the general doctrine of that case has recently been approved. Hodgdon v. Railroad Co., 75 Cal. 648, 17 Pac. Rep. 928. And it is in accordance with the preponderance of authority elsewhere. See Freem. Judgm. (3d Ed.) § 116. In New York, where a contrary doctrine seems to prevail, it is admitted that the rule there rests upon the local law of that state, and "finds no support in adjudications elsewhere." Ferguson v. Crawford, 70 N. Y. 267. And we do not understand that our statute has changed the rule. Section 1916 of the Code of Civil Procedure simply means that evidence is admissible to impeach the judgment in the cases allowed by law,—not in all cases whatsoever. But this rule is not that a judgment which is void will be enforced as if it were valid, but that it cannot be shown to be void except in certain ways. If the party, however, should admit the facts which show the judgment to be void, or if he should allow them to be established without opposition, then, as a question of law, upon such facts, we do not see why the case is not like that where a judgment is void upon its face. In the present case the findings establish the fact that there was no service of summons upon or authorized appearance by the defendant. And none of the evidence is brought up, nor does the question appear to have been raised by exception or demurrer, or in any other way The facts, therefore, must be taken to be established by the record beyond all controversy. And upon such facts the law is that the judgment is void. Baker v. O'Riordan, 65 Cal. 371, 372, 4 Pac. Rep. 232. Merced Co. v. Hicks, 67 Cal. 10J, 7 Pac. Rep. 179. The judgment sued on, being shown to be absolutely void, cannot be held to be valid, or to be a cause of action. We advise that the judgment appealed from be reversed, and the cause remanded, with directions to enter judgment for the defendant Jones.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with direction to the court below to enter judgment for the defendant Jones.

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79 Cal. 183

PORTER *v.* IMUS. (No. 11,926.)

(*Supreme Court of California.* May 20, 1889.)

INSOLVENCY LAWS.

1. The California insolvent act of 1880 discharges debts contracted in 1878, and is not thus unconstitutional, as impairing the obligation of contracts. Following Pomeroy v. Gregory, 66 Cal. 574, 6 Pac. Rep. 493.

2. Under section 53 of the act, providing that the discharge shall be a complete bar to all debts which were or might have been proved, (with certain exceptions,) and may be pleaded by a simple averment that on the day of its date such discharge was granted, setting forth the same, and making the certificate *prima facie* evidence of such facts and of the regularity of the discharge, etc., the burden is on one suing the insolvent to show that he was not a citizen or resident of the state, and therefore not affected by the discharge.

Commissioners' decision. Department 2. Appeal from superior court, Santa Cruz county; F. J. MCCANN, Judge.

Joseph H. Skirm, for appellant. *Geil & Morehouse*, for respondent.

HAYNE, C. Action upon a promissory note made and payable in this state, and dated in 1878. Defense, a discharge in insolvency obtained in 1881. The court below gave judgment for the defendant, and the plaintiff appeals.

The first point is that the insolvency act of 1880 impairs the validity of the contract; in other words, that under that act a discharge could not be granted which would bar a debt contracted in 1878. This precise question, however, has been decided against the appellant. Pomeroy v. Gregory, 66 Cal. 574, 6 Pac. Rep. 493; Hundley v. Chaney, 65 Cal. 363, 4 Pac. Rep. 238.

The only other point made is that it is not pleaded or found that the plaintiff was a citizen or resident of the state. The insolvency act provides, however, that the discharge shall be a bar to all the debts which were or might have been proved, with certain specified exceptions, (of which this is not one,) and "may be pleaded by a simple averment that on the day of its date such discharge was granted to him, setting forth the same in full, and the same shall be a complete bar to all suits brought on any such debts, claims and liabilities or demands, and the certificate shall be *prima facie* evidence in favor of such facts, and of the regularity of such discharge." Section 53. Under this provision, if the plaintiff was not a citizen or resident of the state, and consequently not affected by the discharge, he should have proved the fact. We therefore advise that the judgment appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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79 Cal. 181

ANGELL *v.* HOPKINS. (No. 11,953.)

(*Supreme Court of California.* May 20, 1889.)

TROVER AND CONVERSION—PLEADING—EVIDENCE—FRAUDULENT CONVEYANCES—HARMLESS ERROR.

1. In an action for taking property under an attachment, defendant demurred for misjoinder of the causes of action (1) to recover possession of property or its value, if a delivery could not be had; (2) for damages for the destruction of certain property; and (3) for damages for the use of the property while detained from plaintiff. *Held*, that error in overruling the demurrer, if any, resulted in no injury to defendant, where the findings showed that the value of the property was the only basis of the judgment given.

2. Though the measure of damages was the value of the property at the time of the conversion, (Civil Code Cal. § 3336,) yet it was proper to admit on the question of value evidence of what the property cost.

3. The property was a printing outfit, which was in the rear of plaintiff's drug-store, and was levied on under a writ against a third person, who conducted the printing business. Defendant alleged that when the debtor began business plaintiff had a press and some material, and told the debtor to buy material instead of paying rent; that the debtor did job-printing on his own account, and purported to do so, and there was nothing to indicate that he was not the proprietor; that he afterwards made a secret writing, recognizing plaintiff as owner of the property, and would not show it to the creditor's agent, and did not inform the latter that he was the owner; that plaintiff knew that the debtor insured the property in his own name, and made no objection. But it was not alleged that credit was given on the debtor's supposed ownership, induced by any act or omission of plaintiff, or that the creditor made any investigation as to title before credit was given. *Held*, that such circumstances did not estop plaintiff from showing his ownership.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by J. W. Angell against Peter Hopkins, for the conversion of a printing-press and appurtenances, taken by defendant as sheriff under an attachment in an action by George L. Spinney, assignee of a claim of H. S. Crocker & Co., against S. G. Spencer. Defendant demurred to the complaint, because several causes of action were improperly united, viz.: (1) An action to recover possession of goods and chattels, or for $1,463.65, their value, in case a delivery could not be had; (2) an action for damages in the sum of $20 for destruction of shelving, frames which held type-cases, and one window; (3) an action for consequential damages to the amount of six dollars per day for the use of goods and chattels for every day's detention from plaintiff. Demurrer overruled, and defendant answered. The circumstances relied on in defendant's brief as showing an estoppel of plaintiff to take the property from defendant are that plaintiff was a druggist at a corner store, having an entrance on two streets. That in 1879, when Spencer went to his place of business, which was in the rear of plaintiff's store, and opened on the side street, plaintiff had a printing-press and some other material. Plaintiff told Spencer to buy material instead of paying rent. The sign "Printing Office" was over the side door, and beside this door was a show-case containing cards of Spencer, as job-printer. That from 1879 to the date of the attachment, (1885,) Spencer had been doing job-printing in this place on his own account, and in his own name, and using his own bill-heads. There was nothing, as plaintiff testified, in the manner in which Spencer did business, to indicate that he was not the proprietor. In September, 1883, Spencer, by a secret writing, undertook to recognize the respondent as the owner, and make him the owner, of all the property in the office; and plaintiff would not show the writing to Spinney, who represented Crocker & Co. Plaintiff did not tell Spinney that he owned the property. Plaintiff, however, testified that he thought that Spinney asked if there was any such writing, and plaintiff said there was. This was after Crocker & Co.'s debt was contracted. Plaintiff knew that Spencer had insured the property in his own name, and stood by while it was done, and made no objection. But defendant did not in his brief allege that Crocker & Co. gave credit to Spencer on the faith of his supposed ownership of the property, induced by some act or omission of plaintiff, or that Crocker & Co., before giving credit, made any investigation as to Spencer's title. The judgment was for the possession of the property or its value, if a delivery could not be had, and for damages for detention. Defendant appeals.

J. H. Dickinson, for appellant. *Gray & Haven*, for respondent.

HAYNE, C. Action for the conversion of personal property. Judgment for plaintiff. Defendant appeals. Several points are made.

1. It is said that the demurrer for misjoinder of causes of action should have been sustained. But assuming, for the purposes of the case, that this is so, no injury resulted to the appellant, for the reason that the findings show that the value of the property was the only basis for the judgment given. Error in overruling a demurrer for misjoinder of causes of action is immaterial, if it does not affect the substantial rights of the parties. Reynolds v. Lincoln, 71 Cal. 185, 9 Pac. Rep. 176, and 12 Pac. Rep. 449.

2. It is contended that there was error in admitting evidence as to what the property cost the plaintiff. It is quite true that the measure of damages is the value of the property at the time of the conversion, with certain additions in certain cases. Civil Code, § 3336. But in arriving at such value it was proper to take into consideration what the property cost as a circumstance to aid in arriving at its value at the time in question. Luse v. Jones, 39 N. J. Law, 708; Jones v. Morgan, 90 N. Y. 10; Norton v. Willis, 73 Me. 580; Small v. Pool, 8 Ired. 47; Boggan v. Horne, 97 N. C. 268, 2 S. E. Rep. 224; Rawson v. Prior, 57 Vt. 615; Ford v. Smith, 27 Wis. 267; Roberts v. Dunn, 71 Ill. 50.

3. The circumstances claimed to show that the attaching creditor had reason to believe that the property belonged to his debtor instead of the plaintiff do not estop the plaintiff from showing that he was the owner. The other matters do not require special notice. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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79 Cal. 185

BEETS *et al.* v. CHART *et al.* (No. 11,879.)

(*Supreme Court of California.* May 20, 1889.)

APPEAL—PRACTICE.

1. A "statement on appeal to the supreme court," made after a motion for new trial has been determined, is not provided for in Code Civil Proc. Cal., and, where it does not appear to have been settled, certified, or signed by the trial court, it cannot be considered either as a statement on motion for a new trial, or as a bill of exceptions.

2. Where there is nothing before the court to show that a notice of appeal has been filed or served, the appeal will be dismissed.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; JACKSON TEMPLE, Judge.

Action by Louisa Beets and others against Obed Chart and others. Plaintiffs appeal.

George Pearce, for appellants. *William D. Bliss* and *Thompson & Thompson*, for respondents.

FOOTE, C. The appeal in this case was attempted to be taken without having attached to the transcript any certificate of the clerk identifying the papers contained in it as having constituted a part of the record of the court below. The settlement of what is called "a statement on appeal to the supreme court," made after a motion for a new trial had been heard and determined, is not provided for in the Code. People v. Crane, 60 Cal. 279. It does not appear to have been certified, settled, or signed by the judge of the trial court, and cannot, therefore, be considered here either as a statement on motion for a new trial or as a bill of exceptions. Adams v. Dohrmann, 63 Cal. 418, and cases cited. There is no identification in any lawful way of any of the papers showing that they were ever used in the proceedings, or constituted any part of the record in the court below. There is nothing in the so-called transcript to indicate that any notice of appeal was ever filed or served. The judgment roll which the appellate court permitted to be filed when this condition of what is denominated the "transcript" was called to its attention contains nothing, nor does the certificate of the clerk, or anything else attached thereto or before the court, which shows that a notice of appeal has been filed or served. For aught that appears, none has been. The attempted appeal cannot, therefore, be entertained or heard, and we advise that it be dismissed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

(79 Cal. 187)

RODRIGUEZ *v.* LAMBERT. (No. 11,875.)

(*Supreme Court of California.* May 20, 1889.)

APPEAL.

Where the record clearly shows that there was a substantial conflict in the evidence, the judgment will not be reversed.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

S. F. Geil and *H. V. Morehouse*, for appellant. *N. A. Dorn* and *W. M. R. Parker*, for respondent.

BELCHER, C. C. The plaintiff and defendant owned adjacent lots of land in the city of Monterey, and the plaintiff brought this action to recover possession of a strip about eight and seven-tenths feet wide, along her northern line. The defendant asserted title to the disputed strip under the statute of limitations and by estoppel. The court found against the defendant upon all the issues presented, and rendered judgment for the plaintiff. The appeal is from the judgment and an order denying a new trial. It is contended for appellant that the findings were not justified by the evidence, and that the judgment should be reversed for that reason. This contention is based upon the theory that it appears from the evidence that nearly or quite 30 years ago a fence was erected along the line now claimed by appellant to mark the boundary line between the lots; that this fence was recognized and acquiesced in by the owners of the lots for many years longer than was necessary, under the statute of limitations, to bar a right of entry; and that during all of those years the grantors of appellant held and claimed the disputed strip adversely to the grantors of respondent, and thus acquired a title thereto. We cannot concur in this view of the case. The record clearly shows that there was a substantial conflict in the evidence as to where the old fence was located, and as to whether the appellant's grantors ever held any of the disputed ground adversely to respondent's grantors. This being so, the well-settled rule in such cases must control in this court. No other points are made, and we therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons stated in the foregoing opinion the judgment and order are affirmed.

(3 Cal. Unrep. 92)

HIMMELMAN *v.* HENRY *et al.* (No. 11,659.)

(*Supreme Court of California.* May 21, 1889.)

APPEAL.

A judgment will not be reversed for the want of a finding on an issue with respect to which there was no evidence; and on appeal on the judgment roll alone it will not be presumed, against the correctness of the judgment, that there was evidence on a point as to which there was no finding.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Ejectment by Catherine Himmelman against Bridget Henry and others. Defendants appeal.

Langhorne & Miller, for appellants. *J. M. Seawell* and *J. B. Reinstein*, for respondent.

McFARLAND, J. This is an action of ejectment. The answers, in addition to general denials, set up certain alleged special defenses. The court, trying the case without a jury, found that the plaintiff was the owner and seised in fee, and entitled to the possession, of the premises in suit, and that defendants ousted plaintiff therefrom, and wrongfully and unlawfully withhold possession thereof; but there is no finding as to the alleged special defenses. Judgment went for plaintiff, and defendants appeal from the judgment upon the judgment roll alone.

Appellants' main contention is that the judgment should be reversed because there is no finding on all the issues raised or alleged to have been raised by the pleadings. But a judgment will not be reversed for want of a finding on an issue with respect to which there is no evidence. In Wise v. Burton, 73 Cal. 175, 14 Pac. Rep. 683, this court say: "This court will not reverse for want of a finding on an issue where there is no evidence in relation to such issue." In the case at bar—which is brought here upon the judgment roll alone—we will not presume, against the correctness of the judgment, that there was evidence upon a point with respect to which there is no finding. This view of the case makes it unnecessary to consider the question whether or not the alleged special issues were material. We think the findings support the judgment. Judgment affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J

79 Cal. 192

SALINAS CITY BANK *v.* GRAVES, Sheriff.
(No. 11,708.)

(*Supreme Court of California.* May 21, 1889.)

PLEDGE—POSSESSION.

1. A mill company arranged with plaintiff, a bank, to cash its drafts for grain purchased by it, the grain to be transferred to plaintiff, and held as "collateral security" for the repayment of the advances. Upon the purchase of a quantity of grain, a warehouse receipt would be made out and given to the seller, with a check for the sum due, and the latter would deliver the receipt to plaintiff when he presented the check. Afterwards plaintiff would indorse warehouse receipts to the mill company to enable it to withdraw grain from the warehouses for grinding. It was agreed between them that when the grain was in the mill company's mill or warehouse it should remain plaintiff's property, "as before." After the grain was so withdrawn, it was on the premises of the mill company, and apparently under the control of its agents. When ground, the flour was sold by the mill company's employés, and the proceeds turned over to plaintiff. *Held*, that plaintiff's only interest in the grain and flour was a lien thereon for the advances made, and that, after allowing it to be withdrawn from the warehouse, and taken into the mill company's possession, the lien was ended, as against an attaching creditor of the latter.

2. The attaching creditor derived his claim by assignment from L., who was one of the directors of the mill company. After assigning the debt, L. notified the presidents, both of the plaintiff bank and of the mill company thereof. During the time plaintiff was advancing funds to the mill company the latter leased one of its warehouses to J., as trustee for plaintiff, in order to give plaintiff possession of the grain therein, L. voting for the lease. Afterwards the agent of the mill company took possession of the warehouse and contents. The court found that the agent took such possession under the direction of the president of the company, and "with the tacit consent of some of the directors, of whom L. was one." *Held* that, assuming the finding to mean that L. had tacitly consented that the agent should manage the business, such consent would not estop the attaching creditor from denying the plaintiff's ownership of the property, the assignment having been made before the agent took possession.

3. The fact that the assigned indebtedness was not a negotiable instrument would not be material to an action against the sheriff making the levy.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Morehouse & Geil and *Wm. Matthews*, for appellant. *Jarboe, Harrison & Goodfellow*, for respondent.

MCFARLAND, J. Plaintiff is a banking corporation. Defendant was sheriff of the county of Monterey. There was also another corporation in said county known as the "Salinas Flouring-Mill Company," having a mill and appurtenances, and being engaged in buying grain, and manufacturing it into flour, bran, and other products. On September 6, 1884, one George Grant commenced an action against this last-named corporation (which we will call for convenience the "Mill Company") to recover about $75,000, and sued out a writ of attachment, which defendant, as sheriff, levied upon a large quantity of grain, flour, etc., as the property of said mill company. On October 10, 1884, in pursuance of an order of court duly made, he sold said property for $17,640, which he holds subject to the further order of the court. Plaintiff brings this action to recover said money, upon the claim that said grain, flour, etc., so sold, was the property of plaintiff. Defendant justifies under the writ of attachment, and upon the ground that the property attached and sold was the property of the mill company. The case was tried without a jury, and the court rendered judgment for defendant. Plaintiff appeals from an order denying a new trial.

It is clear from the findings and evidence that at the time of the attachment the property in controversy was in the actual possession of the mill compay. Part of it was in the mill of that company in which it was carrying on its business, and the balance was in a warehouse owned and occupied by said company, and connected with the mill by a railroad about 100 feet long. Plaintiff contends, however, that the property belonged to it, and was only temporarily in the possession of the mill company for a special purpose. But defendant contends that the only interest which plaintiff had in the property was that of a pledgee, having a lien as security for the payment of money advanced for the mill company; and that, as the pledged property was allowed to go into the possession of the pledgor, it was subject to attachment for the latter's debts. If this last contention is true, then the judgment was correct, and the order denying the new trial should be affirmed.

The main facts, found by the court upon sufficient evidence, are as follows: On the 1st of June, 1883, the mill company being desirous of purchasing grain for its business, passed the following resolutions: "Resolved, that the president of this corporation be, and he is hereby authorized and directed, on behalf of this corporation, to enter into an agreement with Mr. H. S. Ball, to engage the said H. S. Ball to purchase grain for this corporation; that such agreement be made on the best terms obtainable: provided, that the commission to be paid the said H. S. Ball does not exceed 25 cents per ton. "Resolved, that the Salinas City Bank, at Salinas, Calif., be, and is hereby, requested to cash all drafts drawn upon this corporation by Mr. H. S. Ball, of Monterey county, for the price of grain purchased by him for the account of this corporation, and said H. S. Ball do transfer to said Salinas City Bank the grain so purchased upon his said drafts being cashed; and this corporation agrees to repay said Salinas City Bank the amount of said drafts, with interest, on demand; and that the grain so purchased shall be held by said Salinas City Bank as collateral security therefor; and said Salinas City Bank to keep said grain fully insured, at the cost of this corporation."

The plaintiff had a certified copy of these resolutions, which were Ball's authority to draw on the bank. The court also found that "under these resolutions said Ball was employed by said mill company to purchase for it from the farmers of Monterey county wheat for the use of said mill company, and plaintiff agreed with the said company to advance the necessary funds to enable said company to make said purchases of wheat." Ball proceeded to purchase grain from farmers for the mill company. Upon the delivery of wheat so purchased at certain warehouses, Ball would give his check to the farmer on the bank (plaintiff) for the amount due, and would at the same time take a warehouse receipt in the name of the plaintiff, which the farmer would take to the bank, together with the check. This manner of doing business continued until December, 1883, when James Baumberger became secretary and general manager of the mill company. After that Ball drew his checks on the mill company, and Baumberger, as secretary, drew its checks on plaintiff in favor of the farmer, for the price of the grain purchased; plaintiff still receiving and holding the warehouse receipts as collateral security for the advances made on account of the mill company. There were also other advances made by the bank for the mill company. After March, 1884, by agreement between the bank and the mill company, with intent to "increase plaintiff's security and value of said grain," grain was taken from time to time from the said warehouses by the mill company to its mill, and after having been ground into flour, etc., was (that not sold) placed in the said warehouse of said mill company near its mill. To accomplish that purpose, whenever Baumberger, manager of the mill company, wanted grain from the warehouse, the plaintiff indorsed to him warehouse receipts for the amount required. It was agreed between the bank and the mill company that while the grain was in the mill and warehouse of the mill company "possession thereof should be retained by plaintiff until the purchase money of said wheat, and any other advances made to said mill company and interest on the same should be fully paid to plaintiff," and that it "should remain the property of plaintiff as before." With this view, on March 22, 1884, the mill company made a lease of its warehouse to W. S. Johnson, as trustee of the bank, for the term of 90 days. Thereupon Baumberger gave the keys of the warehouse to Johnson, who a short time afterwards put one Peterson in charge, and gave him the keys. Until the latter part of June, 1884, Peterson opened the warehouse in the morning, and at night took an account of wheat that had been put in and taken out and reported to Johnson. During the day Baumberger, as manager of the mill, had control of the warehouse and the employés of the mill company had access to it as usual. Peterson was the employé of Baumberger at a warehouse which the latter had about 600 yards distant from the mill. In the latter part of June, 1884, Peterson quit Baumberger's employ, and Johnson "put said Baumberger in possession of said mill, warehouse, and the grain, flour, etc., therein, and gave him the keys thereof;" and things remained in that condition until September 8, 1884, when the attachment was levied. "All of said grain, flour, etc., attached by defendant, was a portion of the grain, and the produce thereof, purchased by H. S. Ball for said mill company, and for which the plaintiff had received the warehouse receipts, as aforesaid, and subsequently delivered to Baumberger for the purpose aforesaid." From December, 1883, to the time of the levy of the attachment, Baumberger, "apparently as the employé of the mill company, had the full possession, control, and management of the business, employed men, discharged them, paid them off by checks of said mill company, signed by him as secretary on said bank, which were paid by the bank, and charged to the mill company, as were all other advances." When the grain was converted into flour, the flour was put into sacks, and branded "Salinas Flouring-Mills," and was taken by the employés of the mill company to its warehouse. Such of it as could be sold to the local trade of Salinas City, and at points between that city and San Francisco, was so sold by Baumberger as manager of said mill company, and the proceeds were paid by him to plaintiff, and credited by plaintiff to the mill company. "When a surplus of flour accumulated in said mill warehouse, said Baumberger was directed by plaintiff to 'ship the same for and on its account to said warehouses'" (certain named warehouses) "in San Francisco; and he shipped the same by rail and took 'shipping receipts therefor,' which read thus: 'Received of the Salinas Flouring-Mill Company,' etc.; and wrote letters to said warehousemen in San Francisco, instructing them to issue receipts for said flour to the plaintiff, and return the same to plaintiff, which was done; and said letters of instruction were signed, 'SALINAS FLOURING-MILL CO., by BAUMBERGER, Secretary.' Said flour was sold and the proceeds thereof were credited by said plaintiff to said mill company account." All of the grain was taken from the original warehouses to the mill, ground into flour, and taken to the mill warehouse, and out of it by the employés of the mill company, under the direction of its manager, Baumberger.

From these facts it is apparent that during the whole transaction the relation of the bank (plaintiff) to the grain and flour was merely that of one who has a lien on personal property as security for the payment of a debt; the validity of the lien being dependent on the possession of the property. The bank was not engaged in the purchase of grain, and did not purchase the grain in controversy. It was purchased by Ball for the mill company. When delivered at the ware-house it was the property of the mill company. By the direction of Ball, acting for the mill company, the receipts were issued in the name of the bank, because, by a previous arrangement, security to the bank was to be effected in that way. In the resolutions passed, and in the testimony of appellant's witness, we find the words "security" and "collateral security" expressly used; so that there can

Subsequently, in accordance with an order of the superior court, an amended complaint was filed, in which the appellant, Brown, was joined with Steffan as a defendant. In this amended complaint it is alleged, in substance, that at the time of the sale the sheep were in charge of the brother of the plaintiff, as his servant and employé merely, and without any interest in, or ownership of, any of the sheep; that the plaintiff, acting by and through his said servant and employé, sold and delivered the sheep to Steffan, who thereupon paid to plaintiff a portion of the purchase price, leaving the sum of $527.20 still due; that subsequently, and with full knowledge of plaintiff's ownership on the part of both Brown and Steffan, Brown induced plaintiff's brother and servant (who was indebted to him and insolvent) to pretend that he had been the owner of the sheep, and upon that pretense, known to Steffan to be false, he, (Steffan,) at the request of Brown and plaintiff's brother, gave Brown his promissory note for said balance; that plaintiff afterwards demanded payment of said balance from Steffan, and of Brown that said note be canceled; both of which demands were refused. Whereupon he prays judgment against Brown and Steffan for $527.20, costs, and interest. The appellant Brown demurred to this amended complaint upon the ground, among others, that it did not state facts sufficient to constitute a cause of action. His demurrer was overruled, and upon trial of the cause judgment was rendered against him alone for said balance of $527.20, with interest and costs; from which judgment, and an order overruling his motion for a new trial, he prosecutes this appeal.

The superior court erred in overruling the demurrer. On the facts stated Steffan alone is liable to plaintiff for the balance of the contract price of the sheep. Brown is in no wise liable on the contract, and he is guilty of no conversion of the property, or any part of it. Whatever claim he may have against Steffan on the note is no concern of the plaintiff. Steffan is none the less answerable to plaintiff because he may, by his own fault, have incurred an additional obligation to Brown or his assignees. The judgment and order appealed from are reversed, and cause remanded.

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79 Cal. 213

NORTH PAC. C. R. CO. *v.* GARDNER. (No. 12,966.)

(*Supreme Court of California.* May 22, 1889.)

MANDAMUS—JURISDICTION.

The superior court may issue a writ of mandate to a sheriff requiring him to execute a writ of restitution issued by a justice of the peace, upon his refusal to do so.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

The North Pacific Coast Railroad Company recovered a judgment before a justice for the possession of certain lands from Manuel Mancebo and another. A writ of restitution was issued, directed to the sheriff, Jacob Gardner, who returned it without executing it. A *pluries* execution issued with like result, and a petition was presented by said company to the superior court, asking that the sheriff be required to execute it. It was contended that the justice himself had power by motion to compel its execution, and to punish the sheriff as for contempt for failure to obey, and that therefore the superior court had no jurisdiction. The superior court decided in favor of its jurisdiction in the matter, and awarded the writ. Defendant appeals.

J. B. Southard and *Edward P. Cole*, for appellant. *F. William Reade*, for respondent.

THORNTON, J. We do not feel clear that a court of a justice of the peace can compel, on motion, a sheriff to execute a judgment rendered in such court, and punish him for contempt on his failure to obey its order. In such case, the party seeking the enforcement of his judgment can apply to the superior court for a writ of mandate on the refusal of the sheriff to execute the writ of execution to compel him to execute it. We find no error in the record. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; WORKS, J.; MCFARLAND, J.

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79 Cal. 208

BUELL *v.* DODGE *et al.* (No. 11,751.)

(*Supreme Court of California.* May 22, 1889.)

PLEADING—PARTIES.

1. Plaintiff alleged an agreement by which he was to convey land on which defendant M. held a mortgage, to defendant D., to whom he was also indebted, and by which M. was to release his mortgage and D. was to give a credit of a certain amount on the debt owing him; that defendants refused to carry out the agreement; that M. foreclosed his mortgage, by which plaintiff was damaged; and that he was also damaged by the attachment by D. of his personal property. *Held* a misjoinder of causes of action and parties defendant.

2. Plaintiff having merely alleged that he would have performed the agreement on his part if the defendants had not notified him that they would not perform it, and having simply averred that he was damaged by said attachment and foreclosure, the complaint was demurrable on the ground that it did not show a performance by plaintiff nor in what manner he was damaged.

Department 2. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Plaintiff alleged a cause of action growing out of the refusal of the defendants to perform a certain agreement. With reference to performance on his own part he simply alleged that he would have performed the agreement if defendants had not notified him that they would not perform it.

R. H. Taylor, *A. Craig*, and *W. C. Stratton*, for appellant. *Pillsbury & Blanding*, for respondents.

McFarland, J. Each of the defendants demurred separately to the complaint. The court below sustained the demurrers; and, plaintiff declining to amend, judgment went for defendants. Plaintiff appeals from the judgment. There was some oral argument of the case at the January term; but there are no points and authorities, or briefs, on file, and we thus lack the benefit of that permanent and satisfactory method of presenting the views of counsel.

Upon an examination of the complaint we think that the demurrers were properly sustained. It appears that the defendant Moss held (individually) a mortgage upon certain lands of plaintiff in the counties of Monterey, Santa Cruz, and San Benito; and that plaintiff was also indebted to defendant Dodge (individually) upon a promissory note. On February 10, 1879, a written agreement was made between the plaintiff and defendants, by which plaintiff was to remove all incumbrances upon said lands except said mortgage of Moss, and convey said lands to Dodge for $12,000. Moss was to "release his said mortgage from and upon said property so to be conveyed," and Dodge was to credit said $12,000 upon the note which he held against plaintiff. There was also to be some change in the matter of interest on the note. Three days after the agreement was signed the defendants notified plaintiff that they would not perform it. On the 6th day of March following, Dodge commenced an action against plaintiff on his said note, and attached a large amount of personal property in the county of Santa Barbara, consisting of live-stock and farming utensils used by plaintiff in his business of dairying and farming. (It does not appear whether or not the attached property was sold, or what became of it.) Afterwards defendant Moss foreclosed his mortgage on the said lands in the counties of Monterey, Santa Cruz, and San Benito. The lands "did not sell for more than sufficient to satisfy said mortgage and the costs of foreclosure." Plaintiff avers that he was damaged by said attachment by Dodge in the sum of $50,000, and by said foreclosure by Moss in the sum of $12,000, making in the aggregate $62,000, for which last-named sum he prays judgment against both defendants. The demurrers raise a great many points; but it is sufficient to say that there is no sufficient statement of the manner in which plaintiff was damaged, or that he had performed his part of the contract, and that there is a misjoinder of causes of action and of parties defendant. Judgment affirmed.

We concur: Sharpstein, J.; Thornton, J.

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79 Cal. 234

Hanscom v. Drullard. (No. 12,878.)

(*Supreme Court of California.* May 22, 1889.)

Sale—False Representations.

1. In an action for damages for alleged fraudulent representations made on the sale of a newspaper to plaintiff, evidence as to the number of subscribers to the newspaper some time before the sale, though immaterial, cannot harm defendant, where he does not claim that the number so shown is too small.

2. Property was sufficiently identified as that sold to plaintiff so that a witness could testify concerning its value, where it was pointed out to witness by one who knew it.

3. An estimate of value was competent, though not made at the very time of the sale.

4. The modification of an instruction asked by defendant, so as to make it read that fraud must be established by a "preponderance" of evidence, instead of by "clear and convincing evidence," is not error, where the court elsewhere instructs the jury that, in order for plaintiff to recover, the different elements making up his cause of action must be established by evidence so clear and convincing as to satisfy their minds by a preponderance of the evidence.

5. An instruction that if the subject of purchase was alike open to the inspection of both parties, and plaintiff did not avail himself of his means of knowledge, he will not be heard to say he has been deceived, is properly modified by adding, "unless he was induced by the trick or misrepresentations of defendant not to make such inspection."

6. Defendant was liable, although he professed to rely on the representations of others, and gave the source of his information, if he knew, or had reason to believe, that they were untrue.

7. An instruction that the jury cannot find for the plaintiff in any sum greater than the actual damage proved by a preponderance of the evidence is correct.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county.

Action for fraudulent representations alleged to have been made on the sale of a newspaper. Defendant objected to certain evidence as to the number of subscribers to the paper, but he did not claim that the number was understated.

P. J. Hazen and *Hatton & Fulkerth*, for appellant. *Schell, Bond & Eastin*, for respondent.

Foote, C. This is an action for damages alleged to have resulted from the practice by the defendant towards the plaintiff of false and fraudulent representations in the sale to the latter of the appurtenances, stock, and business of a newspaper. The plaintiff recovered a judgment, from which and an order refusing a new trial the defendant appeals. The errors relied on for a reversal of the judgment and order are that the court should not have admitted certain evidence for the plaintiff, and that it improperly gave certain instructions, modified some, and refused others. The ground of objection to Maddrill's testimony was that it was not shown that the property about which he attempted to fix the value was identified as that sold to plaintiff, and that his estimate was made about the time of the trial, and not at the time of sale, and was therefore immaterial, irrelevant, and incompetent. The property was pointed out to the witness by Porter, who knew it. That was a sufficient identification. While the estimate of value was not made at the very time of the sale, it was made at a time not remote from it, and, although not conclusive as to the value, it was not immaterial, incompetent, or irrelevant, since it tended to throw some light upon the question of value, one of the matters in issue. One of the questions put to Wagstaff, another witness, was not answered, the court sustaining the objection made. The other question asked him sought to elicit information as to the number of paying subscribers of the newspaper when the witness sold it to the defendant, in 1887, some time before the sale to the plaintiff.

Conceding, without deciding, that the evidence was immaterial, yet it could not have harmed the defendant. He only claims in his answer, upon information and belief, that he had more than 333 paying subscribers,—how many more is not stated. In his testimony upon the subject he does not fix the number of such subscribers, or claim there were more than 333. Neither does he attempt to do so by his witness Medley, who, he says, knew more about the business than he did. While Hanscom, whose statement, which is not now claimed as immaterial, is derived from the defendant's book, and is not controverted, states that there were 338 paying subscribers in May, June, and July, 1887, a short time after the sale by Wagstaff to Drullard. The court modified instruction 1, first asked by defendant, by making it read that fraud must be established by "a preponderance" of evidence, instead of by "clear and convincing evidence," but elsewhere, at folio 192, at the request of the defendant, the jury was instructed: "Before the plaintiff can recover in this action, the evidence must be clear and convincing, so as to satisfy your minds, by a preponderance of evidence, (1) that the alleged fraudulent representations, or a substantial part of them, were made by the defendant: (2) that such representations were false; (3) that they were made with the intent to deceive the plaintiff, and induce him to enter into the contract; (4) that they did so deceive him, and induce him to enter into the contract; (5) that the plaintiff was damaged thereby. Unless each of these facts is shown to your satisfaction by a preponderance of evidence, you should find for the defendant."

The third instruction, first asked by the defendant, is: "Plaintiff cannot recover in this action unless he was deceived by the alleged representations, and if the means of knowledge are at hand, equally available to both parties, and the subject of purchase is alike open to their inspection, if the purchaser does not avail himself of these means and opportunities, he will not be heard to say that he has been deceived." The court added, "unless he was induced by the trick or misrepresentations of defendant not to make such inspection." A man may perhaps be able to discover for himself what he ought to know if left to his own devices, but where he is induced by the artifice of another not to use his opportunities it would seem hardly fair that the one using the trick or misrepresentation should remain protected. The court below evidently thought the evidence warranted the modification, and we cannot say that it was wrong in its conclusion. Instruction No. 2 for defendant was modified by inserting the words, "unless the defendant knew or had reason to believe they were untrue." The language was added to an instruction which told the jury that if the representations made to the plaintiff, as to the value of the property sold, were untrue, yet defendant would not be liable if the defendant professed to rely on the knowledge of others, and gave the source of his information, which plaintiff consulted, and found to be true. If the defendant had any reason to know that such representations were untrue, the fact that he gave the sources of information, and did not profess to be informed himself, would not absolve him. His conduct would simply mislead the plaintiff to his prejudice, and must have been willful, if the defendant had reason to know that the information which the plaintiff should obtain would be untrue. The modification is in accordance with the provisions of section 1710 of the Civil Code and of the rule laid down in Davidson v. Jordan, 47 Cal. 353, where it is said, with reference to a similar affair: "Representations made in that manner cannot be said to be false or fraudulent, unless Frank knew, or had reason to believe, them to be untrue." Instruction No. 5, given for the defendant, where it reads that the jury "cannot find for the plaintiff in any sum greater than the actual damage proved by a preponderance of the evidence in the case to have been sustained by the plaintiff," states the correct rule as to damages, and the jury cannot have been misled as to that matter. The appellant in his brief declares that he refrains from pointing out specifically the imperfections claimed to exist in the instructions, but says that the whole effect of them as given was to mislead the jury, and cause it to decide the case on erroneous views of the law, and that the principles of law denied to the defendant are too well known to require citation of authorities. We have examined the instructions as given, and have become satisfied that, taken as a whole, they could not have misled the jury, and that the law was properly given under the pleadings, facts, and circumstances as shown in the record. This is sufficient, as held in many cases. People v. Tomlinson, 66 Cal. 347, 5 Pac. Rep. 509. We advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

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79 Cal. 203

FARLEY *et al.* v. HOPKINS, Sheriff, *et al.*

(No. 11,964.)

(*Supreme Court of California.* May 22, 1889.)

HOMESTEAD—DECLARATION BY WIFE.

1. In California a declaration of homestead by a wife is not invalid because not filed for record on the day of its acknowledgment, nor because it is not filed by her in person.

2. Civil Code Cal. § 1262, provides for the filing of a declaration of homestead by the wife where the husband has not made the selection. Section 1263 provides that where the declaration is made by the wife it shall show that her husband has not made the declaration, and that she therefore makes it for their joint benefit. *Held*, that a declaration stating that the wife filed it for herself and husband, and that the husband had not made it, is not insufficient because it does not expressly aver the reason for her so doing.

3. On a motion for temporary injunction to restrain the levy of an execution upon premises claimed as a homestead, it is not error for the court to refuse to determine on affidavits the correctness of an allegation that a portion of the premises in question is not exempt.

Commissioners' decision. Department 1.

Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

A. P. Needles and *Wm. Grant*, for appellants. *Stanly, Stoney & Hayes*, for respondents.

FOOTE, C. This is an appeal from an order granting a temporary injunction restraining the defendants, among whom was Hopkins, the sheriff of the city and county of San Francisco, from selling under execution certain premises claimed by the plaintiffs as their homestead. The prayer of the complaint is that it may be decreed that the judgment under which the sheriff is about to sell the homestead is not, and never was, a lien upon the premises in dispute; that they are not subject to levy and sale under execution issued upon the judgment; and that the sheriff be enjoined from selling or offering for sale the premises, etc.; and for such other equitable relief as may seem proper, etc. The record shows that Margaret Farley and her husband, Thomas Farley, who are the plaintiffs here, were the defendants in the judgment above referred to, and that she, as the wife of Thomas Farley, made and acknowledged a declaration of homestead on the premises in question on the 17th day of October, 1884, and filed it for record on the next day, through "Tobin & Tobin," presumably her attorneys or agents. This declaration contains among other things this statement: "I make this declaration for the joint benefit of myself and husband, and I declare that my husband has not made a declaration of homestead." It was claimed in the affidavits filed for the execution creditor, on the hearing of the motion to show cause why the temporary injunction should not be granted, that the upper story of a building on the premises was not a part of the homestead. The affidavit filed on the other side tended, to some extent, to dispute this alleged fact. The defendants claim that the declaration of homestead is invalid, and that the homestead claim does not extend to the upper story of the building; that the injunction, if granted at all, should not have included it. The objections are—*First*, that the declaration of homestead was not filed until the day after it was acknowledged; *second*, that it was not filed by the declarant in person, but by some one for her; *third*, that she does not assign any reason whatever why she made it for the joint benefit of herself and her husband; *fourth*, that a portion of the building upon the premises was not used by the family. We perceive no error upon the part of the trial court in refusing to anticipate the final judgment, and to determine, on the motion and by the affidavits, whether or not the upper story of the building is a part of the homestead.

With reference to the first point, it may be disposed of by saying that there is nothing in the statute which declares that the filing for record must take place on the day of the declaration and its acknowledgment, and to give such a construction to the law would be, in many instances, practically to defeat it. Civil Code, § 1265. The same thing may be said as to the point made that the declarant did not file the declaration in person, but obtained some one to do it for her. The declaration states that the wife filed it for herself and husband, and that her husband had not made any declaration of a homestead. Section 1262 of the Civil Code reads as follows: "In order to select a homestead, the husband or other head of a family, or, in case the husband has not made such selection, the wife, must execute and acknowledge in the same manner as a grant of real property is acknowledged, a declaration of homestead, and file the same for record." Section 1263 prescribes that "the declaration of homestead must contain (1) a statement showing that the person making it is the head of a family; or, when the declaration is made by the wife, showing that her husband has not made such declaration, and that she therefore makes the declaration for their joint benefit." It is said by appellants that the wife has not stated as a reason for her declaration of homestead that her husband has not made any, and therefore the declaration is void. She states the fact that he has not done so, and that she has. The statute only authorizes her to declare a homestead when her husband has not. She is not required under the subdivision, supra, in her declaration to show anything but the existence of the fact, which alone authorizes her and makes her competent to make the declaration, and that she does make it. When she declares that her husband has made no declaration of a homestead, thus showing a state of facts under which she can make a declaration, and then explicitly makes it, it would seem that the reason of her doing so, if any was needed to be shown, is apparent. The statute does not require her, in addition to showing her competency to make it and that she does make the declaration, to go further, and state that the reason she makes it is that she is competent to do it because her husband has not made it. We perceive no merit in this appeal, and advise that the order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order is affirmed.

(79 Cal. 232)

PEREIRA *v.* SMITH. (No. 12,859.)

(*Supreme Court of California.* May 22, 1889.)

APPEAL—DAMAGES—TRIAL BY COURT.

1. Where all the evidence as to the damages suffered by plaintiff was given by his witnesses, and defendant made no effort to controvert it, and plaintiff, after giving an estimate of particular items of damage, stated that he suffered twice as much damage as he claimed in the complaint, which was $500, a judgment for $325 will not be reversed because the damages found were excessive, or not in accordance with the evidence.

2. Where the findings made are sufficient, the refusal to make certain findings as requested is not erroneous.

Commissioners' decision. In bank. Appeal from superior court, Tuolumne county; J. F. ROONEY, Judge.

F. D. & G. W. Nichol and *E. A. Rodgers*, for appellant. *F. W. Street* and *I. M. Kalloch*, for respondent.

FOOTE, C. The plaintiff brought this action to enjoin the defendant from interfering with the former's use of certain natural waters of a stream claimed by the plaintiff as a prior appropriator, and for damages for injury already done in obstructing the flow of that water. The plaintiff obtained a judgment as prayed for. From that and an order denying a new trial the defendant has appealed.

The main contention of the appellant appears to be that the court erred in making its fourth, seventh, eighth, ninth, tenth, eleventh, and twelfth findings of fact, and a long and vigorous argument, of many pages in extent, is devoted to the discussion of the evidence, or at least parts of it, as going to show that there was no evidence to support these findings. A painstaking examination of all the evidence in the record has satisfied us that the findings are supported by it.

All the evidence as to damages suffered by the plaintiff was given by witnesses brought forward by him, the defendant making no effort to controvert it. The plaintiff, after giving an estimate of particular items of damage, states that he suffered twice as much damage as he claimed in his complaint, and it is not denied by anything brought forward in the evidence by the defendant that such is not the fact. The complaint claims $500 to be the damage suffered, and the judgment is for $325. We perceive no reason, therefore, for saying that the amount of damages found is excessive, or not in accordance with the evidence.

It is further maintained by the defendant that the court refused to make certain findings upon points requested on his part. It appears that the findings asked for were written out, and the court was asked to adopt them as its own. This species of dictation as to findings is not allowable. Under the present system of findings requests for findings are unnecessary. The court is bound to find on all the issues without any request to do so. If it does so find, whatever requests may be made may be disregarded. The question in all such cases must be whether the findings are sufficient, and the presence or absence of a request is utterly immaterial. In this case the findings are sufficient. The refusal, therefore, of the court to make the findings as presented to it as facts in the case is not erroneous. Upon the whole record, perceiving no prejudicial error, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(79 Cal. 207)

AVERETT *et al.* *v.* SOBRUNES *et al.* (No. 11,414.)

(*Supreme Court of California.* May 22, 1889.)

SHERIFFS AND CONSTABLES—UNLAWFUL SEIZURE—FINDINGS.

In an action against a constable and his official sureties, for the seizure of plaintiffs' property under execution against a third person, though a finding that the constable, "against plaintiffs' will and consent, wrongfully and unlawfully took all of the personal property mentioned and described in plaintiffs' complaint from said plaintiffs' possession," is not a finding that the title to the property was then in plaintiffs, such defect does not affect the substantial rights of the parties, and must be disregarded on appeal, under Code Civil Proc. § 475, where the trial court has also found that plaintiffs had title at the commencement of the action.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Action by Averett and others against Sobrunes, a constable, and others, sureties on his official bond. Judgment for plaintiffs, and defendants appeal.

W. H. Webb, for appellants. *S. F. Geil* and *H. V. Morehouse*, for respondents.

SHARPSTEIN, J. This is an action against the defendant Sobrunes, a constable, and the sureties on his official bond, for his alleged levy on, and seizure and sale of, the personal property of plaintiffs on an execution against one Tillman. The title of plaintiffs to the property was in issue, and their right to recover depended upon their establishing their ownership of it at the time of the seizure of it. The evidence is not before us, and the contention of appellants here is that the fact of plaintiffs' ownership at the time of the seizure is not found. We must confess that it is not found as directly as it should be. But the court has found that at the time of the commencement of this action the plaintiffs were the owners and entitled to the possession of all of said property. If this had been preceded by a finding that at the date of the seizure the plaintiffs were the owners and entitled to the possession of it, the case probably would never have reached this court. There is a finding "that on the said 10th day of October, 1884, the said defendant, L. G. Sobrunes, in his official capacity as constable of San Antonio township, against plaintiffs' will and consent, wrongfully and unlawfully took all of the personal property mentioned and described in plaintiffs' complaint from said plaintiffs' possession, and converted the same to his own use." Possession is *prima facia* evidence of title, but it is not title, and the ultimate fact, and not the evidence of it, should in all cases be found. But this error or defect is one which, in our opinion, does not affect the substantial rights of the parties, and therefore must be disregarded. Code Civil Proc. § 475. Judgment affirmed.

We concur: McFarland, J.; Thornton, J

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79 Cal. 239

Yuba County *v.* Cloke. (No. 12,298.)

(*Supreme Court of California.* May 22, 1889.)

Injunction—Pleading.

1. A complaint alleged the carrying on of hydraulic mining on a certain river, which filled the bed of the river and destroyed the channel, and rendered plaintiff's (a county's) bridge and highways unsafe; that defendant was selling water, knowing that it was to be used in hydraulic mining on such river, and was thereby assisting in conducting such hydraulic mining, and filling the channel of the river, to the injury of plaintiff's property, etc.; and prayed for an injunction. *Held*, that the hydraulic mining was not of itself unlawful or necessarily injurious to others; that the neglect to properly care for the *débris* resulting therefrom, only was unlawful; that the sale of the water was not unlawful; and that, as the complaint did not show that it was sold with knowledge that it was to be used in such manner as to injure plaintiff, it stated no cause of action.

2. Where the complaint alleges the facts giving the right to an injunction on information and belief, and such alleged facts are positively denied under oath in the answer, a temporary injunction must be dissolved.

Beatty, C. J., dissenting.

In bank. Appeal from superior court, Yuba county; Philip W. Keyser, Judge.

Byrne & Cross, (*J. H. Boalt*, of counsel,) for appellant. *E. A. Forbes* and *E. A. Davis*, (*A. L. Hart*, of counsel,) for respondent.

Works, J. This is an appeal from an order refusing to dissolve a temporary injunction. The motion to dissolve was made upon the pleadings and the minutes of the court. After alleging the corporate capacity of the plaintiff, and the representative capacity of the defendant, as administrator of the estate of Hickey, the complaint contains, in substance, the following allegations: (1) That the plaintiff is the owner of a one-half interest in a bridge on Bear river, in this state. (2) That hydraulic mining has been carried on by numerous persons upon said river for 20 years, the immediate effects of which have been to fill up the bed of said river, and destroy the channel thereof, and render said bridge and the highways of plaintiff, adjacent to said river, insecure and unfit for public travel. (3) That many persons and corporations have been and are engaged in said business of hydraulic mining, and discharge gravel and bowlders into said river, with the effects aforesaid, and threaten to, and will, continue to do so. (4) That, if continued, the same will fill up the channel of the river, and destroy said bridge. (5) That the deceased had been for many years the owner and in control of water-rights, reservoirs, and ditches in this state, acquired for the purpose of selling such water to others to be used in mining by the hydraulic process, and that the defendant, as the administrator of said estate, has continued to sell and furnish water for said purpose, and is now engaged in selling and furnishing the same in large quantities, with the knowledge and understanding that the same is used by the parties to whom it is furnished for the purpose of conducting mining by the hydraulic process upon and on said river, and that the said water is being used in said mining by said process, along the banks of said river and its tributaries, with the knowledge, consent, and by the assistance of the said defendant. (6) That by so selling and furnishing said water the defendant is aiding and assisting the said persons and corporations in conducting said hydraulic mining, and thereby filling up the channel of said river, and holding over the plaintiff a constant menace of the destruction of its said property. (7) If continued said mining will fill up the channel of said river, and destroy plaintiff's property. (8) That the acts of said persons and corporations are of a constantly recurring nature, and the damage and threatened injury to the plaintiff's property is being produced by the repeated wrongful acts of the defendant, and of the said persons and corporations to whom he furnishes water for the purposes aforesaid. (9) That the defendant threatens to continue to sell said water to the parties aforesaid, who will continue to use it for the purposes mentioned, unless enjoined. (10) That if said mining is stopped the river will clear its channels, and plaintiff's property will not be injured, but, if continued, will destroy and render useless plaintiff's said property. The prayer of the complaint is, in substance, that the defendant be enjoined and restrained from selling or furnishing to said persons, companies, or corporations, or to any or either of them, and from suffering or permitting them, or any of them, to use said water supply, or any part or portion thereof, for the purpose of mining by said hydraulic process, or by any other hydraulic process by which there will be or may be dumped or washed into said Bear river, or any of its forks, or tributaries, or gulches, or ravines, any tailings, bowlders, cobble-stones, gravel, sand, clay, *débris*, or refuse matter whatever. There was a demurrer to the complaint, which was overruled. The defendant answered, admitting his representative capacity, and the ownership and control of the water, as alleged in the complaint, and that he had been engaged in selling the waters; but denying the allegations of the complaint, so far as it alleges knowledge on his part that said waters were to be used, or were actually being used, for the purpose of hydraulic mining, or for any other unlawful purpose, or that the same had resulted, or would result, in any injury to the property of the defendant. Upon the filing of the complaint a temporary injunction was issued, as prayed for in the complaint, and upon the coming in of the answer the motion to dissolve the same was made and denied.

It will be seen that in this complaint it is not averred in direct terms, nor can it be inferred from any of the facts stated, that the defendant sold the water with a knowledge that the same was to be used in such manner as to work injury to the property of the plaintiff. The complaint presents the sole question whether a party can be enjoined from selling water to a person engaged in the business of hydraulic mining, without reference to the question whether such mining is to be carried on in such way as to work injury to others or not. It seems to us it must be conceded that the business of hydraulic mining is not within itself unlawful or necessarily injurious to others. The unlawful nature of the business results from the manner in which it is carried on, and the neglect of parties engaged therein to properly care for the *débris* resulting therefrom, whereby it is allowed to follow the stream, and eventually cause injury to property situated below. If this be true, giving full effect to all of the allegations of the complaint, it does not show that the appellant was engaged in an unlawful business, or one injurious to the public or the respondent. The sale of the water was lawful and cannot be enjoined. The business of hydraulic mining, properly conducted, is lawful, and therefore the sale of water for that purpose cannot be enjoined. It would be a remarkable doctrine, it seems to us, that a party furnishing material to another, to be used in conducting a lawful business, could be held for damages if said business be improperly conducted, or be enjoined on the ground that such business will be so conducted as to work injury to others.

Counsel for respondent rely upon Woodruff v. Mining Co., 9 Sawy. 441, 18 Fed. Rep. 753. We do not question the correctness of the case cited, but it does not meet the point presented here. There the defendant was himself engaged in the business of hydraulic mining, and in supplying the water therefor for himself, and it appeared that the business of said parties, including the defendant, was being conducted in such way as to amount to a public and private nuisance. The marked difference between that case and the one before us is that there the defendant was shown to be directly connected with the wrongful and injurious act complained of. Here he is not. If the parties to whom the water was sold have brought themselves within the rule, as laid down in the opinion of the learned judge in the case of Woodruff v. Mining Co., the remedy of the respondent is against them, and not against the appellant. We see no good reason for holding that an injured party may pass by those who work the injury complained of, and attack one who has, in a lawful way, sold them a part of the material to carry on their work, and that, too, where the business for which the material is sold is in itself lawful. Numerous cases are cited to the effect that one who demises his property for the purpose of having it used in such a way as to prove offensive to others may himself be treated as the author of the mischief, but these cases bear no analogy to the one at bar. This is not a case of permitting one's property to be used for an improper purpose, injurious to others, but a sale of property which is put to an improper use after it passes from the seller's control. For the reasons stated, the complaint did not state a cause of action, and the order refusing to dissolve the injunction was erroneous for that reason.

Besides, so far as the complaint alleged that the appellant had knowledge that the water sold by him was to be used in hydraulic mining, it was made upon information and belief, and these allegations were positively denied under oath in the answer; and upon that ground the injunction should have been dissolved, conceding that mere knowledge that such use was to be made of the water would so connect the appellant with the wrong complained of, as to subject him to an injunction. Hiller v. Collins, 63 Cal. 236; High, Inj. § 1523. The order appealed from is reversed.

We concur: McFarland, J.; Thornton, J.; Paterson, J.; Sharpstein, J.

Beatty, C. J. I dissent. The opinion and judgment of the court are based upon the propositions that "the business of hydraulic mining, properly conducted, is lawful;" that "the business of hydraulic mining is not within itself unlawful or necessarily injurious to others; that the unlawful nature of the business results from the manner in which it is carried on, and the neglect of parties engaged therein to properly care for the *débris* resulting therefrom, whereby it is allowed to follow the stream, and eventually cause injury to property situated below," etc. It may be that there is a lawful and harmless method of mining by the hydraulic process, one in which the miners do properly care for the *débris* resulting therefrom, so as to prevent it from following the stream and damaging property below, but nothing of the sort appears from, or is consistent with, the allegations of the complaint in this case. The plaintiff describes the hydraulic process as one that is plainly, distinctly, and inevitably injurious and unlawful; one by which immense quantities of *débris* are deposited in and carried down the natural beds of the streams on or near the banks of which it is conducted; one in which the miners take no care of the *débris*, but allow it to be carried down the stream to and upon the lands below. The complaint does not describe or suggest the possibility of any other process of hydraulic mining. It charges that the miners along Bear river are mining in the manner described, and that the defendant is selling water to be used as aforesaid. It does, in my opinion, clearly show that the defendant is delivering water to the miners to be used for an unlawful purpose injurious to the plaintiff, and with full knowledge, understanding, and intent that it shall be so used. The order appealed from was proper, and should be affirmed.

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79 Cal. 211

Dashaway Ass'n *v.* Rogers *et al.* (No. 11,838.)

(*Supreme Court of California.* May 22, 1889.)

False Representations—Actions to Recover Money Deposited—Parties—Pleading.

1. Where one acts for himself and a third person in making a contract to convey land to plaintiff, and represents that he owns such land, and plaintiff, in reliance on such representation, deposits money with him, to be applied on the purchase price, and he divides such money between himself and the third person, neither of them having any title to the land, and not conveying it to plaintiff within the time specified, they are jointly liable for the amount deposited, though plaintiff did not know of the third person's connection with the transaction at the time of the contract.

2. A common-law count for money had and received is proper in the complaint in an action for the deposit.

Department 2. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by Dashaway Association against R. C. Rogers and Daniel Rogers. Plaintiff appeals from a judgment sustaining demurrers to the complaint.

Tilden & Tilden, for appellant. *Daniel Rogers*, for respondents.

McFarland, J. 1. Each of the two defendants demurred separately to the complaint. Both demurrers were sustained, and judgment rendered for defendants. Plaintiff appeals from the judgment. We think that the court erred in sustaining the demurrers. The facts alleged in the first count of the complaint are substantially these: The defendant R. C. Rogers represented to plaintiff that he (R. C.) was the owner of a certain piece of land. Plaintiff, relying on his representation, and believing that he was acting for himself alone, entered into a written contract with him, by which he agreed to sell said land to plaintiff for $11,500, and make a good title, etc., within two weeks. In pursuance of this contract plaintiff deposited with him $1,150, to be applied on said purchase price if he complied with the contract, and, if not, to be returned, and paid back to plaintiff. As a fact, however, (so it is averred,) said R. C. Rogers, in entering into said contract, and securing said deposit of money, was acting for himself and for the other defendant, Daniel Rogers, on their joint behalf and for their joint benefit. R. C. was the agent of Daniel, and they were both joint principals in the transaction. R. C received said $1,150 for the joint benefit of himself and said Daniel, and it was divided between them. Neither of them had any title to the land, and they were entirely unable to convey, and did not convey, a title thereto. Plaintiff demanded the $1,150 deposited as aforesaid from both the defendants, and they refused to pay the same or any part thereof.

The case here is not confused by those subtleties by which the question whether a principal or agent should be sued is often embarrassed. The defendants were both principals. R. C. Rogers was himself a principal, and was also the hand by which the other principal, Daniel, acted. It makes no difference that plaintiff did not know of Daniel's connection with the transaction at the time the contract was made. In this respect the case cannot be distinguished from Thomas v. Moody, 57 Cal. 215. The money deposited by plaintiff was received for the joint benefit of both defendants, and it is averred that they divided it between them; and that, under the circumstances, they can retain it, (as said in Thomas v. Moody,) "is a proposition which can be no more sustained in law than in morals." See, also, Kreutz v. Livingston, 15 Cal. 345. There was no misjoinder of causes of action or of parties defendant. There was only one cause of action, viz., money of plaintiff which defendants had, and which they wrongfully refused to pay; and defendants were jointly liable to pay said money.

2. The second cause of action stated in the complaint is in the form of a common-law count for money had and received, and we cannot see why it is in any way defective. Stanwood v. Sage, 22 Cal. 517.

Judgment reversed, with directions to the court below to overrule the demurrers to the complaint.

We concur: Thornton, J.; Sharpstein, J.

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79 Cal. 215

Spencer *v.* Lawler, Judge. (No. 13,061.)

(*Supreme Court of California.* May 23, 1889.)

Mandamus.

Plaintiff was on December 27, 1888, adjudged guilty of contempt in failing to pay alimony under a decree of court, and committed to jail. On the following day he applied for a discharge under Code Civil Proc. Cal. § 1143 et seq., relating to the discharge of persons imprisoned on civil process. The judge refused to hear it. On February 2, 1889, plaintiff asked for a mandate commanding the judge to hear the case. Respondent admitted the application as alleged, but did not think it necessary to grant it, as he had examined the question of plaintiff's pecuniary ability the day before, and alleged his willingness at all times after 10 days from December 27th to examine the case. *Held*, that the application as originally made was properly refused, and, in view of the facts alleged in the answer, the mandate will be denied, at plaintiff's costs.

Department 1.

Application for writ of mandate against F. W. Lawler, judge of the superior court.

Jordon & Bull, for petitioner. *Dorn & Dorn*, for respondent.

PATERSON, J. On August 25, 1884, in an action pending between plaintiff and his wife, in the superior court, the bonds of matrimony existing between the parties were dissolved, and Spencer, the plaintiff herein, was ordered to pay to his wife the sum of $50 per month alimony. The decree was on May 13, 1887, so modified as to require him to pay the sum of $25 per month. On December 24, 1888, Mrs. Spencer presented to, and filed in, the court below an affidavit alleging that nothing had been paid to her under the modified decree for alimony for over six months prior to that date, although the plaintiff was and had been amply able to respond to the order. Spencer, the petitioner herein, was thereupon cited to show cause before the court why he should not be punished for contempt. The parties appeared before the court on December 27th, and after a full hearing the court decided that the petitioner herein had contumaciously refused to obey the order of the court, adjudged him guilty of contempt, and committed him to the custody of the sheriff until the amount of alimony due should be paid. On the following day his attorneys gave notice that he would apply to respondent herein, Hon. F. W. Lawler, presiding judge of the department in which the order adjudging petitioner guilty of contempt was made, for a discharge under the provisions of section 1143, Code Civil Proc., et seq. It is alleged in the petition herein that respondent sent a messenger to petitioner's attorneys, informing them that he would not hear the application for a discharge on the 31st day of December, the time fixed in the notice, or at any other time; that, nevertheless, said attorneys appeared in court on the day last named to make the application aforesaid, but respondent was not present to hear it. Upon these facts the petition was filed herein February 2, 1889, asking for a writ of mandate commanding respondent to hear petitioner's application for a discharge from imprisonment. In his answer the respondent admits that an application was made, as alleged, for a discharge on December 28th, but alleges that he did not consider such an examination necessary at that time, because he had fully and fairly examined into the matter of petitioner's ability to pay the alimony on the day previous, but that he (respondent) at all times since the expiration of 10 days from and after December 27th has held himself in readiness as judge of said court, and is now ready and willing, to make whatever examination, and to hear whatever testimony, may be produced by petitioner touching his ability to pay the several sums of money as ordered. We think that the respondent properly refused to again examine into the matter so soon after the examination which was held on December 27, 1888. In re Wilson, 75 Cal. 580, 17 Pac. Rep. 698. Furthermore, it appears, taking the answer of the respondent as true,—and there is nothing to the contrary, except the allegation that a messenger informed the attorneys of the petitioner that respondent would not hear it at all,—that if the application had been renewed at any time subsequent to the expiration of the 10 days referred to by the respondent, and before the time when this petition was filed herein, the respondent would have made the examination which we are asked here to require him to make. The attorneys for petitioner ought not to have relied upon communications from a messenger or the clerk; they should have applied to the judge of the court. If they had done so, this petition would have been unnecessary. The matter now between the parties seems to be one simply of costs. In view of the facts that petitioner's application would have been granted if made to the court below at any time after January 6th, and that no application was made, we think he should pay the costs of this proceeding. Petition dismissed.

We concur: BEATTY, C. J.; McFARLAND, J.

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79 Cal. 218

BARTLETT *v.* ODD-FELLOWS' SAV. BANK.

(No. 11,871.)

(*Supreme Court of California.* May 23, 1889.)

ATTORNEY AND CLIENT—CONTRACTS.

1. Where the attorney of a corporation is employed at a salary which, as also his term of employment, may be changed at the option of the corporation, there is nothing illegal or improper in his making a contract with the corporation for a special fee in a special case; no undue influence, persuasion, or misrepresentation being used by him.

2. Under an agreement by which, for his legal services in a case, the attorney was to receive a fee contingent upon the amount the corporation should receive from the opposite party, and payable when so received, the damages for discharging the attorney without cause before the services were completed are the stipulated portion of the amount received by the corporation, with interest from the date of its receipt.

3. In such case the statute of limitations would not begin to run against the attorney's claim for damages until the receipt of the money by the corporation.

4. Allegations in the complaint that, by reason of the contract, defendant is under an obligation to pay plaintiff a certain sum of money, but has refused to pay the same, and that, therefore, such sum and interest thereon are due, for which judgment is prayed, sufficiently allege that plaintiff has sustained damages.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

C. L. Tilden, for appellant. *Stanly, Stoney & Hayes*, for respondent.

FOOTE, C. This action was brought by an attorney at law to recover a sum of money alleged to be due him by the defendant. Judgment passed for the plaintiff as prayed for, from which and an order denying a new trial the defendant appeals. The points made for the reversal of the judgment and order are (1) that the facts set up in the complaint show that the action was not brought to recover compensation for services rendered as an attorney, but that the cause of action is founded upon a breach of contract by the defendant, and arose when the relation of attorney and client was terminated, and was therefore barred by the statute of limitations; (2) that the contract, as alleged, is of a kind where the presumption arises that it has been entered into without consideration, and under undue influence, and this presumption has not been overcome by the plaintiff; (3) that the contract alleged was entered into by the defendant while laboring under a mistake of fact, and that the defendant had a right under the law to rescind it; (4) that the complaint is insufficient, in that it does not contain an allegation of damages, and therefore is not sufficient to support the judgment.

The case, as presented by the record, is one where an attorney at law, who was the general attorney of the corporation, at a salary which might be changed at the option of the corporation, and whose period of employment as such was subject to the same condition, was voluntarily, and without any effort, fraud, or undue influence on his part, employed specially by the corporation, through its proper officers, to perform certain special work, which he was ready and willing to perform, and did partially perform, but which the defendant prevented him from fully accomplishing, through no fault of his. The compensation of the attorney was to depend for its time of payment upon the time when the corporation should obtain by judgment or compromise the payment of a claim it had against William Sharon. Its amount was to be controlled by the amount received from said Sharon. A certain sum of money was received from that source by the corporation, but before that time it had discharged the plaintiff from being its attorney, and, on his demanding the amount of money which he claimed under the contract that he was entitled to have, payment was refused, and before the time of the running of the statute of limitations from the date of the reception of the money by the corporation this suit was instituted. The corporation had the power to change the amount of the attorney's salary in its general employment at any time; so it could as to the term of his employment. In this existing state of relationship of the parties it does not seem at all wrong that in a special case the attorney should enter into contract with his principal for a special fee; and if, as in this case, the employment is voluntarily tendered to him by those competent to contract with him, with a full knowledge of their right and of the circumstances under which they are acting, we do not perceive anything improper in it. Mr. Bartlett, the plaintiff, did not seek the employment; it was tendered to him. He did not misstate any facts, or mislead the defendant. The contract was entered into with a true appreciation of the situation surrounding the transaction, and was in no sense unfair. To us it seems as if the plaintiff was discharged without cause, and did not forfeit any of his rights. The suit has been instituted to recover the amount of money to which the plaintiff would have been entitled had the defendant allowed him to complete the services which he had commenced to perform. If the defendant, by its wrongful conduct, prevents the performance of acts which entitle a party to a specific recompense, it would seem that such amount and interest from the time it became due may be recovered in an action which sets forth such a state of facts.

The plaintiff could not sue for damages resulting from his discharge, at the time of such discharge, because he could recover no money under his contract until the defendant should be paid some by William Sharon. The moment that money came to the hands of the defendant, and not until then, was the plaintiff entitled to his proportionate share of it. His cause of action could not accrue until the condition had happened; that is, the money had been paid by William Sharon to the defendant, by means of which alone the plaintiff would be entitled to anything. Had the plaintiff brought his action for damages for the non-compliance of the defendant with its contract, in discharging him without allowing him fully to perform the services he had undertaken, the defense would have been that no damages could be recovered, because no money had been received from William Sharon; that the condition on which the plaintiff was alone to be paid had not happened; and the amount of his compensation could not be determined, as it also was contingent on, and a proportionate part of, the amount which Mr. Sharon might pay. There can be no doubt that the plaintiff's cause of action accrued when the defendant received the money, and refused to pay him his share of it. The statute of limitations did not, therefore, bar the action. The detriment caused by the breach of the defendant's obligation to pay the plaintiff the amount of money which it had agreed to pay is the amount due by the terms of the obligation, with interest thereon. Civil Code, § 3302. The allegations of the complaint are that the defendant is under an obligation to pay the plaintiff a certain sum of money and interest, and that it has refused to comply with such obligation, and that, therefore, a certain sum of money and interest is due, for which judgment is prayed. When the plaintiff, as here, alleges facts to exist which, if proved, would entitle him to recover the sum of money he demands from the defendant, he has shown, so far as the recitals of the complaint can, that he has sustained damages. When he proves the facts he should recover a judgment for the sum of money he has thus shown himself to be entitled to. If he states the facts in his complaint which in law constitute his damages and their measure, he has shown enough in the pleading to warrant a recovery of what he claims, if his proof corresponds to his allegations. We perceive no prejudicial error in the record, and advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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79 Cal. 224

COUSINS *v.* PARTRIDGE. (No. 11,920.)

(*Supreme Court of California.* May 23, 1889.)

NEGOTIABLE INSTRUMENTS—MATURITY—PRACTICE.

1. Civil Code Cal. § 3135, providing that "the apparent maturity of a promissory note payable at sight or on demand is" six months after date, if it does not bear interest, etc., does not overturn the rule that as to the maker a note payable on demand is due presently without any demand, but, as shown by the context, relates to the rights and obligations of indorsers, etc.

2. An instruction that the execution of the note sued on "is just about the only question for you to determine," is not open to the objection that it takes from the jury the issue as to whether there was any consideration for the note, where, in the next sentence, the court says, "the first and principal question for you to determine is," was this note duly signed, etc., "and, if so, was there any consideration for it," and afterwards discusses the question of consideration fully.

3. It is not reversible error for the court to read an extract from the opinion of the highest court of another state, containing a correct statement of the law and applicable to the case on trial, the only comment made thereon by the trial court being that "it is a case somewhat similar to this."

4. There was no error or abuse of discretion in allowing plaintiff to introduce certain testimony after defendant had closed his evidence.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

T Z. Blakeman, for appellant. *Wm. H. & Wm. B. Sharp*, for respondent.

MCFARLAND, J. This is an action on a promissory note alleged to have been made by Louis G. Partridge, deceased, on February 19, 1885, for $2,000, payable to plaintiff on demand after date. The answer denies that the note was ever made or delivered by the deceased to plaintiff, or that there was "any consideration for the said promissory note." The case was tried without a jury, and the verdict and judgment were for plaintiff. Defendant appeals from the judgment, and from an order denying a new trial.

1. Appellant contends strenuously that the evidence is insufficient to justify the jury in finding that the deceased made the note, or that there was any consideration for it; but if it could be rightfully said, in the language of appellant's counsel, that "it is difficult to avoid looking upon the claim of Mr. Cousins in this connection without suspicion," that, at least, is all that could be rightfully said on the subject. There certainly was strong evidence tending to show both the making of the note and the consideration, and we cannot say that the verdict is not justified by the evidence, and that, notwithstanding the fact that plaintiff and the deceased held the relation towards each other of attorney and client.

2. Appellant contends that the court, when charging the jury, erred in reading part of the opinion of the court of appeals of the state of New York in a certain case decided in that court. Reading from the opinion of another court when instructing a jury is, perhaps, not a practice to be commended; but as the part of the decision read in the case at bar appears to be a correct statement of the law, and applicable to the case before the jury, we do not see how the practice in this particular case affords a ground for a reversal of the judgment. All that the court told the jury before reading the extract from the opinion, was that "it was a case somewhat similar to this."

3. Appellant objects to the charge of the court, because in one place the jury are told that the execution of the note "is just about the only question for you to determine;" the argument being that this language took away from the jury the question whether or not there was any consideration for it. But in the next sentence the court says: "The first and principal question for you to determine is, was this promissory note signed by Louis G. Partridge in his life-time, and, if so, was there any consideration for it;" and afterwards, the question of consideration is fully discussed. The jury, therefore, could not have been misguided in the matter complained of; and we think that the instructions on the subject of consideration were correct.

4. There was no error or abuse of discretion in the court in allowing plaintiff to introduce certain testimony after defendant had closed his evidence.

5. Appellant complains of one or two remarks made by the court to counsel during the trial of the cause, about the immateriality of certain evidence which was admitted; but no exceptions were taken to the remarks at the time they were made, and they are not brought here in any legal way for review, and, if we could review them, they are not of sufficient importance to work a reversal of the judgment.

6. Appellant contends that the motion for nonsuit should have been granted because the note was not due when the action was commenced. The note was made and dated February 19, 1885, and was payable on demand, without interest. The action was brought June 15, 1885, less than six months after date, and the contention of appellant is that it was not due until six months after date, under certain provisions of the Civil Code.

It has always been the rule that suit may be brought on a note, payable on demand, at any time without any previous demand; the suit itself being all the demand necessary. The rule has been occasionally criticized by judges as illogical; but it has been universally followed by courts, and is as well settled as any other rule of law that could possibly be suggested. Counsel contends, however, that this ancient and well-known rule was intended to be overturned, and was overturned, by section 3135 of the Civil Code, which reads as follows: "The apparent maturity of a promissory note, payable at sight or on demand, is: (1) If it bears interest, one year after date; or, (2) if it does not bear interest, six months after its date." But this section clearly applies to a case where a demand is necessary, and a demand is necessary only when it is sought to charge indorsers and others than the principal. Formerly, in order to hold indorsers on paper payable on demand, demand and notice had to be made and given within that very uncertain period called "a reasonable time." Now section 3135 limits that time to a year or six months, (according as the note does or does not bear interest,) and after that time there cannot be a demand and notice which will bind an indorser. The article in which the section appears is entitled "Presentment for Payment;" and the first section (3130) provides that "it is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him." The next section (3131) provides that "presentment of a negotiable instrument for payment, when necessary, must be made as follows;" and the following sections, including 3135, deal with the subject of presentment, demand, etc., in the cases of various kinds of negotiable paper, subject, of course, to the qualification, "when necessary," and to the said provision of section 3130, that a demand need not be made in order to charge the principal debtor. But these sections were not intended to, and do not, disturb the rule that the payee of a demand note may maintain an action on it against the maker without any demand other than that made by the suit itself.

7. There are no other points which need to be noticed in detail. We think that the presentation of the claim to the administratrix is sufficiently averred, and that there were no material errors in the matter of allowing or rejecting evidence. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

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79 Cal. 246

In re CASTLE DOME MINING & SMELTING CO. (No. 11,130.)

(*Supreme Court of California.* May 24, 1889.)

APPEAL—JURISDICTION—SERVICE OF NOTICE.

1. In a contest between attaching creditors of a foreign corporation and intervening creditors seeking to have the corporation adjudged insolvent, the corporation failed to appear, but a judgment was rendered to the effect that the court had no jurisdiction in insolvency proceedings over such a corporation. The intervening creditors appealed. *Held* that, though the corporation had been defaulted, the judgment appealed from was one in its favor, and the effect of a reversal would be to deprive it of all control over its property, and hence that it was essential to the jurisdiction of the supreme court that notice of appeal should be served on the corporation.

2. Such notice being jurisdictional, the objection that it was not served may be raised for the first time on rehearing of the appeal. Supreme court rule 13 does not apply to the raising of objections going to the jurisdiction.

In bank. On rehearing. For department decision, see 18 Pac. Rep. 794.

Olney, Chikering & Thomas, for appellants. *Clunie & Knight, Wm. H. Sharp*, and *Cope, Boyd & Fifield*, for respondents.

BEATTY, C. J. The Castle Dome Mining & Smelting Company is a New York corporation, having a mine in Arizona, and smelting works in Alameda county, in this state. Its property in this state was attached by certain of its creditors, and thereupon other of its creditors filed a petition, under the insolvent law, in the superior court of Alameda county, praying that it might be adjudged insolvent, and required to surrender its property, etc. The usual order to show cause why the petition should not be granted was made and served on the president and general manager of the company. On the return-day the company failed to appear, but the attaching creditors appeared, and filed interventions, and at the same time demurred to the petition in insolvency, upon the ground, among others, that the superior court of Alameda county had no jurisdiction of the proceeding against a foreign, non-resident corporation. The court sustained the demurrers, and dismissed the petition in insolvency, upon the ground that it had no jurisdiction. From this order of dismissal the petitioning creditors appealed, but they served their notice of appeal upon the intervenors only, omitting to serve it on the Castle Dome Company. In department 2, where the case was originally submitted for decision, the argument of counsel was directed exclusively to the question presented by the demurrers, and decided by the superior court, viz., whether, in the case of a foreign corporation carrying on business and having property in this state, such property is subject to the provisions of our law concerning involuntary insolvency. Upon this point it was held by the department in its decision rendered June 25, 1888, (18 Pac. Rep. 794,) that our insolvent law does apply in such cases, and the judgment of the superior court was ordered reversed. Subsequently a petition for rehearing was filed by respondents, the attaching creditors, in which for the first time several objections to the right of the appellants to be heard on the merits of the appeal were specified. A rehearing having been granted, these objections are renewed, and insisted upon, and one of them being jurisdictional, and, in our opinion, fatal to the appeal, the others need not be, and the question formerly decided cannot be, considered. The notice of appeal was never served on the Castle Dome Company. The judgment appealed from, although rendered at the instance of the intervenors alone, and in the absence of, and after default by, the Castle Dome Company, was still a judgment in favor of the company. It may be, as contended by appellants, that the company is in fact wholly unconcerned in the controversy between the attaching and petitioning creditors; that all its property will go, in any event, in partial satisfaction of its debts; and that it will not be affected in any practical manner, however this appeal may be determined. But the fact still remains that the judgment appealed from was a judgment in its favor, and cannot be reversed without depriving it of an apparent legal advantage. The effect of the judgment was to affirm its right to hold and dispose of its property, subject only to the lien of the attachments. The effect of a reversal of the judgment would be to deprive it of all control of its property, or, in other words, to convert a judgment in its favor into a judgment against it upon the whole subject-matter of the proceeding. This being so, it was absolutely essential to give this court jurisdiction that the notice of appeal should be served on the Castle Dome Company. Code Civil Proc. §§ 938–940; Senter v. De Bernal, 38 Cal. 641; Williams v. Association, 66 Cal. 193, 5 Pac. Rep. 85; O'Kane v. Daly, 63 Cal. 317; Randall v. Hunter, 69 Cal. 80, 10 Pac. Rep. 130; Miller v. Thomas, 71 Cal. 407, 12 Pac. Rep. 432; Milliken v. Houghton, 75 Cal. 537, 17 Pac. Rep. 641; Moyle v. Landers, 20 Pac. Rep. 241.

Our jurisdiction cannot be saved in this case upon the ground taken in Randall v. Hunter, supra. A reversal in that case would have had no effect upon the judgment entered against the party not served, but here a reversal would convert a judgment in favor of the party not served into a judgment against it. And we cannot hold that respondents are precluded by rule 13 of this court from urging this objection now because they failed to make it prior to the original hearing of the case. Rule 13 cannot be held to apply to an objection which goes directly to our jurisdiction to hear an appeal. The ground upon which a respondent is allowed to object to the hearing of an appeal because some other party adverse to the appellant has not been served with notice of appeal is not that his rights are affected, but merely that the court is bound at all times to keep within its proper jurisdiction, and must give heed to such objections, no matter how they are brought to its attention. For the reasons stated this appeal must be dismissed, and it is so ordered.

We concur: WORKS, J.; THORNTON, J.; SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

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79 Cal. 262

SHAIN *v.* BELVIN. (No. 9,995.)

(*Supreme Court of California.* May 25, 1889.)

PLEADING—ANSWER—CROSS-COMPLAINT.

1. A so-called "cross-complaint" in an action on a note, alleging facts from which the conclusion follows that the note was given without consideration, amounts only to a defense to the action, and is insufficient as a cross-complaint.

2. An answer in which the defense of want of consideration is averred "by way of cross-complaint," with a prayer for affirmative relief, cannot serve both as answer and cross-complaint, and, being styled an answer by defendant, it need not be answered as a cross-complaint.

Commissioner's decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Joseph E. Shain against W. W. Belvin on a promissory note. Judgment for plaintiff, and defendant appeals.

Ben Morgan, for appellant. *Vincent Neale*, for respondent.

HAYNE, C. There is absolutely no merit in this appeal. The action was upon a promissory note. The defendant offered no evidence. The sole point made is that the document headed "Answer" contains a cross-complaint, and that inasmuch as the plaintiff filed no answer thereto the defendant should have had judgment thereon by default. The answer contains several denials, and proceeds as follows: "And, for a further and separate answer and defense to said action, defendant avers, by way of cross-complaint," in substance that the note was without consideration; and then, "for a further and separate answer and defense to the complaint herein, avers, by way of cross-complaint," two facts and a conclusion which, when taken in connection with the other pleadings, tend to show the thing previously averred, viz., that the note was without consideration. The document concludes with a prayer "that said note be delivered up for cancellation, for general relief, and for costs."

The judgment in favor of the plaintiff was clearly right. In the first place, the defendant's pleading does not state facts sufficient to constitute a cause of cross-complaint. Assuming for the purposes of the case that there may be circumstances under which a note which is past due may be ordered to be delivered up and canceled, on the ground that it was without consideration, it seems clear that when the holder brings an action upon it (in which, as a matter of course, he would be entitled to a jury trial) the defendant cannot take the case away from a jury and remove it to the domain of equity, by averring affirmatively a legal defense to the action, and praying for equitable relief. If there were any circumstances showing a right to cancellation they should have been averred. Lewis v. Tobias, 10 Cal. 575; Smith v. Sparrow, 13 Cal. 597.

In the next place, if a defendant has any cause of cross-complaint, he should plead it as such. Matters which are proper as a defense will not be turned into a counter-claim or cross-complaint merely by a prayer for affirmative relief. Doyle v. Franklin, 40 Cal. 110; Brannan v. Paty, 58 Cal. 331–333; Carpenter v. Hewel, 67 Cal. 590, 8 Pac. Rep. 314. And, if a party calls his pleading a counter-claim, he will not afterwards be allowed to maintain that it was really a cross-complaint, and required an answer. McAbee

v. Randall, 41 Cal. 136. Upon the same principle a party will not be allowed to gain any advantage by giving his pleading two inconsistent characters. If matter is pleaded as a defense, it is denied by force of the statute: if it constitutes a cross-complaint, and is pleaded as such, it requires an answer from the plaintiff. It is inconsistent to say that the same matter does and does not require to be answered. The pleader should take one ground or the other, so that his adversary may know how to proceed. If he, as here, "for further and separate answer and defense to the complaint, avers, by way of cross-complaint," etc., the rule that a pleading must be construed against the pleader applies, and as against him it may be treated merely as a defense. The words "by way of cross-complaint" may be treated as surplusage. Meeker v. Dalton, 75 Cal. 154, 16 Pac. Rep. 764. We cannot see the least shadow of excuse for the appeal. We therefore advise that the judgment and order denying a new trial be affirmed, with 20 per cent. damages.

We concur: BELCHER, C.C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed; and, it appearing to the court that the appeal herein was taken for delay, it is ordered that there be added to the costs 20 per cent. of the amount of the judgment as damages by virtue of the provisions of section 957, Code Civil Proc.

(79 Cal. 69)

FIRST NAT. BANK OF OAKLAND *v.* WOLFF. (No. 11,965.)

(*Supreme Court of California.* May 25, 1889.)

EVIDENCE—COMPETENCY.

A defendant in an action on a promissory note, the genuineness of which is denied, may testify concerning a conversation about the note, between himself and another person, though no representative of the payee was present, if such person has testified about the same conversation as a witness for the payee, the plaintiff in the action. Reversing ante, 551.

In bank. On rehearing. For statement of facts, see former opinion, ante, 551.

Wm. R. Davis and *Wm. Lair Hill*, for appellant. *Metcalf & Metcalf*, for respondent.

PER CURIAM. The rehearing is denied, but we are of opinion that the court did not err in allowing Wolff's testimony regarding his conversation with Bennett as to the note in suit, inasmuch as Bennett had, as witness for the plaintiff, previously testified as to it. The opinion heretofore filed is modified in that respect.

(79 Cal. 273)

VANDERSLICE *et al.* *v.* MATTHEWS. (No. 11,535.)

(*Supreme Court of California.* May 25, 1889.)

PLEDGE—LIMITATION OF ACTIONS.

1. A complaint by pledgeors of personal property against the administratrix of the bailee, praying for the recovery of the specific property, if to be had, and, if not, for its value, payable in the due course of administration, and an amended complaint stating the same facts, but omitting the prayer for the return of the property *in specie*, and asking only for judgment for its value, aver one and the same cause of action, and the statute of limitations ceases to run at the filing of the original complaint.

2. A finding of the fact that decedent held as a pledge for the payment of a note certain articles, naming them, the property of plaintiffs, is responsive to the allegations of the pleadings, though it does not identify the articles as those sued for; there being no other articles of the kind mentioned in the pleadings or evidence.

3. An averment in the answer excusing the failure to return the property, on the ground that it was lost by or stolen from the pledgee without his fault, is an affirmative allegation, and, if unsupported by proof, a finding against the truth of it is proper.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

W. K. Vanderslice and Kenneth Melrose, partners trading as W. K. Vanderslice & Co., sued Elizabeth D. Traylor, administratrix, etc., of W. W. Traylor, deceased, for the recovery of the possession of a watch and two pairs of diamond ear-rings. Judgment for plaintiffs for the value of the property, and defendant appeals.

Robert Harrison, (*Wm. Douthitt*, of counsel,) for appellant. *Gordon & Young*, for respondents.

FOOTE, C. This action was originally brought against Elizabeth D. Traylor as the administratrix of the estate of W. W. Traylor, deceased. The complaint alleged that the plaintiffs borrowed a certain sum of money from W. W. Traylor, in his life-time, and gave him as collateral security for the payment thereof a certain watch and two pairs of diamond ear-rings, valued at $2,000; that at Traylor's death a part of the money borrowed remaining unpaid, the plaintiffs, on the 21st day of November, 1883, tendered it to Elizabeth D. Traylor, the administratrix of said decedent, and demanded the return of the articles pledged as collateral; that she refused to return them; that afterwards, on the 24th day of November, 1883, the plaintiffs presented for allowance to the administratrix their claim in writing against the estate of her decedent, duly verified, and containing all things necessary according to law, etc., upon which this action is founded, for the return of the articles pledged, or the value thereof, viz., the sum of $2,000; that upon the last-mentioned day the administratrix refused to allow the claim, or any part of it, and wholly rejected it. The prayer of that complaint is for judgment against the administratrix; that she return the property pledged, or, in case a return cannot be had, for the value thereof, $2,000, etc., payable in due course of administration, etc. This complaint was filed on the 10th day of January, 1884, less than three months after the date of the rejection of the claim. Afterwards, by leave of the court, an amended complaint was filed on the 7th day of August, 1884. The allegations are the same in both complaints, the latter complaint differing from the first in the respect only that the prayer of the latter omits to ask for the return of the property, and confines the relief prayed for to a judgment payable in due course of administration for the value of the property, $2,000. The administratrix answered the amended complaint, denying generally the facts alleged in it, and setting up the special defenses that the cause of action was barred by the statute of limitations under section 1498 of the Code of Civil Procedure; that the decedent lost the articles pledged without any fault or negligence on his part; and that they were stolen from him without his knowledge or negligence before coming into the custody of any representative of his estate. She then preferred a counter-claim upon a promissory note made by the plaintiffs to W. W. Traylor, deceased, for $1,151.63, dated March 29, 1882, and prayed for judgment for that sum, interest and costs.

The trial court made findings in which, among other things, in its third finding it declares: "That at the time of the making of said promissory note as aforesaid, and at the time of its delivery as aforesaid, said W. W. Traylor held, as collateral security for the payment of said note, one gold chronograph watch, and two pairs of diamond ear-rings, all of which was the property of these plaintiffs." The findings of fact and conclusions of law were filed on the 12th of August, 1885, but no judgment had been entered when the administratrix, Elizabeth D. Traylor, died, on the 21st of October, 1885. On the 1st day of December, 1885, the present defendant, Louise E. Matthews, was appointed the administratrix of the estate of Mrs. Elizabeth D. Traylor, deceased, and was substituted as defendant in the cause, and on the 1st day of February, 1886, a judgment *nunc pro tunc* upon the above-mentioned findings was entered. The findings, among other things, show that the watch and two pairs of diamond ear-rings were pledged to W. W. Traylor in his life-time to secure the payment of a promissory note, which, with interest, amounted, at the date of this judgment, to the sum of $1,522.-26; that the articles thus pledged were never returned to the plaintiffs, nor were lost by or stolen from W. W. Traylor in his life-time, nor were they or either of them lost or stolen after his death; that the plaintiffs tendered the amount due upon the note to the administratrix, conditioned on her delivering up to them the watch and ear-rings, which she did not do, as she declared she did not have them; that the claim was duly presented to her for the amount of money claimed to be the value of the articles pledged, which she rejected. As a conclusion of law, it is held that the defendant administratrix is entitled to offset the amount of the promissory note and interest against the plaintiffs' claim. The judgment was for the defendant, that she recover her costs and disbursements, from which and an order refusing a new trial she appeals.

No question as to the correctness of the judgment against the plaintiffs can be considered, because they have not appealed. The judgment is therefore final as to them, and conclusive as against their right to recover. So far as the defendant is concerned, upon the findings, as made, she can have no further judgment as against the plaintiffs, for the reason that the amount of her counter-claim is offset by the plaintiffs' claim against the decedent's estate. The point is made that the amended complaint states a different cause of action from the original complaint, and as the first-mentioned pleading was not filed until more than three months had elapsed from the rejection of the claim which was then due, and on which it was based, that the action is barred under section 1498, Code Civil Proc. The cause of action is the same in both complaints, for the same facts are alleged in both as being the foundation of the action; the same evidence is required to prove the statements of facts in the one as the other. In such case "there is no change in the identity of the cause of action. That is the same as before, and the commencement of the action dates from the filing of the original complaint." Easton v. O'Reilly, 63 Cal. 308. The facts set out in the amended complaint state no new cause of action, and the plaintiffs' cause is not barred by the statute of limitations. Easton v. O'Reilly, supra; Cox v. McLaughlin, 18 Pac. Rep. 102–109.

It is further claimed that the evidence is not sufficient to uphold the third finding. This contention is without force. The point made that the finding does not identify the property mentioned in the complaint is untenable. There is nothing in the record to show that the finding could have related to any diamond ear-rings except the two pair mentioned in the complaint, and it is plain that the finding is responsive to the allegation contained in that pleading, and refers to the two pairs of ear-rings there described, and no others.

The court found against the allegation set up as new matter in the answer, *i. e.*, that the articles left with Mr. Traylor during his life-time were lost or stolen without fault or negligence, etc. That was proper. There was no testimony proving the allegation, and the court was right in finding against the defendant upon the issue thus made. Campbell v Buckman, 49 Cal. 368. These are the only contentions urged by the appellant, and we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

3 Cal. Unrep. 80

CRAMER *v.* TITTEL *et al.* (No. 11,723.)

(*Supreme Court of California.* April 22, 1889.)

APPEAL—BRIEFS.

Respondent's brief, after charging the commission of perjury by appellant in his answer, as to a fact alleged to be within his attorney's knowlenge, continued: "When counsel can be permitted to draft pleadings and present them to their clients for verification, and the pleadings being drawn from facts within the knowledge of counsel, and the counsel causes his client to willfully commit perjury," etc. *Held*, a gross violation of professional ethics, and that the brief should be stricken out, with permission to file another within 10 days, or the judgment would be reversed without an inspection of the record.

Department 1. Appeal from superior court, city and county of San Francisco; J. G. MAGUIRE, Judge.

Action by Cramer against Tittel and another. Defendants appeal.

Robert Ash, John H. Boalt, Hall & Rodgers, and *Van Ness & Roche,* for appellants. *J. J. Coffey* and *W. H. Tompkins,* for respondent.

PATERSON, J. Counsel for respondent concludes his written argument with the following peroration: "Let the case be reviewed. The complaint charges notice of assignment to Huber and Tittel, and to Mr. Ash, their attorney, before this action of Cramer v. Tittel; yet in the face of the verified complaint, the evidence of Tittel, Huber, Nobman, Hartman, and Hoffman, and answers drawn by Mr. Ash, as attorney, and without any reservation, B. Ernest Tittel, under the solemnity of an oath, adds another crime to the rascality he had practiced on Lichtnock by committing willful perjury in denying that they, or either of them, knew, or had any notice whatever, that Cramer was the assignee. When counsel can be permitted to draft pleadings and present them to their clients for verification, and the pleadings being drawn from facts within the knowledge of counsel, and the counsel causes his client to willfully commit perjury by an utter disregard of the solemnities of the obligation of an oath, the time has come when perjury can be placed at a premium, and too designing and artful practitioners, assisted with clients of elastic consciences, will be found ready to swear to any fact essential to obtain the end sought. Respondent's counsel has been been extremely careful to present this case as disclosed by the record, with page of same, seeing from the brief of counsel for the appellant an evident desire on his part to misstate both the law and the facts, and thereby try to mislead the court." Counsel forgets that this is not an action against the defendants for perjury, nor against their attorney for subornation of perjury, or for disbarment. Such charges should be made only under oath, and in the proper court. Placing them in a brief for the records of this court is a gross violation of professional ethics. The brief for respondent is stricken out, with permission to file another brief within 10 days, or the judgment will be reversed without an inspection of the record.

We concur: BEATTY, C. J.; MCFARLAND, J.

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79 Cal. 332

CRAMER *v.* TITTEL *et al.* (No. 11,723.)

(*Supreme Court of California.* May 30, 1889.)

ASSIGNMENT—JUDGMENT.

1. L. sued to recover a certain sum of money and an undivided interest in land, and afterwards sold to plaintiff an undivided one-half of all of the same, and assigned to him the cause of action. Judgment was subsequently recovered by L., and was assigned by him to one who had full knowledge of plaintiff's rights, and who filed a satisfaction, and afterwards, with L., jointly executed and filed another satisfaction. *Held,* that the mere fact that such assignee failed to get title to the judgment because of his notice of the assignment to plaintiff did not render him liable to plaintiff for the judgment debt or land.

2. L. was not a necessary party defendant to an action against the assignee and judgment debtor, to recover the judgment debt and land, where no plea of non-joinder was made by demurrer, and the answer showed that he had assigned his interest in the judgment before the action was begun.

3. In the latter action it was improper to give judgment for a certain sum, and leave plaintiff to take other proceedings for the land and the reversionary fund acquired under the assignment. The whole subject-matter should be disposed of, and defendants should be required to execute to plaintiff a conveyance of the interest in the land and the reversionary fund.

Department 1. Appeal from superior court, city and county of San Francisco; J. G. MAGUIRE, Judge.

Robert Ash, (*John H. Boalt,* and *Hall & Rodgers,* of counsel,) for appellants. *J. J. Coffey* and *W. H. Tompkins,* for respondent.

PATERSON, J. On April 4, 1883, one Lichtnock commenced an action against Tittel (defendant herein) to recover a certain amount of money and an undivided interest in a parcel of land. On June 11, 1883, he sold to plaintiff herein an undivided one-half of all the property which was the subject-matter of the action, and executed and delivered to plaintiff an assignment of the cause of action. In consideration of this assignment plaintiff agreed to pay the costs and counsel fees incurred in the prosecution of the case. The court ordered judgment for the plaintiff therein on November 23, 1883, for the sum of $1,450, with interest from the 16th of December, 1881, and for the recovery of the one-fifth interest in the parcel of land sued for, together with costs. On December 5, 1883, the defendant Huber, at the instigation of the defendant Tittel, and with full knowledge of the rights of plaintiff herein, procured from Lichtnock an assignment of his judgment, and filed the same in the superior court. On May 2, 1884, the defendant Huber filed a written satisfaction of the judgment, and on January 30, 1885, Lichtnock and Huber jointly executed and filed another satisfaction of the judgment. Some of the findings of the court—from which we have taken the above facts—are attacked, but there is sufficient evidence, we think, to sustain them all. This action was commenced October 3, 1885, to recover from Tittel and Huber one-half of the money and land awarded to Lichtnock in his action against Tittel. The court entered a judgment in favor of the plaintiff, as prayed for, and from that judgment the defendants have appealed.

Upon the facts stated, the simplest and most direct remedy was for the plaintiff to proceed in the court below by motion to set aside the satisfaction of the judgment in Lichtnock v. Tittel, and substitute himself as a party plaintiff therein. Section 385, Code Civil Proc.; Thomas v. Mining Co., 54 Cal. 578. It is only where damages are claimed, or equitable relief which cannot be had on motion, that an action is necessary. Lichtnock is not a necessary party defendant. No plea of non-joinder was made by demurrer, and the answer shows that prior to the commencement of the action Lichtnock had sold and assigned his interest in the judgment. The judgment against Huber is not warranted by the facts. He is, of course, a necessary party to this action, wherein the court is asked, in effect, to adjudge that he is not the owner of the judgment, and he would have been a necessary party to a proceeding by motion to set aside the satisfaction of judgment, and in each case liable for the costs; but the fact that he failed to get title to the judgment because of his notice of the prior assignment to plaintiff does not render him liable to plaintiff for the judgment debt due from Tittel to plaintiff. His position, under the facts of this case, is not different from that of a purchaser of any chose in action with notice of a prior assignment, set-off, or other defense. The judgment debtor and assignee with notice of the prior assignment may, by a fraudulent and collusive assignment and satisfaction of judgment, succeed in delaying the enforcement of the judgment until, through the insolvency of the debtor, or attachment of his property by other creditors, the judgment creditor or his assignee is deprived of the fruits of his judgment. But no such circumstances appear in this case. It does not appear whether Lichtnock, Tittel, or Huber have been made, or attempted to make, any transfer of an interest in the real estate, other than by the assignment and satisfaction referred to. The court gave judgment against defendants for the sum of $1,042.63 and costs of suit; and then "adjudged and decreed that the plaintiff, C. W. Cramer, or his assigns, have leave to proceed as they may be advised for the recovery of the reversionary interest, and the interest of said Lichtnock in and to the lot of land." The whole subject-matter ought to have been disposed of at once,—not piecemeal. It was not necessary to leave the controversy thus unfinished. The court ought to have required the defendants to execute and deliver to plaintiff a good and sufficient conveyance of the interest in the land, and of the reversionary fund acquired by plaintiff under his assignment from Lichtnock. The judgment must be reversed, and, in order to dispose of the whole matter, it is necessary to reverse the judgment as to both defendants. The defendant, Tittel, however, is not entitled to recover costs of this appeal, as the judgment is more favorable to him than it should have been. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; WORKS, J.

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79 Cal. 283

HANSON *v.* FRICKER. (No. 12,554.)

(*Supreme Court of California.* May 24, 1889.)

APPEAL—PRACTICE.

1. A defense not within the issues, nor attempted to be made in the court below, cannot be asserted on appeal.

2. Matters well pleaded in the complaint, and not denied by the answer, stand admitted.

Commissioners' decision. In bank. Appeal from superior court, Butte county; LEON D. FREER, Judge.

C. K. Boneste, for appellant. *Hundley & Gale*, for respondent.

BELCHER, C. C. This action was brought to establish a resulting trust. The property in controversy is a quarter interest in a mining claim situate in Butte county. The complaint alleges that defendant purchased the interest for the sum of $500, and took a deed therefor in his own name, but that in doing so he acted for and as the agent of plaintiff, and that plaintiff paid the purchase money. The court found all the facts to be as alleged in the complaint, and rendered judgment accordingly. The defendant moved for a new trial, and has appealed from the judgment and order denying his motion. The principal question presented for decision by appellant relates to the finding as to the amount and payment of the purchase money. The contention is that appellant paid for the property $1,500, and not $500, as found by the court, and had therefore a right to retain the title until he received from plaintiff the balance of the purchase price. But no such defense was set up, or even hinted at, in the answer. It cannot, therefore, be raised here for the first time. The case was properly tried upon the issues presented by the pleadings, and upon all of those issues there was ample evidence to justify the findings. It is further contended that the finding that defendant, shortly before the commencement of this suit, repudiated the understanding between the plaintiff and himself, and denied plaintiff's ownership of the one-fourth interest purchased by him for plaintiff, and refused to give plaintiff a deed thereof, was not justified by the evidence. It is said that "the most rigorous examination of the evidence discloses nothing tending to support this finding." The answer to this position is that the facts found were distinctly and clearly averred in the complaint, and were not denied by defendant in his answer.

They were therefore admitted, and no evidence in support of them was necessary. No other points are made, and it follows that the judgment and order appealed from should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(79 Cal. 415)

PEOPLE *v.* BOWERS. (No. 20,345.)

(*Supreme Court of California.* June 1, 1889.)

MURDER—POISONING—EVIDENCE.

On a trial for wife-murder by phosphorus poisoning the evidence was almost entirely circumstantial; the existence of the most important facts was established only by experts, and was disputed by other experts; some of the usual symptoms of phosphorus poisoning were not shown to exist, and there were indications that death might have, and probably did, result from natural causes; there was no evidence that defendant had procured, or had in his possession, any phosphorus. *Held*, that where the conduct of the trial judge was calculated to give the jury the impression that he thought defendant guilty, and the prosecuting attorney made objectionable statements calculated to influence the jury, though the court instructed the jury to pay no attention to such statements, a conviction and sentence of death would be set aside, and a new trial granted. McFARLAND, J., dissenting.

In bank. On rehearing. For former report, see 18 Pac. Rep. 660.

On December 29, 1888, the supreme court, sitting in bank, filed the following order: "This cause having been heretofore submitted to the court sitting in bank, and upon consideration it appearing that a constitutional number of the justices who heard the argument cannot agree upon a judgment, it is therefore ordered that the order heretofore made submitting the case be, and the same is hereby, set aside, and the cause placed upon the calendar to be heard by the court in bank."

Charles N. Fox and *Colin Campbell*, for appellant. *George A. Johnson*, Atty. Gen., for the State.

PER CURIAM. The defendant was convicted of murder, and judgment of death passed against him. He was charged with having poisoned his wife by the use of phosphorus. The evidence against him is almost entirely circumstantial. The existence of the most important facts was established only by the opinion of experts, and their existence is disputed by experts apparently equally competent. The significance of the supposed facts as inculpatory circumstances was also matter of difference. The judgment of medical experts was also taken upon the question whether all the clinical symptoms and pathological conditions indicated death from phosphorus poisoning. Upon this there was also a wide difference of opinion. Some symptoms and conditions usually present in cases of phosphorus poisoning were wholly absent in this case, or at least were not proven to exist. There were indications which, in the opinion of some of the physicians, indicated that death might have resulted, and probably did result, from natural causes. There was atrophy of the liver, which was greatly reduced in size. It was admitted that this might have been occasioned by disease, and there was a difference of opinion as to whether the condition was, or could have been, caused by phosphorus poisoning. There was no jaundice. There was an ulcer in the stomach. Whether this could have been occasioned by phosphorus poisoning was a matter of controversy. Clots of blood were found in the heart and in the ovaries and fallopian tubes. There is evidence that the illness of the deceased was brought on by a miscarriage, purposely caused by her own act, and that she did not wish her husband to know anything about it. There was no evidence that the defendant had procured, or had in his possession, any phosphorus.

We do not feel like saying, under these circumstances, that as matter of law the jury could not be satisfied beyond a reasonable doubt of the guilt of the defendant; but it is evident that the case was one of great difficulty, and required unusual circumspection, and the utmost coolness and impartiality in its consideration. Now, when we remember that the crime with which the defendant is charged is one of an unusually revolting character, it is easy to believe that one unaccustomed to judicial investigations might easily be made to feel, upon finding a mere probability of guilt, much short of the certainty required to authorize a conviction, a strong desire for the punishment of the defendant. In view of all these circumstances, certain occurrences at the trial have a significance which in a different kind of a case we should hesitate to attribute to them. Unfortunately the judge allowed himself rather frequently to question the witnesses, always in the interest of the prosecution, and often by putting questions which were leading and suggestive. We think the jury would be sure to get the impression that the judge thought the defendant guilty. Still more objectionable was the conduct of the prosecuting attorney. It is true, the court properly interfered, rebuking the attorney, and instructing the jury to pay no attention to the statements. But the statements were well calculated to influence the jury in a case of this character, and it is impossible for us to say that no injury resulted to the defendant therefrom.

We think, upon a careful examination of this record, that the interests of justice require a new trial before a judgment of this gravity should be carried into execution. We do not see the necessity of passing upon the other points made. The questions are not likely to recur upon the new trial. Judgment reversed, and a new trial ordered.

I dissent: McFarland, J.

Thornton, J., (*concurring.*) The only poisoning charged in this case is that by phosphorus. If there was no poisoning by phosphorus, then it is not pretended that there was any poisoning at all. In my opinion, the preponderance of evidence supports the conclusion that there was no phosphorus poisoning. The indications of such poisoning were lacking. There was no garlicky odor on the breath before death, and there was no luminosity apparent when the test of the Mitscherlich process was applied after death. The garlicky odor, if apparent in the portion of the stomach and intestines subjected to examination after death, may be accounted for by two circumstances. Such odor is usually made apparent by the decay of the human body, and this decay had commenced when the portion of the stomach and intestines were taken from the body, (to which the process above-mentioned was applied,) some seven or eight days after death. The other circumstance is this: that for some 15 or 20 days prior to the death of Mrs. Bowers a compound containing phosphorus had been given to her by the physician or physicians in charge. These two facts account for whatever garlicky or alliaceous odor may have been perceived after death. The evidence tends strongly to show that Mrs. Bowers died from disease indicated by the symptoms which manifested themselves during her illness, and by the conditions of the body after death. This was the opinion of some of the physicians who testified upon the trial.

Upon a full consideration of the evidence in the case I am of opinion that the preponderance of evidence sustains the conclusion that Mrs. Bowers did not die of phosphorus poisoning, and that in the judgment of men of average intelligence and discretion the evidence would establish the conclusion that the defendant could not be held to be guilty beyond a reasonable doubt. Where this is the case there should be no conviction. For the foregoing reasons I am convinced that the verdict ought not to stand, and that the judgment and order should be reversed, and the cause remanded for a new trial.

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79 Cal. 285

Taylor *v.* North Star Gold Min. Co.

(No. 12,522.)

(*Supreme Court of California.* May 25, 1889.)

Corporations—Assessments on Stock.

Where a mining corporation buys an adjoining property and transfers all the property to a new company, receiving stock in the new corporation therefor, and borrows money from one of its stockholders to pay the expenses thereof, there being no fraud, the company is liable for the money borrowed, and can levy an assessment to pay for it.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; J. M. Walling, Judge.

Suit by M. C. Taylor against the North Star Gold Mining Company, to have an assessment sale of stock set aside.

Charles W. Kitts and *Cross & Simonds,* for appellant. *A. W. Thompson* and *Gaylord & Searls,* (*Niles Searls,* of counsel,) for respondent.

Hayne, C. This was an action to set aside an assessment sale of mining stock. It is admitted that the assessment proceedings were regular. The material facts upon which the objections to the sale are based are as follows: The defendant was a corporation organized for the purpose of mining for the precious metals. Success did not attend its operations, and business was discontinued. The organization, however, was preserved. The secretary was continued at a small salary, and the taxes had to be paid upon the property. In this condition of affairs one of the largest stockholders organized a scheme by which it was hoped to give value to the property. In substance it was this: The corporation acquired the works of an adjoining mine called the "Scotia," which also had abandoned business, and transferred these works and its own mine to a new corporation called the "North Star Mining Company," which raised money for renewed work upon said mine. The consideration which the defendant received for the transfer of its property consisted of stock in the new corporation. In the course of the transaction the defendant incurred indebtedness as follows: For the services of an attorney at law, $800; and for incidental expenses in and about the transaction, such as the employment of an expert, a broker, traveling expenses, and the like, $2,020. These sums, together with that due to the secretary, and for taxes on the mine, amounted to $3,940. Some question is attempted to be raised as to whether the defendant authorized the incurring of a part of these expenses. But the services and expenditures were incurred on behalf of the corporation, and with its knowledge, and it raised no question as to their having been authorized, but borrowed money from one of its stockholders to pay what was due for them. It was to pay the money so borrowed that the assessment was levied. The plaintiff knew of the whole transaction while it was going on, and made no objection thereto. The undertaking was a success, and the property became very valuable.

The plaintiff does not seek to have anything set aside except the assessment sale. His main positions are that there was fraud, and that the disposal of the property of the company for stock in another corporation was *ultra vires.* The findings, however, negative the charge of fraud, and the evidence is sufficient to support the findings. We do not think that the question of *ultra vires* arises in the case, and we express no opinion in regard to it. There having been no fraud, the company could not refuse to pay the money which it had borrowed, on the ground that it was borrowed for the purpose of being used, and was used, for the payment of expenses which were incidental to an act which was *ultra vires*. Bradley v. Ballard, 55 Ill. 413. It is possible that there may be cases where ancillary operations are so inseparably connected with the main act that they would have to fall with it; but we do not think that this case presents features of that character. The company was legally liable for the money borrowed, and had power to levy an assessment to pay for it. The other matters do not require special notice, and we therefore advise that the judgment and order denying a new trial be affirmed.

We concur: **Belcher**, C. C.; **Foote**, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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79 Cal. 266

Batchelder *v.* Baker. (No. 11,495.)

(*Supreme Court of California.* May 25, 1889.)

Guardian ad Litem—Quieting Title.

1. The proceedings in the appointment of a guardian *ad litem* being, under Code Civil Proc. Cal. § 670, no part of the judgment roll, on an appeal on the judgment roll, where the appearance and answer of defendant were by guardian *ad litem*, the court will not go outside the record to determine whether such guardian was appointed or not.

2. In an action to quiet title, a judgment that plaintiff is the owner of the land is supported by a complaint alleging possession for a sufficient length of time to show title in plaintiff.

3. In such case a finding that defendant has no interest in the land is not necessary, where defendant sets up no such claim in his answer.

Department 1. Appeal from superior court, city and county of San Francisco; **Oliver P. Evans**, Judge.

Maria A. Batchelder sued A. S. B. Baker to quiet title. Code Civil Proc. § 670, determines what portion of the proceedings below shall form the judgment roll. Proceedings in the appointment of a guardian *ad litem* are not included.

Fox & Kellogg, for appellant. *E. J. & J. H. Moore*, for respondent.

Works, J. This is an action to quiet title to real estate. The defendant answered by a guardian *ad litem*, as shown by the recitals in such answer, denying the allegations of the complaint, but set up no claim or title to the property. There was judgment for the plaintiff quieting her title, decreeing that she was the owner of the property, and that the defendant had no interest therein. The appeal is from the judgment, and is presented to us on the judgment roll. It is contended by the appellant (1) that no guardian *ad litem* was appointed by the court for the defendant, who was a minor; (2) that the judgment is not supported by the complaint; (3) that the findings do not support the judgment.

1. As to the first of these points we cannot know from the record before us whether a guardian *ad litem* was appointed or not. The appeal being upon the judgment roll, we cannot look outside of it to determine the question. Harper v. Minor, 27 Cal. 107; Sharp v. Daugney, 33 Cal. 505, 512. Proceedings relating to the appointment of a guardian *ad litem* form no part of the judgment roll. Code Civil Proc. § 670; Emeric v. Alvarado, 64 Cal. 592, 2 Pac. Rep. 418. In this condition of the record we must presume in favor of the action of the court below, especially as the answer itself and the recitals in the judgment show that the appearance and answer of the defendant were by a guardian *ad litem*. Sharp v. Daugney, supra; Emeric v. Alvarado, supra.

2. The ground upon which it is claimed that the complaint does not support the judgment is that the complaint alleges possession only, and the judgment is that the plaintiff is the owner of the property. But the complaint alleges possession, not only at the time of the commencement of the action, but for a sufficient length of time to show title in the plaintiff, which is equivalent to a direct allegation of ownership.

3. The last point made is equally groundless. It is to the effect that the findings do not show that the defendant had no interest in the property. Such a finding was unnecessary as the defendant set up no such interest. But the court found the facts showing the plaintiff to be the owner of the property which was sufficient as to the matter of ownership. Judgment affirmed.

Beatty, C. J. I concur.

Paterson, J. I concur in the judgment.

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79 Cal. 265

Faulkner *v.* Hendy. (No. 11,651.)

(*Supreme Court of California.* May 25, 1889.)

Partnership—Accounting—Costs.

In a suit for partnership accounting, if the services of an expert are necessary in the examination of the partnership books, he should be appointed by and act under the directions of the court, and neither party is entitled to charge as costs the expense of an expert privately employed.

Department 1. Appeal from superior court, city and county of San Francisco; **T. K. Wilson**, Judge.

Wm. H. H. Hart, *E. W. McKinstry*, *Aylett R. Cotton*, and *Warren Olney*, for appellant. *C. E. Royce*, for respondent.

Works, J. Action for the dissolution of a partnership and for an accounting. Judgment for the plaintiff dissolving the partnership and for the sum of $35,254.24. As to the costs, it was provided in the decree that "the costs of said action be divided between said parties and adjusted hereafter." Subsequently the plaintiff filed his cost-bill, in which was included an item of $4,570, amount expended by him in payment of one Julius Reimer, an accountant. The defendant moved the court to retax the costs, and to strike out the whole of this item, upon the ground, among others, that it was not a legal charge against the defendant as a part of the costs of the action. The court refused to strike out the whole item of costs, but reduced the amount to $1,360, and charged that amount against the defendant as a part of the costs. The defendant appeals to this court from the order of the court retaxing the costs as above stated. The evidence taken at the hearing of the motion to retax clearly shows that Reimer was employed by the plaintiff, or his attorney, as an expert to examine the books of the partnership, and render a statement of the condition thereof. The question presented, therefore, is whether it is proper, where an expert is employed and is acting for one of the parties, to charge the same against the losing party as a part of the costs of the action. If the services of an expert are necessary for the proper presentation and determination of the case, he should be appointed by, and act under the direction of, the court. Where, as in this case, he is the employé of one of the parties, the temptation to act in the interest of such party must be apparent. Therefore, in order to secure his fair and disinterested services, he should be appointed by the court, and not by either of the parties, and if either party sees proper to employ the services of an expert for his own benefit the court should not require the opposite party to pay for the services thus rendered. For these reasons the order appealed from is reversed, with instructions to the court below to sustain the motion of the defendant to strike out the item of costs above mentioned.

We concur: BEATTY, C. J; PATERSON, J.

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79 Cal. 250

BOYD *v.* DESMOND *et al.* (No. 11,755.)

(*Supreme Court of California.* May 25, 1889.)

SHERIFFS—LIABILITY—FAILURE TO FILE WRIT.

1. In an action by a mortgagee against the sheriff, who made sale under the decree of foreclosure, to recover damages for the sheriff's failure to file the order of sale, with his return thereon, in the clerk's office, whereby plaintiff was prevented from obtaining a deficiency judgment against the mortgagor, evidence that the sheriff's deputy, who actually made the sale, was a competent, prudent, and careful man, was immaterial, it not being shown that he was in any way responsible for the failure to file the order.

2. Evidence that the order of sale, with the sheriff's return thereon, was discovered in the clerk's office, but bearing no marks of filing, is not sufficient to prove that the order was delivered by the sheriff to the clerk or his deputy for the purpose of having it filed.

3. The order of sale, and sheriff's return indorsed thereon, were properly admitted in evidence on behalf of defendants, without first proving that they had been filed in the clerk's office.

4. The facts that, after the death of the mortgagor, plaintiff had his claim for deficiency allowed against the estate as a judgment, (when in truth it was not,) and that, if plaintiff had been diligent in securing its payment according to its priority as such judgment, the estate would have paid it in full, are no defense.

5. Nor is it a defense that the original judgment in foreclosure was a personal judgment, and might have been enforced against all the mortgagor's property. Plaintiff having elected not to treat it as such, and having issued the order of sale, he could thereafter have no personal judgment except for the deficiency, and that depended upon the sheriff's return being properly filed.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Cope & Boyd, for appellant. *Clitus Barbour*, for respondents.

WORKS, J. This is an action on a sheriff's bond for damages for a failure to return an order of sale, by reason of which it is alleged the plaintiff failed to procure the entry of a deficiency judgment, and thereby lost his debt. There was a trial by jury, and verdict for the defendants. The plaintiff moved for a new trial, which was denied, and from this order he appeals. The principal controversy in the case, in the court below and in this court, is whether the evidence is sufficient to show a delivery by the sheriff of the order of sale, with his return thereon, to the clerk for filing. The question as to the weight of the evidence relating to this question is discussed in the briefs of counsel, but we do not regard the truth or falsity of the testimony of the defendants' witnesses, tending to show such delivery, as of any importance. The undisputed evidence shows that there was nothing on any of the registers kept by the sheriff or the clerk showing, or tending to show, that the paper had ever been returned to or filed in the clerk's office. There is no direct evidence that it was ever delivered to the clerk for filing. The bill of sale, with the sheriff's return upon it, was produced, and it was shown that a witness who made search, at the instance of the sheriff, found the paper in an out of the way place in the clerk's office. This finding was within a few days of the trial, and after diligent search made by the deputies in the clerk's office. The paper had been missing for several years. The papers in the clerk's office had been removed in the mean time from one building to another, and all of the papers carefully examined, compared with the register, and filings indorsed upon papers where such filings had been omitted, and this particular paper was not discovered. The place where the paper was found, at the last moment, was used for filing large and bulky papers, such as rolls of evidence, and not for small or loose papers. There was evidence tending to show that this drawer or box had been searched frequently for other papers, and that no loose papers were kept or found therein. The bill of sale, when found, had no file-mark upon it. Laying aside the extreme improbability of this paper having found its way to the clerk's office in the usual manner, and in the regular course of official business, and conceding the evidence of the defendants in respect to the matter to be reliable and trustworthy, it was clear to our minds that such evidence was wholly insufficient to show that the paper had been returned to the clerk's office in the manner required by law. There was not a single entry or indorsement in either of the offices tending to show such return. The whole of the defendants' case, or this branch of it, rests upon the evidence that the paper was found in the clerk's office. It is contended by the respondents that it was not necessary to show the filing by the written indorsement of the clerk on the paper, but that the fact might be proved by parol. This may be conceded for the purposes of this case, although we do not wish to be understood as so holding. But if the filing can be proved by parol the proof must show an actual delivery of the paper to the clerk or one of his deputies, and the proof should be clear and positive. It is not enough to show the paper in the office of the clerk. It must be delivered to him for the purpose of filing. There could be no presumption in favor of the defendants that the sheriff had performed his duty as an officer where he was charged with a specific act of negligence, and where a presumption in his favor would necessarily result in a counter-presumption that the clerk had failed to perform his duty as a public officer. Houghton Co. v. Rees, 34 Mich. 481. The defendants were permitted by the court below to prove by the sheriff that the deputy who made the sale of the property under the order of sale was a competent, prudent, and careful man. This was error. The fact that the sheriff was charged with official negligence in this instance, and that he acted therein through his deputy, did not in any way raise the question as to the deputy's general fitness for the office. Besides, it is not shown that he was in any way responsible for the failure to deliver the return to the clerk. He testifies that he indorsed the return on the writ, and delivered it to the book-keeper. There is other testimony tending to show that it was the custom of the office for the book-keepers to return the papers from that office to the clerk's office. If so, the deputy-sheriff was not shown to have been at fault in respect to the failure to deliver the paper to the clerk, and for that reason the testimony was immaterial.

It is further urged that the court erred in admitting in evidence the order of sale, and the return of the sheriff indorsed thereon, without first proving that they had been filed in the clerk's office. There was no error in this ruling. One of the acts necessary to be done by the sheriff was the indorsement of the return on the writ. This was properly proved by introducing the writ and return in evidence. This did not, it is true, prove his whole case, but it was a step in that direction, and, so far, it was competent. One of the grounds of the motion for a new trial was newly-discovered evidence, and an affidavit, presumably for the purpose of sustaining this ground, appears in the record, but it is in no way authenticated, and for that reason cannot be considered.

The respondents, besides combating the errors complained of by the appellant, contend that, admitting that there was a failure to prove the return of the order of sale, the verdict was general, and may have been right for other reasons. One of these alleged reasons is that the complaint did not state a cause of action. But the complaint was demurred to, and the demurrer was overruled, we think, properly.

Again, it is claimed that the evidence failed to show that the plaintiff was or could have been damaged by the failure to make return of the writ. This is based on the theory that the plaintiff in an action of this kind can only recover his actual damages, and as the evidence fails to show that at the time the return should have been made, or at any time thereafter, the judgment debtor was solvent, or had any property out of which the deficiency judgment, if it had been entered, could have been made, no cause of action was made out. In the absence of statutory provisions, the measure of damages in this class of cases is the actual loss incurred by the plaintiff. People v. Palmer, 95 Amer. Dec. 418, 436, and cases cited. In this state the statute imposes upon the officer a penalty of $200. Pol. Code, § 4179. But this does not apply to the sureties. Glascock v. Ashman, 52 Cal. 493. In this case there is no prayer for relief under the statute.

But there was evidence tending to show that the judgment debtor had property out of which the money could have been made. His death subsequent to the recovery of the judgment and failure to make return was shown, and the proceedings had in the settlement of his estate were introduced in evidence, showing the amount of his property, and that a part only of plaintiff's debt could then be made. The defendants offered to prove that the debtor was insolvent during all of the time subsequent to the recovery of the judgment, but the court below, for some reason which does not appear, refused to permit it; so that the evidence of the plaintiff on the point, although not as satisfactory as direct proof would have been, remained unanswered.

It is further contended by the respondents that the plaintiff actually had his claim allowed against the estate as a judgment, and that, if it had been paid according to its priority, it would have been paid in full, and the failure to secure such priority for it was the fault of the appellant, and he cannot for that reason recover the deficiency from the defendants. But the fact remains that plaintiff's claim was not an enforcible judgment, because it had not been entered as such upon a return by the sheriff. Therefore he was not in fault for not procuring for it a priority to which it was not entitled, although it appeared in the claim allowed as a judgment. So it is claimed that the original judgment recovered by the plaintiff was a personal judgment, and might have been enforced against all the property of the debtor. Conceding this, after having proceeded to enforce his foreclosure decree by sale of the mortgaged property, the plaintiff could not, thereafter, treat his judgment as personal and enforce it as such. He had his election to treat it as a personal judgment, and issue execution upon it, or issue his order of sale as upon a decree of foreclosure. He could not do both. Admitting that it was a personal judgment, it could not be enforced as such until the return of the sheriff on the order of sale, and then only for the deficiency. Englund v. Lewis, 25 Cal. 357; Culver v. Rogers, 28 Cal. 520. Thus the hands of the appellant were tied by the failure of the sheriff to return the order of sale, and no laches can be imputed to him for a failure to enforce the judgment. Order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; PATERSON, J.

(79 Cal. 258)

MAHAN v. WOOD. (No. 11,588.)

(*Supreme Court of California.* May 25, 1889.)

APPEAL—LAW OF CASE.

On the trial court's findings of fact this court, on appeal, reversed the judgment, and granted a new trial. On the second trial the court made findings of fact, and rendered judgment in accordance with the opinion on appeal, but subsequently granted a new trial. *Held*, that though the transcript of evidence on the second appeal is identical with that on the first appeal, there being a conflict in the evidence, this court cannot say that the facts in both trials were the same, nor that it was error to grant the new trial.

Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

Jarboe, Harrison & Goodfellow, for appellant. *Edw. J. Pringle, T. B. Bishop*, and *W. H. Fifield*, for respondent.

PATERSON, J. This is an action on a promissory note made and delivered by the defendant to plaintiff March 19, 1869, for the sum of $3,300 and interest. The defense is failure of consideration. The case was here several years ago (44 Cal. 462) and the chief question is: To what extent does the decision on the former appeal control the case as it is now presented? The case is before us now on appeal from an order granting a new trial. Appellant contends that the facts as they appeared on the former appeal, and as they appear on this appeal, are substantially the same, and for this reason the court below was bound, as a matter of law, to refuse a new trial. There is no doubt that where the facts are the same as on a former appeal, the principles and rules announced by the court will be recognized on a subsequent appeal as the law of the case. And if the case were before us now on appeal from the last judgment of the court below, which was in favor of the defendant, we should doubtless affirm the judgment, unless some error in the admission or exclusion of evidence necessitated a new trial, because the facts found are substantially the same as the facts shown by the record when the case was here before. But where the court has set aside its findings of fact and granted a new trial, can we say what the facts are without usurping the functions of the trial court? Conceding that the evidence in the transcript before us reads word for word with that in the transcript which was before the court on the former appeal, can we say, unless the evidence is without conflict, that the facts are the same? If the evidence is conflicting, one judge might deduce a certain state of facts from it, and another judge an entirely different state of facts. We are of opinion that the parties are entitled to the benefit of the judgment of the court below upon the evidence as to the facts of the case. As the court has set aside its findings we do not know what view it takes of the evidence. But it is claimed also by appellant that there is no substantial conflict of testimony in the case; that the failure of consideration for the note was so fully established that the court could not do otherwise than decide as it did in the first instance, and as shown by the findings of fact. We cannot say, however, that there is no substantial conflict in the evidence. The testimony of the plaintiff tends to show that he requested the defendant to subscribe for some stock, and the defendant objecting that he had no money on hand, he (plaintiff) to induce defendant to subscribe, agreed that he would pay the first 10 installments of the subscription price of the stock if the defendant would give him his note for $3,300, and that the note was given to plaintiff in consideration of plaintiff's agreement to pay said installments; while the defendant's testimony tends to show that plaintiff sold him 30 shares of the capital stock, and that the note was given for the purchase money. The court below has not informed us as to the ground upon which the motion for a new trial was granted, but every presumption is in favor of the order, and the rule applicable to orders granting new trials, where the evidence is conflicting, is so well known that it is unnecessary to state it. The order is affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.

(79 Cal. 260)

LONG v. SAUFLEY. (No. 11,707.)

(*Supreme Court of California.* May 25, 1889.)

CONTRACTS—SUFFICIENCY OF EVIDENCE.

In an action on a contract to pay plaintiff a certain sum out of money collected on a judgment in a certain action, "provided the said money shall be collected from property" of defendant in that action pointed out by plaintiff, when it appears that plaintiff pointed out property from which the judgment could have been collected, but that defendant compromised by accepting a smaller sum, judgment for plaintiff is proper.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Stewart & Herrin, (*H. L. Gear*, of counsel,) for appellant. *William H. Sears*, (*D. H. Whittemore*, of counsel,) for respondent.

HAYNE, C. Action upon a contract to pay plaintiff $500 "out of money collected on judgment in action of Frank v. Kilbourn et al., * * * provided the said money shall be collected from property of defendant pointed out by the said Long." The complaint avers that said Long "did point out property belonging to said Kilbourn of the value of $30,000, out of which said judgment could have been collected, and did keep and perform all the requirements of said agreement on his part to be kept and performed," but that defendant compromised and settled said judgment by accepting $4,000 without the knowledge or consent of Long. Judgment was given for plaintiff, and defendant appeals.

Findings were waived, and the evidence is not brought up. It must, therefore, be presumed that Long did point out property from which the amount of the judgment in question could have been collected, and that the appellant chose not to collect it, but to accept a less sum. This being the case, judgment was properly given against him. Wolf v. Marsh, 54 Cal. 232. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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79 Cal. 313

In re KOHLER'S ESTATE. (No. 12,806.)

(*Supreme Court of California.* May 28, 1889.)

WILLS—MENTAL INCAPACITY—UNDUE INFLUENCE.

1. Where a complaint alleges that at the time of executing a codicil the testator's mind was "weak, debilitated, and deranged, to such an extent as to incapacitate him from making or undertaking a will or codicil," a special issue, asking if testator at that time was "mentally incompetent" to make a codicil, is within the pleadings.

2. The definitions of fraud and undue influence contained in Civil Code Cal. §§ 1572, 1575, though appearing in that part relating to contracts and under the chapter entitled "Consent," apply to fraud and undue influence generally.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Wm. M. Pierson, *H. C. Hyde*, and *John Lloyd*, for appellants. *Chas. F. Hanlon*, for respondent.

FOOTE, C. This is an appeal from a judgment rendered upon the special verdict of a jury annulling a codicil to the last will of a decedent, and from an order denying a new trial of the contest of the codicil. The testator, Andrew Kohler, made his will on the 19th of February, 1884, wherein he made several legacies, among them being one of $5,000 to the contestant, Miss Carrie Gerholdt, who seems to have been at that time a favorite niece. On March 4, 1885, he executed a codicil to that will, whereby he revoked the legacy given to the contestant. The grounds of the contest are that the testator was fraudulently induced to execute the revoking codicil; that undue influence was exercised to accomplish that end; that he was mentally incompetent when he made the codicil. The fourth ground, the informality attending the making of the codicil, was abandoned, and the special issues, from the seventeenth to the twenty-second, inclusive, were withdrawn from the consideration of the jury. Special issue No. 9, under the head of "Undue Influence," was also withdrawn by contestant. After the evidence on the part of the contestant had been submitted to the jury upon the issues then before them, a nonsuit was moved for by the appellant, which was refused. The proponents then presented their side of the case, the issues were submitted to the jury, and they found in favor of the contestant. The court rendered its judgment, based upon the verdict, that the codicil in contest was, so far as its formal execution was concerned, in accordance with law, but that it was not, in fact, the codicil of the testator, on the ground of his incompetency to make it or to dispose of his property by will; that at the time he made it he was acting under undue influence and fraud practiced by other persons. The appellants claim that the evidence was totally wanting in any of the necessary elements to sustain the contentions of the contestant, even according to her own showing, and that a nonsuit should accordingly have been given in their favor.

A close scrutiny of the record has satisfied us that there was no such entire absence of evidence, tending to prove the issues as submitted, as would permit us to declare the action of the court below erroneous.

The instructions are also very sharply assailed. It is said that they are misleading; that the court improperly applied the rules of law as laid down in the Civil Code, with reference to undue influence and fraud; that the rule as declared with reference to undue influence is taken from section 1575 of the Civil Code, in that part relating to contracts, and under the chapter entitled "Consent," and that it has no reference to wills. There is nothing in the section which shows that it was not intended to apply to undue influence generally, and the rule is certainly applicable under the evidence in the record. The same argument is used with reference to the rule laid down as to actual fraud, under section 1572 of the same Code. We do not perceive any merit in the position taken. The instructions, taken altogether, were plainly expressed, and easy of comprehension to an unbiased mind. The law, as it seems to us, was properly given, under the pleadings, issues, facts, and circumstances contained in the record, and this is entirely sufficient. People v. Tomlinson, 66 Cal. 347, 5 Pac. Rep. 509.

The appellants further claim that there was no issue made in the pleadings as to the competency of the testator to make a will, and that, therefore, the verdict on special issue No. 16 was not supported by the pleadings. The special issue submitted was this: "Was Andrew Kohler mentally incompetent to make a codicil or dispose of his property by will on March 4, 1885?" The allegation of the complaint on the point is that "on March 4, 1885, and for a long time prior to his death, said Andrew Kohler's mind was weak, debilitated and deranged, to such an extent as to incapacitate him from making or undertaking a will or codicil." It is provided by the Code of Civil Procedure, § 1312, that a will may be contested upon the issues: (1) "The competency of the decedent to make a last will and testament." If the testator's mind was weak, debilitated and deranged, to such an extent as to incapacitate him from making or undertaking a will or codicil, he could hardly be said not to be incompetent to make a will or codicil. Thus the issue found upon was within the pleadings.

The verdict of the jury, based upon all the evidence in the case, is most vigorously attacked. In view of the fact that the witnesses for the contestant sharply contradicted those for the proponents in all material matters, it is unnecessary to go into a detailed argument showing the verdict to have been sustained by a preponderance of evidence. The jury saw and heard the witnesses, observed them, doubtless, particularly and critically, and took note beside of all the circumstances surrounding the transactions. We cannot say that, upon evidence substantially conflicting, they gave credit to some witnesses and denied it to others improperly.

Upon the whole case, perceiving no prejudicial error, we advise that the judgment and order denying a new trial be affirmed.

We concur: BELCHER, C. C.; VANCLEIF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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79 Cal. 304

In re BAUER'S ESTATE. (No. 12,853.)

(*Supreme Court of California.* May 28, 1889.)

PRESUMPTION—HUSBAND AND WIFE—SEPARATE PROPERTY—WITNESS—ATTORNEYS.

1. A husband at his marriage owned personalty worth more than $3,000; and, shortly after, engaged in business with a partner, using his separate property, or a part of it, therein. He then purchased his partner's interest, which he sold at a profit, for $1,400. He supported his family from his business, and purchased for $5,000 land on which he and his wife joined in declaring a homestead. The $1,400 was applied on the price, and the remainder was paid by borrowed money. The declaration of homestead contained the following: "We further declare that said property was, to the extent of $3,000, acquired and improved with the separate estate of" the husband. Code Civil Proc. Cal. § 1961, provides that a presumption, not by law declared to be conclusive, "may be controverted by other evidence, direct or indirect." Section 1963, subd. 32, makes it a disputable presumption "that a thing, once proved to exist, continues;" and Civil Code, § 163, provides that "all property owned by the husband before marriage, * * * with the rents, issues, and profits thereof, is his separate property." *Held*, that the separate property owned by the husband on his marriage would be presumed to have continued his separate property; and that the presumption that the real property, having been purchased during coverture, was the community property of himself and wife, was overcome.

2. An attorney at law who drew the declaration of homestead, acting at the time for both husband and wife, is competent to testify, in a contest between the deceased husband's legatee, who claims the property as his testator's separate property, and testator's widow, who claims it as community property, as to whether the recital in the declaration of homestead was explained to the wife, and as to what the explanation was.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

F. J. French and *T. M. Osment*, for appellant. *McAllister & Bergin*, for respondent.

GIBSON, C. In probate. Contest between Charles F. Bauer, son of deceased, and his mother, Frederica Garrett, late widow of deceased, over the settlement of the final account of the administrator and the final distribution of the residue of the estate. The deceased and Frederica Bauer—now Garrett—intermarried on the 7th of May, 1868, and on the 9th of May, 1869, the contestant was born unto them. On the 8th of November, 1872, the deceased in his own name purchased the land in controversy for $5,000, and received a deed therefor in the usual form. The deceased and his wife on March 4, 1875, and while living upon and occupying the land as a place of residence, jointly executed and acknowledged a declaration of homestead in proper form and caused the same to be recorded in the office of the county recorder in and for the city and county of San Francisco. The homestead thus created still exists. On December 1, 1878, Charles A. Bauer died, leaving a will dated April 6, 1875, whereby Frederica Bauer, his widow, and one Liemert were nominated as executrix and executor of the will, and his son, the contestant, made sole devisee of the separate property of deceased and one-half of the community property. The will was admitted to probate upon the application of his widow, who was appointed and duly qualified as executrix, and acted as such until October, 1880, when, after her accounts were finally allowed and settled, she resigned and was discharged from her trust. On the 26th day of October, 1880, the present administrator, husband of the late widow of Bauer, deceased, was appointed, but did not qualify as such until February 14, 1887, six years and four months after his appointment. He thereupon entered upon the discharge of his duties as administrator, and on the 23rd day of August, 1887, filed his final account with his petition for final distribution, showing, *inter alia*, that all the personalty belonging to the estate had been disposed of; that the only residue consisted of the homestead; and that the same was community property, and that the only heirs and devisees of deceased are contestant and his mother, Frederica Garrett. To which petition Mrs. Garrett answered, averring that the homestead was selected and declared to be such by herself and her former husband; that it was at that time community property, not exceeding $5,000 in value; and up to the date of the death of deceased did not exceed such value; and closing with a demand for the distribution of the homestead to her as her sole property. The contestant also filed exceptions to the administrator's account for his, the administrator's, failure to collect and charge himself with the rent of the homestead property from the date of his appointment until he qualified, and for expenditures for counsel fees and interest paid on a mortgage debt which had never been presented to the administrator for allowance; and also his opposition to the distribution of the whole of the homestead to his mother, on the ground that three-fifths of the purchase price thereof was the separate property of the deceased, and by the terms of the will he, contestant, should receive three-fifths of the homestead. After a hearing upon the issues thus raised, the court decreed that the homestead was community property, and assigned it to Mrs. Garrett, and that the rents and profits of the homestead during the six years and four months from the appointment until the qualification of the administrator were received and applied by Mrs. Garrett to her own use and the maintenance and education of contestant; that the items of counsel fees and interest were paid out of such rents, and as contestant had no interest in the homestead he had no right to object. From this decree the contestant appeals.

The principal question is whether the realty from the time it was purchased until the time the homestead character was impressed upon it belonged to the community property, or partly to the community property and partly to the separate estate of deceased. The property having been purchased for $5,000, during the coverture of deceased and Mrs. Bauer, became presumptively the community property of both. This is a disputable presumption. "A presumption is a deduction which the law expressly directs to be made from particular facts." Code Civil Proc. § 1959. And "a presumption (unless declared by law to be conclusive) may be controverted by other evidence, direct or indirect; but unless so controverted, the jury are bound to find according to the presumption." Id. § 1961. Respondent contends that this presumption upon which the decree depends, and which of itself is indirect evidence, the latter consisting of two kinds of evidence,—inferences and presumptions, Id. § 1957,—must be controverted by clear and decisive proof, citing Meyer v. Kinzer, 12 Cal. 251, in which the presumption was absolute, because the only proof made to overcome it was the mere joinder by the wife in a conveyance of certain realty which was community property, and the taking by them in their names jointly of a mortgage for a portion of the purchase price therefor, which facts standing alone fell within the same presumption that was assailed. In speaking for the court, Mr. Justice FIELD said: "This invariable presumption which attends the possession of property by either spouse during the existence of the community can only be overcome by clear and certain proof that it was owned by the claimant before marriage, or acquired afterwards in one of the particular ways specified in the statute, or that it is property taken in exchange for, or in the investment, or as the price of the property so originally owned, or acquired. The burden of proof must rest with the claimant of the separate estate." Although in a former part of the same case the phrase "clear and decisive" is used in the same connection, the language above quoted contains a proper and correct statement of the rule, and is in conformity with the rule as established by the Code of Civil Procedure, supra.

Applying this rule, we think the evidence is sufficiently clear and certain to overcome the presumption relied upon by the respondent and acted upon by the trial court, and shows that when the deceased married he had separate property consisting of personalty of his own amounting to over $3,000 in value, and was then employed as a printer, and five months thereafter changed his occupation, and with his wife's father entered into business as partners, using his separate property or a portion thereof to engage in and carry on the partnership business. They remained in business together until his partner's death in December, 1871, and in January, 1872, C. A. Bauer, deceased, purchased at probate sale the interest in the business of his deceased partner for $1,030; and two weeks later, at a profit of $370, sold the same interest to a new partner for $1,400, receiving $300 of it at the time and the remainder in two several payments about one month later. While it is difficult to determine what became of all the separate property of the deceased between the date of his marriage and the purchase of the homestead property, and to trace his separate funds through the community funds which were commingled so as to destroy their identity at the two banks where he had accounts, it is sufficiently clear, and the inference may be fairly deduced, especially in the absence of any evidence to the contrary,—excepting the presumption that the homestead was purchased with community funds, and which, in the opinion of the learned trial judge, overcame all the evidence adduced to rebut it,—that, at the time the homestead was purchased, deceased's interest in the business he was then engaged in was his separate property, and also the $1,400 that he had eight months before received from his partner in business in payment as before stated for the interest sold to such partner; and that, at least, the said sum of $1,400 was used by deceased as his separate property in purchasing the homestead; and that the remainder of the purchase price was derived from a loan from his wife's mother, a portion of which loan was used to finish or repair the building that was then on the land purchased. He supported his family out of his earnings or profits in his business, and had no other business or income except occasional dividends from the banks where and while he had money on deposit, these dividends having been earned by the separate and community property, and, it not appearing in what proportion, must be considered as belonging to the community property. Where property is acquired by funds belonging partly to the separate property of one spouse and partly to the community property, the property so acquired becomes in part the separate property of the spouse who furnishes the funds from his or her separate property, and in part the community property of both spouses in proportion to the separate and community funds invested in it. Schuyler v. Broughton, 70 Cal. 282, 11 Pac. Rep. 719. In following the separate property of deceased through its various mutations in the two banks and in his business until the purchase of the homestead, we are aided by the principles that it having been conclusively shown that deceased owned separate property at the time of his marriage it is presumed that it continued to remain such, (Code Civil Proc. § 1963, subd. 32,)[1] and that the profits thereof acquired the same character. Civil Code, 163.[2]

Under the facts in Smith v. Bailey, 66 Tex. 553, 1 S. W. Rep. 627, cited by respondent, it was hardly possible to distinguish the separate from the community property. In that case the profits arising from the investment of the married woman's property in carrying on a business for herself, but in her husband's name, became by law of that state the community estate of herself and husband; and had been, for between two and three years, commingled with her separate estate in replenishing her stock of goods in carrying on her business; especially as there was no evidence to show what part of the profits had been used in keeping up the stock.

When the declaration of homestead was made, in which both joined, the following, to wit: "We further declare that said property was to the extent of $3,000 acquired and improved with the separate estate of Charles Bauer," was inserted therein. This declaration or recital was on the part of Mrs. Bauer self-disserving, and can be used against her, especially as she is claiming under her husband, with whom in the homestead she was a tenant in common. The acts and declarations of one co-tenant in the presence and hearing of the other as to their relative rights is competent evidence against the one claiming under the other. Crippen v. Morss, 49 N. Y. 63.

Standing alone, this admission is not sufficient to overcome the presumption that the property belonged to the community, but tends to show how she regarded the property at the time it was made. It seems also that from that time until she filed her answer to the petition in this contest, a period of twelve years, she treated it as property belonging partly to the separate estate of the deceased and partly to the community property of both. And, while acting as the executrix, she signed and swore to the inventory of the estate, which set forth that the realty to the extent of $3,000 was the separate property of the deceased. Although this, and the statement to the same effect in the declaration of homestead, are admissions subject to explanation operating against her, and tending to show how she regarded the property at the time of signing the instruments respectively, (Duff v. Duff, 71 Cal. 513, 12 Pac. Rep. 570, and authorities cited, Code Civil Proc. §§ 1850 and 1870, subd. 7,) they do not, as contended for by appellant, estop her from asserting the contrary. In Anthony v. Chapman, 65 Cal. 73, 2 Pac. Rep. 889, the court says: "The appellant contends that by representing in his petition for letters testamentary of the will of Mary A. Smith that said property belonged to her estate, and filing an inventory of her estate which included said property, J. P. Smith was estopped from afterwards claiming that it was his own. In Carter v. McManus, 15 La. Ann. 676, the court says 'that admissions made by the executor or an administrator in the course of judicial proceedings are made for the benefit of the estate represented by him, and do not conclude his individual right by way of estoppel.' Another case very much in point is Werkheiser v. Werkheiser, 3 Rawle, 326. The facts in this case fall short of what is required to constitute an estoppel." From the foregoing it follows that the court erred in distributing all of the homestead property to Mrs. Garrett, and in holding that contestant had no interest therein, and had no right to object to the account of the administrator.

One other point remains to be considered. The attorney at law who drew the declaration of homestead, and was at the time apparently acting for the deceased and his wife in the matter, was interrogated, on behalf of contestant, as to whether the recital in the declaration of homestead was explained to Mrs. Bauer, if she understood it, what explanation was given, and what she knew about the matter. This was objected to on the ground that it called for a privileged communication between attorney and client, and was sustained, and excepted to. The objection should have been overruled. When two persons address a lawyer as their common agent, their communications to the lawyer, as far as concerns strangers, will be privileged, but as to themselves they stand on the same footing as to the lawyer, and either can compel him to testify against the other as to their negotiations. 1 Whart. Ev. § 587; Hanlon v. Doherty, 109 Ind. 37, 9 N. E. Rep. 782; 1 Greenl. Ev. § 244; Michael v. Foil, (N. C.) 6 S. E. Rep. 264. In the latter case it was held that an attorney who wrote the deed could be examined as to what was said by the parties at the time relative to the transaction, whether he was acting as attorney for the one who called him or for both. We therefore advise that the decree be reversed, and the contest remanded for further proceedings.

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[1] This section makes it a disputable presumption "that a thing, once proved to exist, continues as long as is usual with things of that nature."

[2] "All property owned by the husband before marriage, * * * with the rents, issues, and profits thereof, is his separate property."

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the decree is reversed, and the contest remanded for further proceedings.

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3 Cal. Unrep. 92

RAZZO *v.* VARNI *et al.* (No. 11,558.)

(*Supreme Court of California.* May 28, 1889.)

TRESPASS—PLEADING—DAMAGES.

1. A complaint in trespass, alleging that defendants entered plaintiff's close, and diverted the waters of his well, and frightened his wife, is not objectionable as presenting a misjoinder of causes of action.
2. In such action, where plaintiff shows peaceable possession under a paper title for several years, if defendants have any right of entry, it must be pleaded in justification.
3. In such case, evidence by plaintiff that his loss was four dollars per day, estimated on the loss of profits on his crop of vegetables, is incompetent, as being the conclusion of the witness, and not the facts on which an estimate could be made.
4. Such damages were special, and, if recoverable at all, must be pleaded.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

C. Razzo sued N. Varni and others for trespass. His complaint alleged an entry on his close, which was then "the property of, and in the quiet and peaceable possession of, said plaintiff, and then and there, willfully, unlawfully and maliciously, and with force and arms, broke and dug up said close and the soil, earth, and ground of said close, and made a large, long, and deep ditch in said close, and diverted the waters from a certain spring on said close, and converted and appropriated the waters of said spring to their (said defendants) own use, said spring and the waters thereof being then the property of plaintiff; and broke and destroyed a large quantity of rushes then and there growing on said soil, and the property of plaintiff; and frightened and terrorized Catarina Razzo, the wife of plaintiff, whereby she became sick and was injured; and then and there disturbed the plaintiff in the use, possession, and occupation of said close, and prevented him from enjoying the same, as he otherwise would have done; whereby said plaintiff has been injured and damaged in his said close, and in said soil and rushes, and said spring, and the waters thereof, and in the use and enjoyment thereof, and by reason of all which premises aforesaid, said plaintiff is injured and has sustained damages in the sum of $5,000." Judgment for plaintiff, and defendants appeal.

M. C. Hassett, Winans & Belknap, (*J. B. Hannon,* of counsel,) for appellants. *T. C. Coogan,* for respondent.

HAYNE, C. Action for a malicious trespass in entering with force the plaintiff's close, and diverting the waters of a certain spring. Verdict and judgment for plaintiff. Defendants appeal.

We do not think that the complaint was ambiguous, or that there was any misjoinder of causes of action. The circumstances adverted to by counsel were matters of aggravation, and the defendants must be held to have had no right to enter the close, for the plaintiff proved a peaceable possession under a paper title for several years; and, if defendants had any right of entry for any purpose, they should have pleaded it in justification, which was not done.

But we think there was error in the admission of evidence upon the question of damages. Conceding that where a trespass is malicious or accompanied with circumstances of oppression the damages may be exemplary, nevertheless some of the evidence was not admissible. The plaintiff was called as a witness, and was asked: "What do you estimate your damages per day from your loss of water from that spring?" and was allowed to answer that he estimated his damages at about four dollars per day. It is apparent from the use of the words "per day" that the question called for some continuing damages supposed to result from the trespass. And it is clear from the testimony of the witness that he was speaking of the profits which he thought he would have made from the sale of vegetables which he was of opinion he could have raised upon his land had his supply of water not been lessened by the acts of the defendants. His business was "that of gardener,—furnishing vegetables to the city markets;" and he says: "Before defendants dug the ditch I grew nice vegetables. Now I have poor vegetables; not worth anything. My garden used to bring me in twice as much as it does now. I raised twice as many vegetables, for then I could irrigate it; but since the ditch was dug I could not." Assuming, as counsel have assumed, that such damages are not too remote and speculative, we think that the question was improper for two reasons: In the first place, it called for a mere conclusion of the witness, and not for facts upon which any rational estimate could be made; and in the second place, the damages, if recoverable at all, were special, and were not pleaded. The rule that special damages must be pleaded is well settled. Potter v. Froment, 47 Cal. 166; Nunan v. San Francisco, 38 Cal. 690; Gay v. Winter, 34 Cal. 162; Stevenson v. Smith, 28 Cal. 103. There was scarcely any other evidence of pecuniary damage, and we cannot say that the jury did not base their verdict upon this evidence. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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79 Cal. 347

CARDWELL *v.* SACRAMENTO COUNTY *et al.*

(No. 12,572.)

(*Supreme Court of California.* May 29, 1889.)

NAVIGABLE WATERS.

The effect of a series of statutes declaring what streams or portions of streams shall be navigable, which, after declaring a stream navigable between certain points, and repeatedly changing one of those points, omits the stream from the list of navigable waters entirely, is to declare by implication that the stream is non-navigable. THORNTON, J., dissenting.

In bank. Commissioners' decision. Appeal from superior court, Sacramento county.

Action by John T. Cardwell against the county of Sacramento, the California Bridge Company, and Alfred W. Burrell, to restrain the erection of a bridge across the American river. A demurrer to the complaint was sustained, and plaintiff appeals.

Taylor & Holl, for appellant. *Davis & Hill* and *W. H. Beatty,* for respondents.

BELCHER, C. C. This action was brought to enjoin the defendants from constructing a bridge without a draw across the American river, and thereby obstructing its navigation. In the complaint it is alleged, in substance, that plaintiff owns a large tract of land bordering on the American river, about 20 miles above its mouth; that during the winter and spring months of the year the river is navigable from its mouth to a point above the land of plaintiff, and by the use of steam-boats and other vessels he is able to transport the commodities produced and existing on his land down the American river to the Sacramento river, and thence to the cities of Sacramento and San Francisco, which are his principal markets; that the county of Sacramento has contracted with the other defendants for the construction of a bridge across the American river at a point about a mile above its mouth, which, under the contract, is to be made without a draw or other opening for the passage of vessels, and it is to be so low that when the river is navigable,—that is, at the time of high water,—no vessels capable of transporting the products of plaintiff's land can pass beneath it; that unless restrained the defendants will proceed to construct the bridge according to the contract, and that, if it is so constructed, it will obstruct the navigation of the river, and cause special damage to the plaintiff. A general demurrer was interposed and sustained to the complaint, and, the plaintiff declining to amend, judgment was thereupon entered dismissing the action. The appeal is from this judgment.

It is argued for appellant that the demurrer admits that the American river is a navigable stream, and that section 2875 of the Political Code expressly prohibits the construction of bridges across navigable streams without draws, or so as to obstruct navigation; and section 3479 of the Civil Code provides that anything which obstructs the free passage or use in the customary manner of any navigable river or stream is a nuisance; that the demurrer was therefore improperly sustained, and the judgment should be reversed. But the averment in the complaint is only that the river is navigable at certain seasons of the year, when the water is high, and not generally that it is a navigable stream. What is meant by the words "navigable streams," as used in the section of the Code cited? Do the words include all streams that can be navigated in times of high water? If so, then many small creeks and sloughs in the state, though they may be nearly dry during the larger part of the year, must be treated as navigable streams, across which bridges "must be so constructed as not to obstruct navigation, and must have a draw or swing of sufficient space or span to permit the safe, convenient, and expeditious passage at all times of any steamer, vessel, or raft which may navigate the stream or water bridged." We do not think the words were intended to have the broad meaning suggested, or to include any streams other than such as have been declared navigable by the legislature, or are generally navigable in fact, that is to say, during ordinary stages of water. But, however this may be, the words certainly cannot be held to include streams which have been in effect declared by the legislature to be non-navigable. Now, turning to the statutes, we find that in 1850 an act was passed which declared the American river to be navigable from its mouth up to "the place called the 'Mill Dam,' at the head of the race, made by Captain J. A. Sutter for the erection of a grist-mill." St. 1850, p. 100. In 1851 a new act was passed repealing the act of 1850, and declaring the American river navigable from its mouth to the town of Brighton. St. 1851, p. 422. In 1853, and again in 1854, the act of 1851 was amended, and by both of these amendatory acts the American river was declared navigable from its mouth to the "lower ford," which is said in respondent's brief to be the site for the erection of the bridge in controversy. St. 1853, p. 182; and 1854, p. 81. In 1860 and 1861, the act of 1854 as amended in 1853 and 1854, was further amended, and by these acts, the American river was entirely dropped from the list of navigable streams. St. 1860, p. 168; and 1861, p. 274. Many other acts, and among them section 2349 of the Political Code, have since been passed, declaring certain rivers and water-ways to be navigable, but in none of these acts is the American river named or referred to. The question then is, what is the effect of this legislation? In Water Co. v. Amsden, 6 Cal. 443, the court, speaking of the same river, said: "In regard to the river under consideration, the statute declares it to be navigable up to a point which is below the dam of the plaintiffs. Thus, by implication, it is declared non-navigable above that place." This language seems to be applicable to the case in hand. Here we have a stream which was by statute declared navigable up to a certain point, and then, by successive amendments to the statutes, was placed lower and lower down, until finally the stream was wholly omitted from the list of navigable waters. This shows that the attention of the legislature was directly called to the matter; that its action was direct and affirmative; and that by implication the whole stream has been declared non-navigable. We therefore conclude that the American river is not a navigable stream, or a "public way," within the meaning of any of the provisions of the Codes, and that the judgment should be affirmed.

I concur: Vancleif, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

Thornton, J., dissenting.

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79 Cal. 365

Baker *et al.* v. Ducker *et al.* (No. 12,471.)

(*Supreme Court of California.* May 31, 1889.)

Religious Societies—Complaint—Evidence.

1. A complaint for the recovery of land, stating in substance that plaintiffs are members of a certain religious society and sue for the benefit of themselves and all other members; that the society is in full membership with a certain national church, and was organized to teach the gospel according to the rules, discipline, and doctrine of that church; that the society was incorporated; that it purchased the property in question to be used as a parsonage, with funds contributed by its members and others; and that the defendants, who were members, also, procured the name of the corporation to be changed for fraudulent purposes, and diverted the property from its intended use,—avers a good cause of action.

2. Such a complaint, alleging that the plaintiffs accepted one doctrinal standard and the defendants another, is sufficiently definite, though it does not show the difference between the two confessions of faith.

3. Plaintiffs could maintain such an action under Code Civil Proc. Cal. § 382, providing that one or more may sue or defend for all in an action involving a question of common or general interest to many persons.

4. A document identified by members of the society, one of whom was its secretary, as the constitution and by-laws used by the society from its organization, is admissible, though no vote of the society, adopting it as such, is shown.

5. A majority of the society could not change the purpose for which the property was purchased by adopting the different doctrine of a different church, and procuring a change of its corporate name.

6. Evidence that some of the persons who were members of the society when it was organized and incorporated, and many contributors to the parsonage fund, were members of the church to whose use defendants sought to divert the property, is irrelevant.

In bank. Commissioners' decision. Appeal from superior court, San Joaquin county; John Hunt, Judge.

Action by Henry Baker and others against John Ducker and others, to recover land. Judgment for plaintiffs, and defendants appeal.

Joseph H. Budd, (*T. M. Osment*, of counsel,) for appellants. *J. C. Campbell*, (*C. H. Clement*, of counsel,) for respondents.

Belcher, C. C. This is an action to recover, for the use of the members of the First Reformed Church of the City of Stockton, a lot of land, with the dwelling-house thereon, which is situate in the city of Stockton and was purchased and formerly used as a parsonage for the church. The defendants demurred to the complaint on the ground that it did not state facts sufficient to constitute a cause of action; that it was indefinite and uncertain in certain specified particulars; and that the plaintiffs had not legal capacity to sue and maintain the action. The demurrer was overruled, and thereupon the defendants answered. The findings and judgment were in favor of plaintiffs, and the appeal was taken by defendants from the judgment and order denying them a new trial.

The first question to be considered is as to the sufficiency of the complaint. The complaint is very long, but it states, in substance, that the plaintiffs and those with whom they are associated, and for whose benefit the action is also prosecuted, are a religious society in full membership with a national religious society known as the "Reformed Church in the United States;" that they were organized for the purpose of teaching the gospel according to the particular form of worship, rules of government, discipline and doctrines of that church, and, after such organization, they were duly incorporated under the name of the "First Reformed Church of the City of Stockton;" that the corporation purchased the property in controversy with funds donated by its members and by the public, for the purpose of using it as a residence for its pastors, and for no other or different purpose whatever; that the defendants, for fraudulent purposes, procured the name of the corporation to be changed, and thereafter diverted the property from the use for which it was purchased and originally intended.

1. Assuming, as we must on demurrer, that all facts stated are true, we think the complaint states a cause of action.

2. We do not think the complaint indefinite and uncertain in any important particular. The plaintiffs accepted the doctrinal standard contained in the Heidelberg Catechism, and the defendants that of the Lutheran Church. These doctrinal standards are alleged to be different; but we can see no necessity for stating particularly what they were and wherein they differed.

3. The plaintiffs aver that they, together with a large number of other persons, are associated together for religious purposes, and are members of the First Reformed Church of the City of Stockton, and that they prosecute the action for all the members of the church as well as themselves. This shows the question to be one of a common or general interest of many persons, and that the action was authorized by section 382 of the Code of Civil Procedure.

4. It is argued for appellants that the court erred in admitting in evidence the constitution and by-laws of the First Reformed Church of the City of Stockton, and in support of this argument it is said that they were never adopted by any vote or act of the congregation. The congregation was organized in 1870, and the paper offered in evidence was headed: "Constitution and By-Laws of the First Reformed Church of Stockton, Adopted the 12th of June, 1870." One of the defendants, Louis Tschiersky, was a witness, and, on being shown the book containing the writings objected to, testified: "This which you now show me in the book are the constitution and by-laws of the Reformed Church,—of our church here in Stockton. I do not know of any other constitution or by-laws for that church." Another witness, Schimelpfenig, on being shown the same book, testified: "I was the first secretary of the church here. That book is one of the books of the First Reformed Church. The constitution was written by Mr. Fox, the minister. We always took it for the constitution and by-laws of our church. They always acted on them, and considered them as such. I do not know of any direct vote of the congregation adopting them, but they have always been the constitution and by-laws of the church, since it was organized until the present day." In view of the foregoing testimony, we see no error in the ruling complained of.

5. It is also urged that the court erred in excluding evidence offered by defendants to show that some of the persons who were members of the society when it was organized, and took part in having it incorporated, and many of those who contributed money for the purchase of the parsonage, were at the time Lutherans in their religious belief. The objection was that the evidence was irrelevant and immaterial, and we are unable to see how it was relevant to any issue in the case. The society was organized and incorporated as a "reformed church." Its articles of incorporation show that its purpose was "to provide its members with the preaching of the gospel, the administration of the sacraments and the other means of grace, in accordance with the confessions of faith known as the 'Heidelberg Catechism,'" and that it adopted the doctrine and discipline of the Reformed Church in the United States. The subscription list by which all the money was raised to purchase the parsonage was headed: "We, the undersigned, obligate ourselves to pay the sums which we have written opposite our respective names for the erection of a parsonage for the First Reformed Congregation of Stockton;" and the deed of the property was made to the Reformed Church of the City of Stockton. This being so, the property was dedicated to the use of the church for which it was purchased, and it was a matter of no consequence whether some of the church members and some of the persons who contributed money to make the purchase were Lutherans or not.

6. Stress is laid upon the fact that the name of the corporation was changed by an order of court, and that 11 of its members signed the paper asking for the change. But it does not appear that the 11 were a majority of the members of the church, nor, if it had so appeared, do we see how appellants would have been aided thereby. Defendant Tscheirsky testified: "When we made the application for a change of name it was to change the church into an independent Lutheran church and adopt the Lutheran doctrine." And the court found that the application was made "with the intent and for the purpose of depriving said congregation of the benefit of their corporate franchise, and of changing the original purpose and intent for which the same was organized, and of depriving said Reformed Church, and the congregation thereof, of the use and benefit of their property herein described, and for the purpose of diverting all of said property of said corporation from the use to which it was dedicated by said corporation and by the members of said congregation, and from the purposes for which the funds were subscribed with which to purchase the said property." It is thus made clear that the property in question was held by the Reformed Church in trust for its members, and the defendants, even though they constituted a majority of the members, had no right and no power to divert it to the use of another and different church organization. Kniskern v. Lutheran Churches, 1 Sandf. Ch. 439; Schnorr's Appeal, 67 Pa. St. 138; Roshi's Appeal, 69 Pa. St. 462; Watson v. Jones, 13 Wall. 679.

The other points discussed by counsel do not require special notice. Looking at the whole record, we find nothing calling for a reversal of the judgment, and we therefore advise that the judgment and order be affirmed.

I concur: FOOTE, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

PATERSON, J., did not participate in the decision of this cause.

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79 Cal. 317

LOVELAND *v.* GARDNER *et al.* (No. 12,550.)

(*Supreme Court of California.* May 28, 1889.)

FENCES—BARB-WIRE—NEGLIGENCE—APPEAL—REVIEW.

1. One who has constructed and maintains a barb-wire fence in a negligent manner is liable for injuries occasioned thereby to the domestic animals of others, though the fence is entirely on his own land.

2. Where a judgment for plaintiff is for too large an amount, and the supreme court ascertains the correct amount, which is small, the cause will be remanded, with directions to require plaintiff to file a waiver of any greater sum than the correct amount, with interest from the date of the judgment, or, on his failure so to do, to grant a new trial.

In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

Action by F. C. Loveland against Charles F. Gardner and others. Judgment for plaintiff, and defendants appeal.

Taylor & Holl, for appellants. *Spencer & Raker* and *E. R. Dodge*, for respondent.

PATERSON, J. The defendants inclosed their land with a barb-wire fence, part of it running along a highway. The posts were thirty-six feet apart, and had fastened to them three strands of barb-wire. The first strand was 24 inches above the ground; the second, 13 inches above the first; and the third, 15 inches above the second. Nothing was used in the construction of the fence but posts and wire. The fence was built entirely upon the lands of the defendants. Plaintiff, who is an adjoining owner, and a stock-raiser, alleged and proved that some of his horses came in contact with the fence without any fault or negligence on his part, and a number of them were killed, and others badly wounded. There was evidence tending to show that the wires of the fence were not properly stretched, but were left hanging loose between the posts, in such a way that stock would not be likely to see them. The question of negligence in the construction of the fence was properly and fairly left to the jury under the instructions of the court.

The act of the defendants in constructing the fence upon their property, and along the line of the public highway, did not, of itself, render them liable to the plaintiff for the damages sustained, but, if the fence was constructed and maintained in such a manner as to constitute negligence, they were properly held liable. We cannot say that the evidence is insufficient upon the question of negligence to support the verdict. There are many material circumstances which, added to the facts above stated, tend to show negligence, but we do not deem it necessary, for the purposes of this decision, to relate them. A lawful wire fence has been defined by the legislature as follows: "Wire fence shall be made of posts not less than twelve inches in circumference, set in the ground not less than eighteen inches, and not more than eight feet apart, with not less than three horizontal wires, each one-fourth of an inch in diameter. The first one shall be eighteen inches from the ground, the other two above this one at intervals of one foot between each, all well stretched, and securely fastened from one post to another, with one rail, slat, pole, or plank of suitable size and strength, securely fastened to the posts not less than four and one-half feet from the ground." Pol. Code, § 19, subd. 23; Hitt. Gen. Laws, § 3032. Of course the liability of the defendants does not depend upon the question whether their fence came up to the legislative standard,—which fixes the liability of owners of trespassing animals in certain counties,—but the act quoted shows what the legislature of the state considered a good fence. The defendants were not bound to maintain any fence at all, but, having undertaken to maintain one, they were bound to see that it was not made a trap for passing animals. It is the duty of the land-owner to take notice of the natural propensity of domestic animals, and to exercise reasonable care to prevent his fence from becoming dangerous. The fact that the fence was constructed entirely upon defendants' land is no defense, if negligently constructed or maintained. The case comes within the rule established by a recent decision of this court in Malloy v. Savings & Loan Society, ante, 525, (filed April 22, 1889.) In that case the defendant had negligently suffered a privy vault and cess-pool to remain open upon its premises, about 10 feet from the sidewalk of a public street in the city of San Francisco, without any inclosure, and plaintiff's minor child, without any fault or negligence on his (plaintiff's) part, had fallen into the same and was drowned therein. The demurrer to the complaint, which stated substantially these facts, was sustained in the court below, and the order reversed here. The decision was based upon the principle that one should so use his own property as not to injure the property of another. Of course, this principle—which is a maxim of common justice, as well as of law—does not create a liability for every injury one may sustain through the use by another of his own property; but where the latter is guilty of a breach of duty which he owes to others in the use of his property, whether by intention or neglect, he is liable for any injury which is occasioned thereby, if the injury is the natural or probable result of the act, and such as a prudent man, under the circumstances, acting with ordinary care, would have foreseen. Under such circumstances, it is no defense that the property is used for a lawful purpose. The following cases illustrate the rule: Birge v. Gardner, 19 Conn. 507; Durham v. Musselman, 18 Amer. Dec. 133; Railroad Co. v. Allen, 22 Kan. 286. The case at bar is similar to Sisk v. Crump, 112 Ind. 504, 14 N. E. Rep. 381, where it was held that a barbwire fence, the strands of which were negligently suffered to sag down and hang loosely from the posts, was not such a fence as a good husbandman would construct or maintain, and that the defendant was liable for injuries occasioned to plaintiff's horse while attempting to pass from the street into defendant's field. See, also, Powers v. Harlow, 19 N. W. Rep. 259; Fink v. Furnace Co., 10 Mo. App. 69; Railroad Co. v. Hudson, 62 Ga. 680.

The court instructed the jury that the plaintiff could recover only one-half of the damage sustained by the horses owned by him and Knight jointly. We thing the instruction is correct, but, whether correct or incorrect, the jury was bound by it. Emerson v. County of Santa Clara, 40 Cal. 543. The verdict and judgment were in favor of the plaintiff for $575 and costs. The evidence shows without conflict that the damage to the property owned jointly by Knight and the plaintiff was $390. Only four horses belonged to plaintiff individually. It is in evidence that two of these horses were damaged to the extent of $75. The other two of the four mentioned were a sorrel colt and a black mare, but plaintiff does not state the damage occasioned to these, or either of them. The witness Cady mentioned the sorrel colt, and estimated the damage to it to be $30. Assuming this to be the property of plaintiff, the colt mentioned by plaintiff as his property, he would be entitled to recover the following sums only: One-half of $390,—the damage to the joint property of Knight and himself,—and the other sums mentioned,—$75 and $30 damages to his individual property,—or a total of $300. The amount involved is very small, and we desire, if possible, to avoid the expense and delay of a new trial. The cause is therefore remanded, with directions to the court below to enter an order requiring plaintiff, within such time as the court may fix, to file with the clerk a waiver of any greater sum than $300, with interest thereon at 7 per cent. from the date of the judgment, together with the costs of the action, and directing that, unless such waiver be filed within the time mentioned, a new trial will be granted. In case such waiver is filed, each party will pay one-half the costs of this appeal, and the judgment and order will stand as they are. If the waiver be not filed, the court below will order a new trial

We concur: BEATTY, C. J.; THORNTON, J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.

(79 Cal. 278)

EDE *v.* COGGSWELL. (No. 11,486.)

(*Supreme Court of California.* May 27, 1889.)

STREET CONTRACTS—EXTENSION OF TIME.

1. Const. Cal. art. 11, § 19, (which went into operation January 1, 1880,) prohibits the letting of any contract by a city for street improvements the cost of which is chargeable upon private property by special assessments, unless the assessments therefor shall have been previously levied, collected, and paid into the city treasury. *Held*, that a contract for street work, made by a city at a time when there was no such constitutional restriction, could lawfully be extended, as to time of completion, by agreement made after January 1, 1880, but before the expiration of the period originally fixed for completion. Following Paving Co. v. Barstow, ante, 544.

2. The special act (Acts Cal. 1877–78, p. 231) conferring certain powers upon the board of supervisors of the city and county of San Francisco in addition to those already existing under the general street-improvement act of April 1, 1872, does not affect the latter act as to the authority of the street commissioner to make contracts for the street grading authorized by the act of 1878, nor the jurisdiction of the board of supervisors to have the work performed under such contracts.

3. Though the act of 1878 authorized the improvement of a street consisting of eight blocks, it is not required that the work shall be let by a single contract, nor treated as an entirety, but the board of supervisors are given full discretionary power to order what part shall be graded under different contracts.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

J. C. Bates, for appellant. *Garber & Bishop*, for respondent.

FOOTE, C. This is an action to recover on an assessment upon certain property of the defendant to pay for work done in grading Seventh street, from King to Berry street, in the city and county of San Francisco. The plaintiff sues as the assignee of one Buckman, the contractor, who is alleged to have performed the work. The improvement was made by virtue of a statute contained on page 231 of the Legislative Acts of 1877 and 1878, which gave certain powers to the board of supervisors of said city and county in addition to those which already existed under the general street-improvement act of April 1, 1872, (Acts 1871–72, p. 804 et seq.) The cause was heard before the court without a jury, and upon the evidence adduced a nonsuit was entered. From the judgment therein, and an order denying a new trial, this appeal is taken. There seems to be no dispute but that the assessment, warrant, diagram, and return show *prima facie* the regularity of all the proceedings prior thereto. The contract to which the complaint has reference, as well as the assessment, was in due form; so that if the contract was performed under constitutional authority, and was authorized and made in accordance with the Acts of 1872 and 1878, supra, it seems to be conceded on all sides that the nonsuit should not have been granted on the grounds alleged,—that the evidence was insufficient to sustain the action, or that the claim set up in the complaint was invalid.

The main defense upon which the respondent relied in the court below, and relies here, is that the claim set forth in the complaint is void, because in contravention of section 19, art. 11, of the state constitution of 1879.[1] He claims that, although the contract on the performance of which the assessment was issued may have been authorized by the acts of April 1, 1872, and March 12, 1878, supra, if performed before the date of the going into effect of the constitution of 1879, yet that, being unperformed at that time, to-wit, January, 1880, it became null and void, and no valid assessment based upon it could be made. The contract was entered into November 28, 1879, and was by its terms to be completed in 100 days. Before the expiration of the 100 days an additional time of 60 days was given by the board of supervisors of the city and county above mentioned, and, before the last-mentioned extension expired, an additional extension of 100 days was granted, within which latter time the work was completed. The argument of the respondent is that the extensions of time in which to perform the work were in the nature of new contracts, and, as such, were forbidden by the constitutional provision above cited; that any contract unperformed at the date of the going into effect of the constitution of 1879 was nullified, and nothing could be done under it by which any liability could be fixed to pay street assessments. The same contentions raised here upon the effect of the constitutional provision as regards the street work where extensions of time in which to perform it have been given were made in a case lately decided by the appellate court, and were disposed of as follows: "As the contract was made before January, 1880, it was not impaired or affected by the new constitution. The granting of the extension of time was not a novation or new contract; it was merely a pursuance of the original contract under rights existing by virtue of the law under which it was made. The extensions were made before the original time, or the time given in the first extension, had elapsed. The case of Bank v. County of Franklin, 9 Sup. Ct. Rep. 159, cited by the appellants, differs in many respects from the case at bar." Paving Co. v. Barstow, ante, 544, (No. 11,972, filed April 24, 1889, Department 2.)

It is further alleged that the contract is void on its face because it purports to have been made under the street act of 1872; the respondent claiming that the contract was made, and could only be made, under the act of 1878, which he alleges was a special act, and repealed the act of 1872, so far as the latter gave any jurisdiction to order or make the improvement; that, therefore, no contract could be made under the act of 1872. An examination of both acts shows that the act of 1878 was supplementary merely to the act of 1872; so that a part of Seventh street might be opened without any petition of the owners of the lots thereon, as prescribed by section 4 of the act of 1872, as a condition precedent to give the board of supervisors jurisdiction to have the work done. Notice is also dispensed with to property-owners in certain instances, and special reference is made to all laws respecting street work, including the act of 1872; and it is declared that all such not inconsistent with the act of 1878 are made applicable thereto. The act of 1872 was left intact as regards the authority of the street superintendent to make a contract such as is here involved, and the jurisdiction of the board of supervisors to have the work performed, as required under the act of 1872, was not taken away under the act of 1878. The last act was intended to confer additional powers on the board, not possessed by them under the act of 1872, and what was done under and by virtue of the last-mentioned act is in entire consonance with the act of 1878, supra. It is said by respondent, however, that the contract is void because it authorized only a part of the improvement which the act of 1878 authorized to be done, it being argued that the statute only authorized the work to be done as a whole; that, while the contract was for one block only, the statute contemplated the improvement of eight blocks as an entirety. We do not think that the act in question is susceptible of this narrow construction. It seems to give the board of supervisors full discretionary power to order what part should be graded in one or more contracts at a time. This disposes of the material points made for the affirmance of the judgment and order. They seem to have no substantial merit, and we advise that the judgment and order be reversed.

We concur: Belcher, C. C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment and order are reversed.

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[1] No public work or improvement of any description whatsoever shall be done or made in any city, in, upon, or about the streets thereof, or otherwise, the cost and expense of which is made chargeable or may be assessed upon private property by special assessment, unless an estimate of such cost and expense shall be made, and an assessment, in proportion to benefits, on the property to be affected or benefited shall be levied, collected, and paid into the city treasury before such work or improvement shall be commenced, or any contract for letting or doing the same authorized or performed.

(79 Cal. 297)

WITHERS *v.* JACKS. (No. 11,919.)

(*Supreme Court of California.* May 28, 1889.)

MORTGAGES—QUIETING TITLE.

1. A land-owner gave two mortgages and in a suit to foreclose one of them defendant, the other mortgagee, was made a party. The mortgagor defaulted and consented to the foreclosure of defendant's mortgage also. There was a dispute as to the priority of the mortgages, and defendant appealed from a decision against him, without, however, obtaining or asking for a stay of execution. The judgment was reversed for defective findings as to priority, but it was held in that suit, and in a suit between the mortgagor and defendant, that the mortgagor was not affected by the appeal and that the foreclosure sale was final. Plaintiff held under the purchaser at the sale, and the land was not redeemed. *Held*, that plaintiff was the owner in fee of the land.

2. Defendant, in a suit to quiet title, after having denied that plaintiff had any right or title to the land, and put him to his proof, cannot contend, on appeal, that a mortgage, which was the interest defendant claimed, was not such an interest as would justify a decree quieting title.

Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Code Civil Proc. Cal. § 738, authorizes an action by any person against another who claims an estate or interest in real property adverse to him, to determine such adverse claim.

S. O. Houghton and *S. F. Leib*, for appellant. *N. A. Dorn* and *W. M. R. Parker*, for respondent.

MCFARLAND, J. This is an action to quiet title to certain lands in Monterey county, described as "lots one and two" of a certain range. The answer denies that plaintiff is the owner of the land, or that he has any estate or right or title to the same, or any part thereof, and avers that defendant has a mortgage upon said land executed by one Milton Little and his wife, Mary Little, bearing date July 21, 1874. The court below gave judgment for plaintiff, and defendant appeals from the judgment and from an order denying a new trial.

Plaintiff holds title to the land by virtue of a sheriff's deed made upon the foreclosure of a mortgage by Milton Little and wife to James W Withers, executed December 11, 1875, and recorded the next day, and, also, of another mortgage executed by said Little and wife to David Jacks, (defendant herein,) dated July 21, 1874, but not recorded until June 2, 1876. The foreclosure suit was brought by said James W. Withers, and Jacks was made a party defendant therein. The Littles made default, and consented that Jacks' mortgage might also be foreclosed. Both mortgages were foreclosed. There was a contest between Withers and Jacks as to priority between the two mortgages. The court decided that contest in favor of Withers. Jacks appealed, but did not get, or ask for, any stay of execution. The land was sold under the decree of foreclosure to James W. Withers, and in due time—no redemption being made—he received a sheriff's deed and the title under said deed was conveyed to Milton Withers, the plaintiff in this present action. On Jacks' appeal the judgment was reversed on account of defective findings on the issue of priority between the two mortgages; but it must be taken to have been conclusively held in that case, (Withers v. Little, 56 Cal. 370,) and in the subsequent case of Little v. Superior Court, 74 Cal. 219, 15 Pac. Rep. 731, that the Littles were not affected by the appeal, and that the sale under the foreclosure was final. We think, therefore, that the court correctly found that the plaintiff is the owner in fee of the land. Milton Little, the former owner of the land, died testate, and devised it to Mary Little, who conveyed to plaintiff herein; so that plaintiff, also, in that way, represents the former owners.

2. Appellant, having denied that respondent had any title or right to the land, and put him to his proof, ought not to be heard to say now that a mortgage is not such an interest as will justify a decree quieting title. Moreover, we think that the claim set up by appellant would be a cloud on respondent's title which he has a right to have quieted. "The plaintiff has a right to be quieted in his title whenever any claim is made to real estate * * * the effect of which claim might be litigation, or a loss to him of his property." Head v. Fordyce, 17 Cal. 149. Section 738, Code Civil Proc., is "intended to embrace every description of claim whereby the plaintiff might be deprived of his property, or its title clouded, or its value depreciated." Id.

3. We think the findings cover all the material issues in the case. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

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3 Cal. Unrep. 91

MILLARD *v.* SUPREME COUNCIL AMERICAN LEGION OF HONOR. (No. 11,716.)

(*Supreme Court of California.* May 30, 1889.)

VERDICT—NEW TRIAL.

1. A new trial must be granted where the findings of the jury do not determine all the material issues made by the pleadings.

2. Under Code Civil Proc. Cal. § 659, relating to motions for new trial and their contents, it is not necessary, in a motion for new trial for failure to pass on all such issues, to set out in the statement such failure as a ground for the motion.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

R. B. Mitchell, for appellant. *Manuel Eyre*, for appellee.

BELCHER, C. C. This is an appeal from an order granting the defendant a new trial. The action was brought to recover the amount of a benefit certificate issued by defendant, and judgment was rendered in favor of plaintiff for the amount sued for. It does not appear from the record upon what ground the new trial was granted, but counsel for respondent prints in his brief what purports to be the opinion of the learned judge who made the order, and from that it appears that the motion was granted upon the ground that there were no findings upon some of the material issues raised by the pleadings. Assuming that the motion was granted upon the ground stated, the question is, was the ruling erroneous? It is argued for appellant that the findings did cover all the material issues, and that, at any rate, a new trial should not have been granted, because it does not appear that the failure to make full findings, if there were such failure, was prejudicial to the losing party, and because there was no specification of the failure in the statement as a ground for the motion. It has been held by this court that a judgment based upon findings which do not determine all the issues raised by the pleadings is a decision against law, for which a new trial may be had. Knight v. Roche, 56 Cal. 15; Brown v. Burbank, 59 Cal. 535. And in such case the statute does not require the moving party to specify in his statement the failure as a ground for his motion. Section 659, Code Civil Proc. After carefully reading the record, we think it clear that the findings did not cover all the material issues raised in the case, and we cannot say, as claimed by appellant, that the judgment would have been the same if the omitted findings had been made in favor of defendant, and that defendant was therefore in no way prejudiced by the failure. The rule is that every error is presumed to work injury to the losing party, unless the contrary clearly appears, and the burden is upon the winning side to show that no injury could have resulted. The cases cited by appellant do not meet the case in hand. The above disposes of the appeal. Counsel have discussed the whole case in their briefs, but we are not called upon to follow them and thus determine what the judgment should be in advance of the new trial. We advise that the order appealed from be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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79 Cal. 351

CENTRAL IRRIGATION DISTRICT *v.* DE LAPPE *et al.* (No. 12,954.)

(*Supreme Court of California.* May 29, 1889.)

IRRIGATION DISTRICTS—ELECTION—BONDS.

1. Irrigation districts, provided for under Laws Cal. 1887, p. 29, are public corporations to the same extent as reclamation districts.

2. Under section 2 of the act which requires that the petition for the district "shall set forth and particularly describe the proposed boundaries of such district," a description which would be good in a deed is sufficient, and false calls may be rejected, and lines supplied by intendment.

3. Section 2 provides that the petition must be accompanied by a bond to pay all costs if the organization is not completed; and then, "when such petition is presented," the supervisors shall hear the same. A petition was signed by 64 persons. A bond recited that certain persons named, including R. and T., proposed to present a petition "herewith." R. and T. did not sign the petition. *Held* that, there being no other petition presented, the recital sufficiently identified it.

4. Where the statute requires a bond conditioned to pay the costs "in case the organization is not effected," a bond to "pay all the costs" is insufficient compliance therewith.

5. The board had the power on the day set to hear the petition to continue the hearing and allow a new bond to be filed, and it is sufficient if the bond be filed on the day of the hearing.

6. The recording of an ordinance of a board of supervisors, providing for the holding of regular meetings, is not essential to the validity of the ordinance.

7. A verbal application to the supervisors by an owner of land, to have the same included in the district, is sufficient.

8. Section 2 of the act provides that the board shall not exclude lands from the district which are capable of irrigation by the same system. *Held*, that the judgment of the board as to the propriety of excluding any lands was final.

9. There is nothing in the act requiring the board to state the reasons which led it to establish the boundaries of the district.

10. A publication of the notice of the election on November 22d in a weekly newspaper, on October 28th, and on the 5th, 12th, and 19th of November, is a sufficient compliance with the provision of the act requiring publication "three weeks prior to the election."

11. The act provides that the election shall be "conducted" in accordance with the general election laws, which provide that voting precincts shall be established at least 30 days before the election. Section 3 of the irrigation act provides that the supervisors shall establish a convenient number of election precincts. *Held*, that the time for establishing the precincts was in the discretion of the board, and when published with the election proclamation it was sufficient.

12. Section 15 of the act provides that the board of directors shall determine the amount of money required for the purpose of constructing the works, etc., and shall call an election and submit to the electors "the question whether or not bonds of said district shall be issued in the amount so determined, and if a majority vote 'Bonds, yes,' then the board shall cause bonds in said amount to be issued." "The bonds shall each be of the denomination of not less than $100, nor more than $500," and "said bonds shall be payable in installments." *Held*, that the bonds were properly drawn so as to make each one payable in installments.

Commissioners' decision. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

W. F. Good, *W. C. Belcher*, *H. M. Albery*, and *K. Albery*, for appellants. *Richard Bayne*, for respondent. *Stanton L. Carter*, *amicus curiæ*.

HAYNE, C. This was an application for *mandamus* to compel the secretary of an irrigation district to sign and seal certain bonds. One of the property owners of the district was allowed to intervene for the purpose of contesting the validity of the bonds. The court below awarded the *mandamus*, and the defendant and the intervenor appeal. The district was organized under the act known as the "Wright Law." See Laws 1887, p. 29. This act was held to be constitutional in Irrigation Dist. v. Williams, 18 Pac. Rep. 379. In that case irrigation districts were likened to districts organized for the reclamation of swamp lands, and the court said that it was inclined to think that they were to be regarded as public corporations. We think that the analogy between the two kinds of corporations is strong. The purpose of the one is to make large bodies of land fit for cultivation by removing the excess of water, and that of the other is to make large bodies of land fit for cultivation by distributing water over them. Their general powers are similar in many respects, and they are organized upon the same plan. It is settled that reclamation districts are public corporations, (Dean v. Davis, 51 Cal. 410, 411; People v. Reclamation Dist., 53 Cal. 348; People v. Williams, 56 Cal. 647; Hoke v. Perdue, 62 Cal. 546; People v. La Rue, 67 Cal. 528, 8 Pac. Rep. 84;) and we think that irrigation districts must be held to be so to the same extent. Many objections are taken to the proceedings for the organization of the district, and the argument in relation thereto rests in great part upon the proposition that the proceedings are to be strictly construed. This is put upon two grounds. It is said, in the first place, that the proceedings are for the purpose of divesting the citizen of his property *in invitum.* It is true that later on provision is made for assessing the property within the district for the purpose of defraying expenses; but no assessments have yet been levied, and none are involved in the case before us. The objections made relate to the organization of the district. The primary purpose of such organization is to perform certain important public functions. The power of assessment, it is true, is incidental. But in the same way it is incidental to cities, and other municipal corporations, strictly so called, for the improvement of streets, etc. And it can no more be said that for this reason proceedings for the organization of irrigation districts are for the purpose of depriving the citizen of his property *in invitum* than the same could be said of proceedings for the organization of cities and other municipal corporations. It is said, in the next place, that the district was not created by the legislature itself, but by or under the supervision of a local body. But all municipal corporations in the state are henceforth to be created in this way. The constitution provides that corporations for municipal purposes shall not be created by special laws, but shall be organized under such general laws as the legislature shall provide. Article 11, § 6. This necessitates organization under some kind of local supervision, and the general laws which the legislature has provided require that the organization shall be under the supervision of a local body, much in the same way as in the case of an irrigation district. A petition "which shall set forth and particularly describe the proposed boundaries of such corporation" is to be presented to the board of supervisors of the county, which body is to deal with it much in the same manner as the board is to deal with the petition for the formation of an irrigation district. In fact the phraseology of the irrigation law is so similar to that of the municipal corporation act as to make it evident that the former was modeled upon the latter. See Laws 1883, p. 94. Hence, if proceedings for the formation of irrigation districts are to be strictly construed because they are organized under the supervision of a local body, proceedings for the formation of municipal corporations must be so construed for the same reason. But the consequences of wiping out municipal organizations, perhaps after property rights had grown up, because of some slip in the preliminary proceedings, would be so serious that we cannot think that any court would adopt the strict rule of construction which would require it. It will be time enough to apply such a rule when questions as to the extent of the powers arise. So far as proceedings for the organization are concerned, we think that a reasonably liberal rule of construction should be adopted to carry out the wise purposes of the law. In the light of this rule we proceed to examine the various objections made.

1. Several objections are taken to the description contained in the petition. They are based upon the requirement of the second section of the act, that such petition "shall set forth and particularly describe the proposed boundaries of such districts." It is probable that this provision requires a description by metes and bounds, for it is "the boundaries" which are to be described, and not merely the district. But we think that a description by metes and bounds, which would be sufficient in an ordinary deed, is a compliance with the provision. "The same construction that is given to grants is given to statutes which prescribe the boundaries of incorporated territories." Iron Works v. Tolland, 9 Cush. 496. It has even been held that a more liberal rule should be applied. Hamilton v. NcNeil, 13 Grat. 394. But, at all events, a description by metes and bounds, which would be good in a deed, is sufficient in the petition.

Now, the main point in regard to the description is that it cannot be made to close upon itself. The learned counsel say that "the only way in which this could be done would be to change the distance '200 feet' in line 10 of folio 14 to '2,000 feet,' and '540 feet' in line 6 of folio 18 to '5,400 feet.'" But, if this is necessary, we think that it can and should be done upon the *data* furnished by the petition itself. The first call referred to is as follows: "Thence south, 34 degrees east, 200 feet to stake 208." For anything that appears to the contrary, this stake is a perfectly plain monument; and, being so, it must control the statement of the distance. Mills v. Lux, 45 Cal. 273; Penry v. Richards, 52 Cal. 672. If, therefore, it is 2,000 feet from the point of departure, the call for 200 must be rejected. False calls may be rejected, and lines supplied by intendment, in the description of the boundaries of a municipal corporation. In re Inhabitants of Ipswich, 13 Pick. 431. A false call may be rejected even in a tax-deed. Bosworth v. Danzien, 25 Cal. 299. The objection to the call for "540 feet" is to be disposed of in a similar way. It is also contended that the starting point and certain other calls of the description are too indefinite. But we cannot say from the face of the paper that this is so; and the evidence to explain and locate the calls, which was clearly admissible, (Reamer v. Nesmith, 34 Cal. 626,) makes them sufficiently definite. Similar objections are made to the description in the order of the board establishing the boundaries of the district, and similar answers apply.

2. It is contended that a proper bond was not filed with the petition. The provision of the act is that "the petitioners must accompany the petition with a good and sufficient bond, to be approved by the said board of supervisors, in double the amount of the probable cost of organizing such district, conditioned that the bondsmen will pay all said cost in case said organization shall not be effected. * * * When such petition is presented, the said board of supervisors shall hear the same," etc. Section 2. The petitioners presented, and the board approved, a bond which is claimed to be insufficient in form. The particulars in which it is said to be insufficient are the following: It is said, in the first place, that the recital in the bond misdescribes the petition. The petition was signed by 64 persons, among whom were J. A. Sutton, James McDermott, George B. Harden, George M. Sutton, and P. R. Garnett. The recital in the bond is that "whereas, J. A. Sutton, James McDermott, Geo. B. Harden, Geo. M. Sutton, P. R. Garnett, N. D. Rideout, A. J. Tully, and others, their associates, propose to present herewith" a petition, etc. Rideout and Tully did not sign the petition. The argument is that the petition filed does not correspond to the one referred to in the bond, and, consequently, that there was no bond upon that petition. The recital, however, is not of a petition actually presented, but of one proposed to be presented. There is no pretense that any other petition was presented. The bond did in fact accompany this petition, and we think that this circumstance, coupled with the recital, is sufficient to identify the document. In the next place it is said that the bond was not conditioned as required by the act. The condition was that the bond should be void "if said obligors or bondsman shall pay all the costs," etc., while the condition required by the statute is that the bondsmen shall pay the cost "in case said organization shall not be effected." The difference is therefore that the bond given provided that the bondsmen should pay the cost in any event, while the statute only requires that they should pay in a certain contingency. We think, however, that the bond may fairly be said to include the provision required by the statute, and that it is not vitiated by including something which was not required; and the use of the singular number in the phrase "if said obligors or bondsman shall pay," etc., is unimportant. But at most the bond was defective merely, and, if it be assumed for the purposes of the case that the giving of a bond

was jurisdictional, we think that the board had power to allow a new one to be given before taking action on the petition. The petition was presented, pursuant to notice, on October 10th; and when the matter came up on that day the board made an order allowing a new bond to be filed, and continuing the hearing until a future day. A bond free from objection was filed, and the board then proceeded with the hearing. We think that this course was within the power of the board. No time is fixed for the presentation of a petition. It is to be presented at a regular meeting, pursuant to notice, and the bond must "accompany" the petition. Neither the petition nor the bond need be filed before the petition is presented, and the hearing and the action of the board in the matter may be at the same meeting, although power is expressly given to adjourn for a certain time. It is sufficient, therefore, if the bond be given on the day of the hearing, and we think it clear that there was power to adjourn the hearing so as to allow a proper bond to be filed. Such a bond may be said to "accompany" the petition in the sense of the statute. Even in the case of an appeal-bond it was held, prior to the enactment of any statute on the subject, that where a bond had been given which was defective merely the defects could be cured by giving a new bond in the supreme court. See cases in Hayne, New Trial & App. 651.

3. It is objected that the petition was not presented at a lawful meeting of the board. The act provides that the petition "shall be presented at a regular meeting of said board." A similar provision is in the municipal corporation act. Laws 1883, p. 94. In relation to meetings of boards of supervisors the county government act has the following: "The board of supervisors must by ordinance provide for the holding of regular meetings of the board at their respective county-seats." In pursuance of this provision the board, on April 11, 1885, passed an ordinance fixing the times for its regular meetings. Meetings were held under this ordinance for nearly two years, and up to and including the presentation of the petition. The objections made go back to the validity of this ordinance. It is said that it was not properly recorded in the ordinance book. But its recording in that book has been held to be not essential to its validity. People v. Cole, 70 Cal. 60, 11 Pac. Rep. 481. It is further said that the vote of one of the supervisors was not shown by the entry in the minutes or by the publication; but the meetings were held under this ordinance for a long period as and for regular meetings, and they were the only meetings of the kind which were held; and we do not think that the question of their regularity can have any such far-reaching and collateral effect as to render abortive all the public business that has been transacted during a series of years.

4. It is contended that the petition was not published. The objections in this regard are founded on slight mistakes in the spelling of some of the names, which are entirely unimportant, and of certain defects in the description which are disposed of by what is said under the first head.

5. It is urged that the board had no power to modify the boundaries of the proposed district in the way it did. What the board did was, in the first place, to include in the district certain lands not included by the petition, upon the verbal request of the owners, and, in the second place, to exclude from the district certain lands included by the petition. The provision of the act under which this was done is as follows: "The said board, on the final hearing, may make such changes in the proposed boundaries as they may find to be proper, and shall establish and define such boundaries: provided, that said board shall not modify said boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district; nor shall any lands which will not, in the judgment of the said board, be benefited by irrigation by said system, be included within such district: provided, that any person whose lands are susceptible of irrigation from the same source shall, upon application of the owner to said board, be entitled to have such lands included in said district." Section 2.

(*a*) The objection to the inclusion of lands not embraced in the petition is that the application of the owners (which is admitted to have been made) was not in writing; but we see nothing in the act which requires a writing, and we do not think that the court is authorized to superadd such a requirement.

(*b*) The objection to the exclusion of lands from the proposed boundaries is based upon the proviso that "said board shall not modify said boundaries so as to except from the operation of this act any territory within the boundaries of the district proposed by said petitioners, which is susceptible of irrigation by the same system of works applicable to the other lands in such proposed district." The appellants offered evidence to show that the excluded lands were in fact susceptible of irrigation by the same system of works as the other lands; and such evidence was excluded on the ground that the judgment of the board as to the matter was final. We think that this ruling was right. It is to be observed that no power is given to the board to include lands which are not included by the petition, except upon request of the owners; and with reference to excluded lands it is possible (although we express no opinion upon the point) that the owners could, upon request and a proper showing in some appropriate proceeding, have their lands reincluded. But, so far as the validity of the organization of the district is concerned, we think that the judgment of the board cannot be contradicted, as is attempted here. It is clear that this would be so in the absence of the proviso quoted, (People v. Hagar, 66 Cal. 60, 4 Pac. Rep. 951; People v. Riverside, 70 Cal. 461, 11 Pac. Rep. 759;) and from the nature of the question we think that the proviso must be considered merely as a rule for the guidance of the board, and that, so far as the validity of the district is concerned, their decision is as conclusive as if the proviso had not been inserted. It is objected to this view, however, that the records simply show what the action of the board was, and do not show the grounds or reasons upon which such action proceeded, or as counsel put it, that there was any decision of the board upon the question of the application of the system of works to the excluded lands. But the order fixing and establishing certain boundaries, excluding certain of the lands included by the petition, is certainly a decision as to where the boundaries shall be; and there is nothing in the act which requires the board to state why it fixes the boundaries in any particular place, and we think it may be safely laid down as a general proposition that the reasons or grounds of the action of any tribunal or body, whether legislative or judicial, need not be stated unless the law expressly so requires. It is to be observed that there is a clear distinction between cases of the statement of the reasons or grounds of the action which a tribunal is authorized to take and cases where the power to act depends upon the existence of antecedent conditions. We think that this case belongs to the former class.

6. It is objected that the proclamation for the election on the question of the organization of the district was not published as required by the act. The objection is based partly on small inaccuracies in the description, which have been already considered, partly on unimportant mistakes in the spelling of names, and partly on the alleged ground that the proclamation was not published for "three weeks prior to the election." These words, we think, simply indicate the time during which the notice is to be published, and not the manner of the publication, (In re Cunningham, 73 Cal. 558, 559, 15 Pac. Rep. 136;) and, nothing being said about the number of publications, we think this matter was left to the discretion of the board. The board ordered that the publication be made in a weekly newspaper "as often (or for four insertions) as the same may be published between this date and the said day of election." This order was made on October 28th. The election was on November 22d, and the proclamation was published on October 29th and on the 5th, 12th, and 19th of November. This, we think, was sufficient.

7. It is said that the voting precincts were established less than 30 days before the election. The irrigation act does not say in terms when the voting precincts shall be established. It says, however, that "such election shall be conducted in accordance with the general election laws of the state," and by the general election laws the voting precincts must not be established less than 30 days before the election. We are inclined to doubt whether the "conducting" of an election necessarily includes something which cannot take place within 30 days before the election day; but, assuming that it does, the evident meaning is that the election shall be conducted in accordance with the general laws, except as otherwise provided in the act itself. The act provides that, "for the purposes of the election above provided for, the said board of supervisors must establish a convenient number of election precincts in said proposed district, and define the boundaries thereof, which said precincts may thereafter be changed by the board of directors of such district." Section 3. This provision does not say when the precincts are to be established; but we think it cannot be the meaning that the board is to establish them 30 days before the election; for the notice of election is to be, or at least may be, given at the time the order establishing the boundaries of the district is made, (Id.;) and only three weeks' publication of the same is required. Hence the election may take place within less than 30 days from the time when it is first known where the boundaries of the district are to be. Consequently the argument made would require the voting precincts to be established before it was known where the district was to be, or what it was to include. No such absurd construction will be adopted. The time for the establishment of the precincts seems to be left to the discretion of the board. They were established by the election proclamation, which was published for at least three weeks; and this, we think, was sufficient.

8. It is finally objected that the bonds were not in proper form. The provision of the act is as follows: "Said bonds shall be payable in gold coin of the United States, in installments, as follows, to-wit: At the expiration of eleven years, not less than 5 per cent. of said bonds; at the expiration of twelve years, not less than 6 per cent.; at the expiration of thirteen years, not less than 7 per cent.; at the expiration of fourteen years, not less than 8 per cent.; at the expiration of fifteen years, not less than 9 per cent.; at the expiration of sixteen years, not less than 10 per cent.; at the expiration of seventeen years, not less than 11 per cent.; at the expiration of eighteen years, not less than 13 per cent.; at the expiration of nineteen years, not less than 15 per cent.; and for the twentieth year a percentage sufficient to pay off said bonds." Section 15. The bonds here involved were drawn so as to make each one payable in installments; and the objection is that a proper construction of the act requires that a certain number of bonds should be payable in 11 years, a further number in 12 years, and so on. We think, however, that the bonds were in proper form. The

phrase, "a bond payable in installments," is clear, and can mean only one thing. Is the meaning changed by putting it in the plural, and making it "bonds payable in installments?" But there are other provisions of the act which make the intention clear. The sixteenth section provides that "the board may sell said bonds from time to time in such quantities as may be necessary and most advantageous," etc. It may happen, therefore, that only a portion of the bonds are sold. Now, for illustration, we will suppose that the bonds are issued on appellant's theory, and that only those payable at the end of 11 years are sold. In such case the only bonds outstanding would be the 11-year bonds; for a bond which has not been sold, or, in other words, not issued, cannot be said to be "outstanding." The whole amount of the principal of such bonds would be due and payable at the end of 11 years. How would it be paid? The twenty-second section provides, in substance, that at the expiration of the tenth year the board of directors shall make an assessment "in the following percentage of the principal of the whole amount of bonds then outstanding, to-wit: For the eleventh year, five per cent.," etc. This is the only provision for raising money to pay the principal of said bonds. It would, therefore, result that upon the appellant's theory, that although the whole amount of the principal of the 11-year bonds would be due and payable, only 5 per cent. thereof could be paid, and similar results would follow as to the others, while, as the bonds are drawn, 5 per cent. upon the whole amount of the principal of the bonds "then outstanding" would be sufficient to pay off each installment of the principal as it became due. It may be that the legislature supposed that there was a good reason for making each bond run in part for the whole 20 years. As is well known, a bond for a long term is more salable (other things being equal) than a bond for a short term, and the object may have been to help the sale of the short bonds by incorporating them with the long ones. However this may be, we think that the intention to have the bonds drawn as the respondent has drawn them is sufficiently expressed. The other matters do not require special notice. We therefore advise that the judgment appealed from be affirmed.

I concur: FOOTE, C.

BELCHER, C. C., being disqualified, took no part in this decision.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(79 Cal. 288)

ROMAN CATHOLIC ARCHBISHOP OF SAN FRANCISCO (a Sole Corporation) *v.* SHIPMAN *et al.* (No. 12,100.)

(*Supreme Court of California.* May 28, 1889.)

ADVERSE POSSESSION.

Plaintiff, who was archbishop, and as such a sole corporation, took a conveyance of land to himself as an individual, which land was paid for with funds of the church. The record title remained in plaintiff as an individual for more than 20 years. A college, chapel, dormitory, etc., were erected on the land, and were used as a college and for church purposes. Plaintiff controlled and managed the property alone and expended the moneys. The corporation had no trustees, and its business was entirely in plaintiff's hands. There was no overt act changing the possession from plaintiff individually to the corporation. A decree was rendered for sale of the land for a street assessment, plaintiff not being made a party in his corporate capacity. *Held*, in action by plaintiff in such capacity to enjoin the enforcement of the decree, the position that more than 20 years before the assessment proceedings plaintiff, as individual, had delivered possession to the corporation, which had held the land adversely and under claim of ownership, was not supported by the evidence.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

J. C. Bates, for appellants. *Wilson & Wilson*, *M. C. Hassett*, and *S. M Wilson*, for respondent.

WORKS, J. This is an action to enjoin the enforcement of a decree for the sale of certain real estate in the city of San Francisco for the satisfaction of a street assessment, upon the ground that the plaintiff was, at the time the action was brought and the decree rendered, the owner of the property, and, not having been made a party to the suit, the judgment as against it was void. There was a demurrer to the complaint, which was overruled, and upon a trial by the court a perpetual injunction was decreed. This is the second time the case has been to this court on appeal. At the former hearing it was reversed on the ground that the complaint was insufficient. Archbishop v. Shipman, 69 Cal. 586, 11 Pac. Rep. 343. The complaint has been amended in such a way as to avoid the objections then urged against it, and, as amended, is sufficient, and the demurrer to it was properly overruled.

The only question necessary for us to consider, arises upon the point made by the appellant that the findings of the court below are not sustained by the evidence. The respondent contends that there is but one question in the case, viz., whether the respondent was or was not the owner of the property in controversy at the time of and subsequent to the commencement of the proceeding to foreclose the street assessment lien. This is undoubtedly true, if this question of ownership be determined against the respondent. The undisputed facts as shown by the evidence are these: Joseph S. Alemany was the Roman Catholic archbishop of San Francisco, and was, as such archbishop, a sole corporation. The real estate mentioned in the complaint was, on the 25th day of July, 1858, conveyed to said Alemany, not as such archbishop, but in his individual name, by the then owner of the property; but the same was purchased by and paid for with moneys donated by members of the church. The property was, subsequent thereto, improved by said corporation by the erection of buildings, fences, and other improvements, but the title thereto, so far as it appears of record, has remained in the individual name of said Alemany from the time of the execution of said conveyance to him until now. The complainant alleges the ownership of the respondent in the property as follows: "And the plaintiff avers that the said land above particularly described was purchased by said Alemany for the use and benefit of the Roman Catholic church of the diocese of San Francisco, and was paid for with the money of said church; and that afterwards, and more than twenty years before the commencement of this action, said Alemany delivered the possession of said land and premises to this plaintiff, and then and there this plaintiff entered into and took the actual, peaceable, exclusive, open, and notorious possession and occupation of said tract of land above particularly described under a claim of title exclusive of any other right, and has ever since that time been in and maintained the actual, open, notorious, peaceable, exclusive, continuous, and adverse possession and occupation of said land and every part thereof, claiming to own and hold the same and every part thereof as its own, under a claim of title in fee-simple absolute, exclusive of any other right, and adversely to all the world, during all of which time said land was by the plaintiff fully protected by a substantial inclosure; and said plaintiff paid during all the time of such occupation as aforesaid, and continuously, all the taxes, state, city, and municipal, which were levied and assessed upon said land or any part thereof." The court below found this allegation of the complaint in favor of the respondent. There is no evidence tending to show that at the time of the proceedings to foreclose the street assessment the plaintiff therein had any notice that the respondent had or claimed any title or interest in the property except as such notice might be inferred from the improvements made upon the property and the uses made of it. The learned counsel for the respondent has, by one or two admissions in his brief, very materially narrowed the controversy upon this point. He says: "Of course, if a title stood of record in a trustee, the *cestui que trust* could not attack a judgment duly rendered against the trustee without notice, to the plaintiff, of the interest of the beneficiary." Again: "In his brief the counsel goes to the extent of citing authorities to show that the deeds which were executed by the Bernals to J. S. Alemany vested legal title in him as an individual or person. With the last proposition we entirely agree, and think there can be no doubt that the deeds originally vested the title in the individual and natural person, J. S. Alemany, though the parol evidence showed him to be a trustee only." We fully coincide with these views. Therefore we take it as fully conceded (1) that as a matter of record J. S. Alemany was the owner of the legal title to this property; (2) that it appears from the parol testimony in the case that he held the legal title as a trustee for the respondent; (3) that these facts alone would not entitle the plaintiff to enjoin the sale, but it must show that it had, subsequent to the deed, become the owner of the legal title to the property, and that the appellants had notice of the fact at the time of the proceeding to enforce the street assessment.

The respondent claims that it has shown the legal title in it by adverse possession. The court below so found. The question is, therefore, whether or not this particular finding is supported by the evidence. The evidence shows conclusively that the respondent was a sole corporation; that the corporation was Joseph S. Alemany, Roman Catholic archbishop of San Francisco; that as such archbishop he purchased the property for and with the money of the church, but took the deed in his individual name; that as such archbishop he had and actually exercised exclusive control over said property, as fully as if he were the sole and individual owner thereof; that all improvements made thereon, and use made of the same, were made at the instance of, and used under the exclusive direction and control of, said Alemany as such archbishop, as fully and completely as if he were the sole and individual owner of the property. There is no evidence showing or tending to show that any overt act was done, as constituting a change of possession from Joseph S. Alemany, individual, to Joseph S. Alemany, archbishop. It is true, improvements are shown to have been made, and made with the money of the church, but the improvements were made, and the money expended, by Joseph S. Alemany. The testimony of the archbishop shows this very clearly. After testifying fully to the improvements made upon the property, the use made of them, and that they were made with the money of the church, his examination proceeds: "*Question.* Has this corporation any secretary? *Answer.* Yes, sir; that is, not as such,—not one specifically, especially for that. *Q.* It does not have a seal? *A.* Yes, sir. *Q.* Have you any trustees? *A.* The sole corporation has no trustees. *Q.* You have been the sole manager of that corporation, I suppose, from beginning to end, haven't you? *A.* I may say yes; but, of course, I have to take advice. I have to consult. I have to guide myself a great deal with counsel." Again, the following from the testimony of one P. J. Gray, a witness for the respondent, is equally convincing on this point: "*A.* Well, I was president of the college for five years. I went there in 1863, and I stopped there till 1868. *Q.* What would you say with reference to the management and control of that property by the corporation? *A.* It was all under the archbishop. It was all managed by the archbishop. I was only representing him." Does this evidence show adverse possession in the respondent, such as is required to confer title, and such as could constitute notice of a transfer of title from the individual Alemany to Alemany the archbishop. We cannot think so. To constitute the possession adverse it must have been open, visible, notorious, and exclusive, and must have been retained under a claim of right to hold against the owner, and in hostility to his title. Thompson v. Felton, 54 Cal. 547. Unger v. Mooney, 63 Cal. 586. Here the owner of the legal title, as it appeared of record, was in the actual possession of the property, and, as the sole corporation, he was the beneficiary under the deed conveying him the legal title, and, as the respondent contends, he was also in possession as the adverse claimant, and holding in hostility to himself. So far as the title was concerned, he might have held it either as an individual or as the representative of the church; but the possession must have been by Joseph S. Alemany in person, in either capacity, and his possession in one capacity could in no way be distinguished from his holding in the other. "Where property vests in a bishop, parson, or other sole corporation, he holds it to his own use and benefit, whilst he holds the office, and afterwards the estate and the enjoyment of it go together to his successor, when established. The transmission of the estate is perpetual, but the beneficial enjoyment changes at each succession." Overseers v. Sears, 22 Pick. 124; Weston v. Hunt, 2 Mass. 500. So he was equally entitled to the possession and control of the property, whether his holding was that of an absolute owner in his individual right, or of a trustee under an absolute deed; and his right to the possession was precisely the same as if the deed had been made to him as the archbishop in his corporate capacity. Fitzpatrick v. Fitzgerald, 13 Gray, 402; Perry, Trusts, §§ 321-328. Such being the case, we cannot conceive of any theory upon which a title by adverse possession can be upheld under the circumstances of this case. One cannot hold in hostility to himself; nor can one holding in one capacity hold adversely to himself, claiming in another capacity. In the case of Heiss v. Vosburg, 59 Wis. 532, 18 N. W. Rep. 463, it was held that a priest, being in charge of a church as the agent of the bishop, the possession of the building was, as a matter of law, in the bishop, although the congregation worshiped in the building, and paid the salary of the priest and the expense of keeping the property in repair, and maintaining services, and although the committee of trustees aided the priest in the management of the temporalities of the church. It must be presumed that Alemany held possession under the legal title vested in him by the deed; and, as the undisputed evidence is that he continued in possession, there was no actual change of possession or control of the property that could amount to constructive notice of any claim adverse to such title. Smith v. Yule, 31 Cal. 180; McCarthy v. Nicrosi, 72 Ala. 332; 3 Wait, Act. & Def. 450; Cook v. Travis, 20 N. Y. 400; Burrows v. Holt, 20 Conn. 459, 463.

The manner in which property is held and controlled by a sole corporation is well stated in Overseers v. Sears, 22 Pick. 128, in which it is said: "In all these respects the distinction between an aggregate and sole corporation, growing out of their different modes of constitution and forms of action, is striking and obvious. A bishop or parson acting in a corporate capacity, and holding property to him and his successor in right of his office, has no need of a corporate name. He requires no peculiar seal. He performs all legal acts under his own seal, in his own name and name of office. His own will alone regulates his acts, and he has no occasion for a secretary, for he need not keep a record of his acts; no need of a treasurer, for he has no personal property, except the rents and proceeds of the corporate estate, and these he takes to his own use when received. By-laws are unnecessary, for he regulates his own action by his own will and judgment, like any other individual acting in his own right."

It is claimed by the respondent that the use made of the property was sufficient to constitute adverse possession. The evidence shows that there was erected on the property a large brick building used as a college for the education of young men, chapel, dormitory, stables, and other out-buildings, and that these buildings were used as a college and for church purposes. The construction of such buildings, and the uses made of them, were not necessarily inconsistent with private ownership, nor were they inconsistent with the trust under which Alemany is claimed to have held originally; but, if they were, the occupation and use of the buildings and property are thus shown to have been by individuals, presumably members of the Catholic church, and not by the plaintiff. Such individual members of the church could not, by any use they could make of the property, acquire any interest in it that could avail the respondent in this action. As we look at this evidence, it was wholly insufficient to sustain the finding that the respondent was the owner of the property, and for that reason the case must be reversed.

There are other questions raised and elaborately argued, but, the question of ownership being the decisive one, we need not extend this opinion by taking up the other points discussed. Judgment and order denying a new trial reversed, and cause remanded.

We concur: Beatty, C. J.; Paterson, J.

Roman Catholic Archbishop of San Francisco (A Sole Corporation) *v.* Shipman *et al.* (No. 11, 893.)

(*Supreme Court of California.* May 28, 1889.)

Works, J. This is an appeal from an order refusing to dissolve an injunction. The questions presented are the same as in the case of Archbishop v. Shipman, ante, 830, (No. 12,100,) this day decided, and upon the authority of that case the order appealed from is reversed.

We concur: BEATTY, C. J.; PATERSON, J.

79 Cal. 301

MITCHELL *et al.* *v.* HAWLEY *et al.* (No. 11,987.)

(*Supreme Court of California.* May 28, 1889.)

INJUNCTION BOND—ACTION—ATTORNEYS' FEES.

1. In an action on an injunction bond it appeared that the attorneys for defendant in the injunction suit were paid $500 for all their services in the case; that they attempted to get the temporary injunction dissolved, but failed; that afterwards the injunction was ended by dismissal of the action because of a recent decision of the supreme court of the United States determining the issues against the plaintiff. It was not proved that there was any separate or distinct amount paid to the attorneys for the attempt to procure the dissolution. *Held*, that it was error in the suit on the bond to award $400 for attorneys' fees.

2. The fact that counsel fees are not allowed in the United States courts in actions on injunction bonds does not preclude recovery of such damages in an action in a state court on an injunction bond given in a United States court.

Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

M. A. Wheaton and *G. E. Harpham*, for appellants. *Charles A. Shurtleff*, for respondents.

MCFARLAND, J. This is an action to recover damages on a bond for a temporary injunction in an action in the United States circuit court. The judgment was for plaintiffs, and defendants appeal from the judgment, and from an order denying a new trial. The court found that plaintiffs were damaged by the injunction, generally, in the sum of $770, and that they were also entitled to the further sum of $400 for attorneys' fees in procuring its dissolution.

1. We have carefully examined the elaborate argument of the learned counsel for appellants to the point that the evidence does not justify the court in finding the first item of damage of $770, but, after a close examination of the transcript and the views of counsel, we find no reason for disturbing that finding. It would serve no useful purpose to discuss that matter in detail.

2. We cannot agree with counsel in the view that in an action brought in a court in this state, on an injunction bond given in a court in the United States, counsel fees can, in no instance, be recovered as damages, because such damages are not allowed by the federal courts. Bondsmen, in such a case, cannot be held to have contracted with the understanding that a suit would be brought upon the bond, if at all, in a federal court, and that their liabilities would be fixed according to the view which that court might be supposed to take of the law. If, for instance, the defendants here and the defendants in the injunction suit were all residents of California, which was probably the fact, an action on the bond could probably not be maintained in a federal court at all.

3. But we think the court below erred in allowing as damages the item of $400 for attorneys' fees. The allowance of counsel fees in suits on injunction bonds, and in one or two other actions of a kindred character, is exceptional, and it should not be carried beyond the point to which former decisions have taken it. In the injunction suit in which the bond now before us was given, the attorneys for the defendants were given $500 in gross for all their services in the case. They made an effort to get the temporary injunction dissolved, but failed. Afterwards the injunction was ended by the dismissal of the action; and the action was dismissed because a recent decision of the supreme court of the United States, (Heald v. Rice, 104 U. S. 737,) made after the attempt to dissolve the injunction had failed, determined all the issues in the injunction suit against the plaintiffs therein. Whether or not attorneys' fees can be recovered at all for services rendered in an unsuccessful attempt to dissolve an injunction it is not necessary here to decide. In New York it was held that "having thus been unsuccessful in resisting the allowance of the injunction, there is no ground upon which the sureties can be required to pay these expenses," (Randall v. Carpenter, 88 N. Y. 293.) And in Allen v. Brown (5 Lans. 511) the court says as follows: "The defendants' motion, before the trial of the action on the merits, for an order vacating the injunction, was denied. The referee correctly refused to allow the defendants any costs or counsel fees on that motion, for the reason that the expenses of an unsuccessful motion to set aside an injunction cannot be recovered, though the court afterwards decides that the plaintiff was not entitled to the injunction." Without now holding that such should be the rule here, it is sufficient to say that in the case at bar there was no separate, distinct amount of money paid the attorneys for services in unsuccessfully attempting to procure a dissolution of the injunction, no special charge made for them, and no sufficient showing in the evidence of a segregation and apportionment of a part of the gross sum to those services. Bustamente v. Stewart, 55 Cal. 115. The cause is remanded, with directions to the superior court to modify the judgment by striking out the $400 awarded for attorneys' fees; and, in all other respects, the judgment and order are affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

79 Cal. 375

YOLO COUNTY *v.* BARNEY. (No. 12,834.)

(*Supreme Court of California.* May 31, 1889.)

COUNTIES—DEDICATION—LIMITATION OF ACTIONS.

Land purchased by a county, on which is erected a hospital, as provided by Pol. Code Cal. § 4046, subd. 9, authorizing counties to build hospitals and "other public buildings," is dedicated to a public use, though under the succeeding subdivision the land may be sold; and while owned by the county the statute of limitations does not run in favor of one taking possession of it.

In bank. Commissioners' decision. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Action by the county of Yolo against Margaret Barney, to recover certain land. Judgment for plaintiff, and defendant appeals.

Thomas & Hurst, for appellant. *F. S. Sprague*, (*F. E. Baker*, of counsel,) for respondent.

FOOTE, C. This action was brought by the plaintiff to quiet its title to a piece of land claimed adversely by the defendant. An answer and cross-complaint was filed by the latter, in which, after denying the right and title of the plaintiff, she claims title by continuous adverse possession for more than five years before the commencement of the action, and asks that the plaintiff be made to show its interest in the land, and that her title thereto be quieted. The court found, among other things, that all the allegations of the complaint were true; that the defendant was not the owner of the land, although she had been in possession of it for more than five years; that her possession was not such as entitled her to obtain title through the statute of limitations; that the land had been, long before her entry, dedicated to a public use by the county of Yolo, and that the right to such public use had never been relinquished or abandoned. And as conclusions of law, "that neither the defendant nor her grantors ever acquired any right, title, or interest in or to the land in controversy so dedicated to public use by their possession of the same; nor does the fact of such possession constitute a sufficient defense to this action." Judgment was given quieting the plaintiff's title to the land as against the defendant and for costs. From that and an order refusing a new trial the appeal is taken.

It is contended that the findings are not supported by the evidence, chiefly for the reason, as alleged, that the land was never dedicated to a public use, but was bought by the county as a private individual would buy property, and was subject to be resold by the county, abandoned as to whatever use it might have been temporarily put, and subject, like ordinary municipal or private property, to be acquired by peaceable and continuous adverse possession under the statute of limitations of five years. The facts in evidence show that the land was purchased by the county, acting through its *quasi* trustees, the board of supervisors, for the purpose of erecting thereon a county hospital, and using the land for purposes connected therewith. The hospital had been established thereon for about eight years when the defendant's grantor took possession of and fenced the portion of the land in controversy, which up to that time had been uninclosed, and the defendant's possession by herself or grantors has been since that time, for about fifteen years, peaceable and continuous. A deed to the land was made to the plaintiff in 1863 by one Freeman, and duly recorded, and a quitclaim deed was also made from the same grantor to the defendant's grantor, one Sill, in 1867.

The whole controversy seems determinable by ascertaining whether or not the land was dedicated to a public use when the hospital was erected thereon. If it was dedicated to a public use, then under the decision of the appellate court in Hoadley v. San Francisco, 50 Cal. 276, it could not be subjected to the operations of the statute of limitations. If it was not so dedicated it would be subject, as lands ordinarily held by a municipality are, to the running of the statute. San Francisco v. Calderwood, 31 Cal. 588; Hoadley v. San Francisco, supra. Was it devoted or dedicated to a public use? It was purchased for the purpose of building a county hospital on a portion of it, and using the balance of it for the necessities of the hospital. For eight years all the land was necessary for, and was used for, the purpose of maintaining the hospital, before the defendant's entry and possession. The hospital was not removed from the land until within about a year of the institution of this action. The defendant contends that the dedication to a public use was never made, because, as she alleges, the county had the right of revoking the use of the land for county purposes, and that no dedication to a public use can be effectual unless it be irrevocable. The case of San Francisco v. Canavan, 42 Cal. 553, is cited as conclusive upon the point. That case was not one in which the facts were as in this case, and we do not think that by the term "irrevocable," as there used, it was intended to say, where a municipal corporation has devoted land to a public use, that because it is within the power of that body to dispose of the land in some other way, if it shall choose, the power of disposition being limited by statute, such dedication to a public use can never be made. The term "irrevocable," as it originally came to be used, was ordinarily applied to a private individual who had dedicated land to a public use in such a way that he had reserved no right to reclaim it. But in the case of a county which buys land for a public use, and devotes it to that purpose, we cannot see any reason to declare that the dedication is incomplete because the county may have the power given by statute afterwards to discontinue the use, and apply the land to another public use, or sell it in a statutory and limited way. Pol. Code, § 4046, subd. 10. If this was the rule, then it might be applied to county roads, for the county may abandon the use of them, and the dedication may be said in that sense to be revocable. Id. § 2681. Yet such roads are dedicated to the public use, as well as streets in a city, and the statute of limitations will not run against it. People v. Pope, 53 Cal. 450; Visalia v. Jacob, 65 Cal. 456, 4 Pac. Rep. 433.

The question, then, recurs: Did the board of supervisors, acting for the county, apply this land to a public use? Hospital buildings are public buildings. Pol. Code, § 4046, subd. 9. If a public building be erected upon land belonging to the county by the proper authorities, and it be devoted to the uses necessary to the character of the building and the purpose for which it is erected, it would seem as if the land was dedicated or put to a public use. Court-houses, jails, and hospitals are put upon the same footing by the statute, supra, are called "public buildings," and they are such to all intents and purposes. It will not do to say that the land on which they stand, or which is appurtenant and necessary thereto, is not dedicated to a public use. To hold otherwise would be to leave county jails, hospitals, court-houses and other public buildings, and the ground on which they stand, at the mercy of careless or corrupt county officials and rapacious trespassers, in collusion, perhaps, with such officers. This is contrary to public policy. Judge Dillon, in his work on Municipal Corporations, (volume 2, § 533, p. 674,) says: "The author cannot assent to the doctrine that, as respects public rights, municipal corporations are within ordinary limitation statutes. It is unsafe to recognize such a principle." The appellate courts of Pennsylvania, New Jersey, Rhode Island, and Louisiana hold to this view, and it seems to have been approved by the supreme court of California in Hoadley v. San Francisco, supra. As we understand the decisions of California, they place the non-running of the statute of limitations upon the ground that the public is in the use of the land, and that while in such use a trespasser may neither erect a nuisance thereon, nor acquire a right to hold the land based upon a supposed grant to the land from the owner. Hoadley v. San Franciso, supra; People v. Pope, supra. In reference to dedications to public use, it was said by the supreme court of the United States, in City of Cincinnati v. White's Lessee, 6 Pet. 440: "There is no particular form or ceremony necessary in the dedication of land to public use. All that is required is the assent of the owner of the land, and the fact of its being used for the public purposes intended by the appropriation. This was the doctrine in the case of Jarvis and Dean, already referred to, with respect to a street, and the same rule must apply to all public dedications." "The law applies to them rules adapted to the nature and circumstances of the case." Id. 434. "All public dedications must be considered with reference to the use for which they are made." Id. 437. After diligent search no case has been found in the books presenting the same state of facts as this record shows. We see no reason why the use of county land for court-houses, jails, county hospitals, and other public buildings may not be placed upon the same footing as being public places. Public policy requires that such protection should be given to public rights. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

79 Cal. 382

In re CARPENTER'S ESTATE. (No. 12,911.)

(*Supreme Court of California.* May 31, 1889.)

INSANITY—EXPERT AND OPINION EVIDENCE.

1. Code Civil Proc. Cal. § 1870, subd. 10, allows the opinion of an intimate acquaintance of an alleged insane person to be given on the question of his sanity. To establish testator's sanity proponents offered the opinion of W., who testified that he had known testator 12 years, and intimately for 10 years. He conversed with testator frequently during the last 4 years of his life, and met him frequently in the city of witness' residence, and talked with him on business. He met testator on the latter's ranches at 3 different times, at his (witness') office 12 or 15 times, saw him on business at another city, and twice during his last illness, but never saw him at his home. *Held*, that the witness was competent to testify as to his opinion, and, the evidence being closely balanced, it was prejudicial error to reject his testimony.

2. A witness may not give his conclusions as to whether there was a change in the mental condition of testator, but he may state facts with reference to such change.

3. It is improper, and prejudicial to proponent, to refer to the conduct of a testator in bequeathing his property to the children of his business partner, and excluding his brothers and their children, whom he had not seen for 35 years, and who were living at a great distance from him.

In bank. Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

Carter & Smith and *S. D. Woods*, for appellants. *Amos H. Carpenter*, for respondents.

MCFARLAND, J. This is a contest over the will of Charles W. Carpenter, deceased. Special issues were submitted to a jury, who found that the will was not procured to be made through fraud exercised by any one, and was not procured to be made in the form in which it was made through undue influence exercised by any one, and was executed and attested according to law; but the jury also found that the deceased, at the time of the execution of the will, was "of unsound mind," was "incompetent to make a will," and did not have "sufficient mental capacity to comprehend fully," etc. Thereupon the court entered an order revoking the will (which had previously been admitted to probate.) The proponents, executor of the will, and devisees and legatees, appeal from said order, and also from an order denying a new trial.

The issue upon which the contest was determined was the testamentary capacity of the deceased. Some witnesses were examined on both sides as to their opinions of the mental sanity of the deceased, on the ground that they were intimate acquaintances, within the meaning of subdivision 10, § 1870, of the Code of Civil Procedure; and it could not be correctly said that, outside of those opinions, there was sufficient evidence to justify the finding of the jury. The principal witness on that point for the contestants was George M. Hurlburt, and he was, indeed, about the only witness on that side who expressed a positive opinion that the deceased was insane, or of unsound mind. Appellants contend very strenuously that there was no sufficient showing of Hurlburt's intimacy with the deceased, under the section of the Code above mentioned, to warrant the court in allowing him to give his opinion. While the showing of intimacy was not very strong, still there was considerable evidence to that point, and we cannot hold that the court erred in admitting the testimony; but we are satisfied that the court did err in refusing to allow the witness of the appellants, H. W Weaver, to give his opinion of the mental sanity of the deceased. The evidence of his intimacy with the deceased was much stronger than that of the intimacy of Hurlburt; and the two rulings were inconsistent. The preliminary testimony of Weaver was as follows: "I live in Stockton. Have lived here sixteen years. I know C. K. Bailey, and I knew Carpenter in his life-time. I became acquainted with Carpenter in 1875. I became intimately acquainted with him about 1877. From 1880 to the time of his death I conversed with him quite frequently. I met him in the city of Stockton and on Bailey & Carpenter's ranches. I know three ranches,—the home ranch, the ranch on the plains, and the ranch in the mountains. I never saw him on the plains ranch. I met him on the home ranch twice,—once in 1879 and once in 1881. In 1879 I saw him a few minutes. I stopped a few minutes. I was on business. In 1881 it was about the same. I stopped there as I was passing by. Stopped there and saw him. I saw him but a few moments at the mountain ranch. It was in 1882 or 1883. I was there two or three days. I had two or three conversations with him at that time. He was shearing sheep, and we had some conversation about shearing,—about the condition of his sheep. Then one evening he came up to our camp, and we had a general conversation with him. Conversed on general subjects. I met him in my office in Stockton quite frequently, and conversed with him generally on business matters. I saw him twice during his last sickness. The first time I talked with him five or ten minutes; the second time I asked him how he was. That was about all the conversation I had with him. I met him in Sacramento. He was a witness there in a case in which I was an attorney. The case never came to trial. I examined him in regard to what the nature of his testimony would be. Examined him on what his knowledge of the case would be. I met him a dozen or fifteen times in my office; once at the ranch in the mountains; twice on the ranch. I also met him frequently, a half a dozen times, on the streets of Stockton, and talked to him. I met him once at the house of Mr. Schmidt, and conversed with him. I always stopped and talked with him when I met him on the street. I talked to him ten or fifteen minutes when he was shearing sheep. I never was at his place where he lived, except in the mountains. I never was at his abode, you may say, except in the mountains at one time." The witness, having then said that he had an opinion as to the mental condition of the deceased, was asked to state that opinion, and the reasons for it. Respondents objected because sufficient intimacy had not been shown. The court sustained the objection, and appellants excepted.

In People v. Pico, 62 Cal. 53, People v. Levy, 71 Cal. 623, 12 Pac. Rep. 791, and People v. Fine, 19 Pac. Rep. 269, it was said that the determination of the question whether a witness was an acquaintance within the meaning of the Code was addressed to the discretion of the court below, and that, "there being no abuse" of the discretion, the appellate court would not interfere. But in all those cases the evidence had been admitted; and the language used was not in a case where, after a sufficient showing of the statutory qualification, the testimony of the witness had been rejected. The distinction between those cases and the one at bar is obvious. A jury, in determining the doubtful and delicate question of a man's sanity, not having had the opportunity of personal observation, should have the benefit of everything offered within the range of legal evidence. It was said in the case of Estate of Toomes, 54 Cal. 509, that, "whatever may be the rule as to the admission of improper testimony, the exclusion of proper testimony is always ground for reversal." Perhaps that is too strong a statement of the rule; but it is certainly true that the exclusion of proper testimony, which is evidently material and important, and might probably have changed the result, is a ground for reversal; and we are satisfied that the offered testimony of Weaver was proper, and also that in the state of the evidence it was in a high degree material and important. For this error, therefore, the judgment must be reversed, and a new trial granted. We will not undertake to discuss all the other points made in the case, but will notice one or two.

1 We think that the instruction No. 27, given at the request of the respondents, had better be omitted or greatly modified. If a man, by his will, should disinherit his wife or children, or perhaps other near relations with whom he was intimate, and for whom he had shown great affection, the will would perhaps, by common consent, and may be in law, be called "unnatural." But in the case at bar the testator was a bachelor, and had neither father nor mother living. He had left his early home in Vermont in 1849, when only 20 years old, and had spent nearly all his life in California. During that time he had but little, if any, intercourse with his collat-

eral kin in the Eastern states; and, under these circumstances, it was for the jury to say if the willing of his property to the children of his business partner here, instead of his brothers and their children in the Eastern states, was unnatural. The use of the word "unnatural" in the instruction was, we think, improper and prejudicial.

2. We think, also, that the court erred in refusing to allow the witness Montgomery to testify whether or not there had been any change in the mental condition or capacity of the deceased, provided the witness was asked for facts about the change, and not for a conclusion. A marked change in a man's habits of thought is strong evidence of his mental unsoundness, and the absence of such change is evidence of the contrary.

3. The affidavits presented by appellants make a strong case for a new trial, upon the ground of newly-discovered evidence; but if that were the only ground for a new trial we would not feel warranted in holding that the court erred in denying it.

4. The instructions asked by the parties, and given or refused, number over 80, and, with the instructions given by the court of its own motion, cover about 50 pages of the transcript. We have not observed any material errors, except as above noticed, but, as the case is reversed on other points, we have not undertaken to critically examine the whole mass of instructions given and refused, and this opinion must not be taken as a determination of the correctness of the rulings of the court in the matter of instructions. It is to be hoped that if there shall be another trial of the case counsel may be able, in asking instructions, to put their views of the law with reasonable brevity, and in a digestible form. Orders appealed from reversed, and new trial granted.

We concur: BEATTY, C. J.; THORNTON, J.; WORKS, J.; SHARPSTEIN, J

PATERSON, J., did not participate in the decision of this cause.

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79 Cal. 268

AFFLERBACK *v.* McGOVERN. (No. 11,930.)

(*Supreme Court of California.* May 25, 1889.)

REPLEVIN—COMPLAINT—SALE TO ADMINISTRATOR.

1. A complaint in a suit to recover personal property, alleging a cause of action existing more than four years before the suit, and not at that time, is bad.

2. Where an administrator pays and satisfies a judgment in favor of the estate against a third party, and takes a bill of sale of personal property to himself, as administrator, from the third party in consideration of such payment, the sale is to him personally, and the reference to him as administrator is descriptive of the person.

Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

J. W. Harding, for appellant. *J. C. Bates*, for appellee.

WORKS, J. The respondent brought this suit against the appellant to recover certain personal property, consisting of live-stock and a wagon. The complaint avers that the plaintiff was the owner, and entitled to the possession, of the property on the 12th day of August, 1880, and the complaint was not filed until the 15th day of December, 1884. There was no demurrer to the complaint, but the point is made in this court that it does not state facts sufficient to constitute a cause of action. A complaint to be good must show a cause of action in favor of the plaintiff, and against the defendant, existing at the time the action is commenced. This complaint does not show this, but, if it states a cause of action at all, shows that it existed more than four years before the commencement of the suit, and for that reason the complaint is clearly bad. There is nothing in the complaint to show that at the time the action was commenced the plaintiff had any ownership or right to possession of the property, or that the defendant had possession of it wrongfully.

It is further claimed that the verdict of the jury in favor of the plaintiff is not sustained by the evidence. The facts, as disclosed by the evidence, and upon which the plaintiff relies, are in substance as follows: The plaintiff was the administrator of the estate of Cord Pope, deceased, on the 11th day of August, 1880, and at that time the defendant was indebted to the estate upon a judgment, and executed to the plaintiff, as administrator of said estate, a bill of sale for a large amount of personal property, including the property in controversy here. On the following day the plaintiff, in his individual capacity, executed to the defendant a lease of this same property for the term of one year. It is claimed by the plaintiff that the bill of sale was an absolute conveyance of the property in satisfaction of the judgment due the estate, and so it appears to be upon its face, while the defendant claims that the bill of sale was executed as a mere security for the payment of the debt, and that the lease back was made upon an express verbal agreement between the parties that the defendant should hold the property under the lease, and pay the rent, which was to be applied in satisfaction of the judgment, and, upon the judgment being so satisfied, the property was again to be his. Subsequently to the execution of these instruments it was found that the defendant owned but a one-half interest in the property, the other one-half being owned by one Jean Sere, as a partner of the defendant. In a litigation between Sere and the defendant, involving the title to the property, Sere was determined to be the owner of a one-half interest therein, and the property here in controversy was ordered to be sold. Execution had issued, and the property was about to be sold. While the property was in that situation, the defendant, acting with the attorney for the plaintiff, purchased from Sere his interest in the property in order to avoid the sale upon execution, and furnished to the plaintiff's attorney the sum of $225 to be paid therefor. The attorney of the plaintiff made the purchase of the property, and took a bill of sale from Sere to the plaintiff. There is no evidence showing that this bill of sale to the plaintiff was made with the consent of the defendant, and it is an admitted fact that the purchase money was paid by him. The defendant testifies positively that the bill of sale was made to the plaintiff without his knowledge or consent, and the only evidence to the contrary is that of the attorney for the plaintiff, who testified as follows: "*Question.* Were you authorized to do that by your client, McGovern? *Answer.* Was I authorized to do what? *Q.* To take the bill of sale of Sere's half interest in this property to Afflerback, instead of making it to McGovern. Did McGovern authorize you to do that? *A.* In effect, he did. The sheriff had succeeded in getting a part of this property, and the other part was concealed from the sheriff, and upon my demand McGovern delivered the other part to me as agent of Afflerback, and the next day or two brought me this $225, and paid me for Sere's interest." This testimony wholly fails to show any authority given by the appellant for the taking of this bill of sale to the plaintiff instead of himself.

These three written instruments—the bill of sale to the plaintiff as administrator of Cord Pope, the lease from him individually to the appellant, and the bill of sale from Sere to the respondent—are the only evidences of title in the respondents, and we think they wholly fail to show a right of recovery on his part. The first bill of sale, admitting it to be an absolute conveyance of the property, vested the title in the estate of Cord Pope, and not in the respondent. The second bill of sale, having been made to him without authority from the appellant, who paid the purchase money for the property, vested no title in him that he can assert as against the appellant. Admitting that an administrator may sue in his individual name to recover property belonging to the estate, it is conceded here that at the time this suit was brought the appellant had ceased to be the administrator of the estate of Cord Pope, and for that reason no cause of action existed in him.

We think, for the reasons stated, the verdict of the jury was not sustained by the evidence. Other questions are made upon the instructions, but the view we take of the merits renders it unnecessary to consider them.

The point is made by the respondent that we cannot consider questions made upon the statement, for the reason that the notice of intention to move for a new trial is not set out therein; but we have held in a late case that it is not necessary to bring the notice of intention to move for a new trial to this court. Pico v. Cohn, 20 Pac. Rep. 706, (opinion filed March 13, 1889.) The judgment and order denying a new trial are reversed, and the cause remanded.

We concur: BEATTY, C. J.; PATERSON, J.

ON PETITION FOR REHEARING.

(June 19, 1889.)

In bank.

WORKS, J. The petition for rehearing is denied, but upon a more careful examination of the bill of sale from the defendant to the plaintiff, for the property in controversy, we are of the opinion that it should be construed as being a bill of sale to him, individually, and not as administrator. The reference to him should be regarded as descriptive of the person. Therefore, if it be made to appear on a second trial, as claimed in the petition for rehearing, that the plaintiff paid and satisfied the judgment held by the estate, and the bill of sale was given in consideration of such payment, it had the effect to vest the title to the property in him, if all other things necessary to pass title to personal property were performed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.

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79 Cal. 336

PEYRE *v.* PEYRE. (No. 11,834.)

(*Supreme Court of California.* May 30, 1889.)

DIVORCE—ALIMONY AND COSTS.

1. Civil Code Cal. § 136, providing that in an action for divorce, if relief be denied the plaintiff, the court may direct that the husband maintain the wife or children, does not authorize an allowance of permanent alimony in such a case upon the mere allegations by defendant of her husband's cruelty, without proof.

2. Under Civil Code Cal. § 137, authorizing alimony *pendente lite* to be granted to enable the wife to maintain or defend the action, temporary alimony and reasonable attorney's fees may be required, and no proof is necessary to assist the court in fixing the amount of the fees, or to show that the husband has property with which to pay the amount ordered to be paid.

Commissioners' decision. Department 2. Appeal from superior court; T. H. REARDEN, Judge.

Action by Jean Peyre against Annie Peyre for divorce. Relief denied to plaintiff, who was ordered to pay permanent alimony and counsel fees. Plaintiff appeals.

Langhorne & Miller, for appellant. *E. P. Cole* and *R. Johnson,* for appellee.

BELCHER, C. C. Plaintiff and defendant were husband and wife. Plaintiff commenced an action for divorce on the ground of defendant's habitual intemperance. Defendant, by her answer, denied the charge made against her, and as a separate defense alleged that while she was sick plaintiff, with intent to make her worse, compelled her to drink some mixture concocted by him, and that after she had taken it she became so ill that she was unable to leave her bed, "and while she was ill the plaintiff caused her to be removed to a hospital for inebriates, and had her imprisoned therein without her consent for the period of one week; that there was no reason or cause for the act of plaintiff, but that he did so to compel defendant to leave him, and he has forced her to leave and abandon her home, and to seek the protection of friends." It is then alleged that defendant has no means to defend the suit or on which to live, and that plaintiff is worth the sum of $3,000. The prayer is for judgment in her favor, and that plaintiff be compelled to pay her alimony and counsel fees. The cause was tried, and findings filed stating, in effect, that defendant had not been guilty of habitual or any intemperance whatever. Thereupon judgment was entered, denying the plaintiff's prayer for a divorce, and requiring him to pay defendant "permanent alimony in the sum of $20 per month, payable in advance on the first day of each and every month hereafter, beginning on the 1st day of April, A. D. 1886, and the further sum of $20 attorney's fees." From this judgment plaintiff appealed, and has brought the case here on the judgment roll. He now asks that that part of the judgment which awards alimony and counsel fees be reversed, on the ground that it is wholly unsupported by any findings of fact.

1. The judgment, in so far as it gives alimony, was evidently based upon the supposed authority of section 136 of the Civil Code, which reads as follows: "Though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband." That section was before the court for consideration in Hagle v. Hagle, 68 Cal. 588, 9 Pac. Rep. 842, and 74 Cal. 608, 16 Pac. Rep. 518. In the former case the trial court found, among other things, that while there was no sufficient cause for a divorce the husband's conduct towards his wife was cold, harsh, and disagreeable, making it unpleasant for her to live with him; that the marriage was an unhappy one from the beginning; that there was no love between the parties, and no probability that they would ever live together again as husband and wife; and that, under the circumstances as shown, $25 per month was a reasonable sum to be provided by the husband for the maintenance of the wife. Judgment was accordingly entered, denying a divorce, and requiring the husband, until the further order of the court, to pay to his wife for her maintenance the sum of $25 per month. And this judgment was affirmed on appeal. In the last case it was held that the courts of this state have no authority to grant a divorce *a mensa et thoro*, or to compel a husband to support his wife while she is living separate and apart from him, against his will and consent, without any statutory ground for an absolute divorce, or any statutory ground for her absence from his home. And speaking of section 136, supra, the court said: "The objects of the provision evidently are to enable the court in a proper case to aid in a restoration of domestic harmony, to prevent the breaking up of the family,—especially where there are children of tender age and delicate health,— and to require penurious husbands to furnish decent support for their wives, and for the care and education of the children, where the parties have no cause for divorce on statutory grounds, or where the innocent party has condoned the offense." In view of these decisions we think the court erred in granting to defendant permanent alimony. The affirmative defense set up in the answer was deemed to be denied, and there is nothing in the record showing that any proof was offered in support of those allegations, or tending to show that the parties were not living together, or that defendant then needed, or would need, alimony for her support and maintenance. If such proofs were offered the court should have found the facts so that it could be seen that the relief granted was necessary and proper.

2. Section 137 of the Civil Code provides that "when an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." Under this section the court was authorized to require the plaintiff, by an order entered for that purpose, to pay the defendant temporary alimony, and a reasonable attorney's fee. And no testimony was necessary to determine what the amount of the fee should be. "The court could determine from its own experience and from the facts and circumstances of the case, as they appeared to it from the pleadings and other papers and proceedings, what was a reasonable fee." Llamosas v. Llamosas, 62 N. Y. 618; Estate of Dorland, 63 Cal. 282. Nor was it necessary to appear that plaintiff had money or property with which to pay the amount ordered to be paid. "The allowance may be based upon his earnings or his ability to earn money." Eidenmuller v. Eidenmuller, 37 Cal. 364. We conclude, therefore, that the judgment, in so far as it awards permanent alimony, should be reversed, and that in all other respects it should stand affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment, in so far as it awards permanent alimony, is reversed, and in all other respects it is affirmed.

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79 Cal. 402

FENTON *v.* ALSIP *et al.* (No. 12,615.)

(*Supreme Court of California.* May 31, 1889.)

TENDER.

In a suit to recover money paid for land, where plaintiff acquired no title to the land actually purchased, but received a deed to another lot, it was not necessary for him to tender a conveyance before suit.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Taylor & Holl, for appellant. *Beatty, Denson & Oatman*, for respondents.

WORKS, J. This is an action to recover money paid as a part of the purchase money for real estate for which the plaintiff claims he got no title. There was a nonsuit granted by the court below on the ground that the plaintiff had received a deed for the property, and, the title having vested in him, he must tender a reconveyance of the property before he could recover back the money paid by him. But the evidence shows, beyond any question, that the property deeded to the plaintiff was not the property purchased by him, but of lots in a different block, and that immediately upon discovering the fact he declined to go further with the trade, and did not take the deed, although it had actually been placed in his hands. This was not a delivery of a deed for the property the plaintiff had purchased, and vested no title in him. It was not necessary, therefore, that he should have tendered a conveyance of the property before bringing this action. Judgment reversed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

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79 Cal. 340

PACIFIC ROLLING-MILL CO. *v.* TELEGRAPH HILL R. R. CO. (No. 11,421.)

(*Supreme Court of California.* May 31, 1889.)

NEW TRIAL—DISCRETION.

Granting a new trial for the insufficiency of the evidence to support the findings of fact is discretionary, and such an order will not be reversed unless it clearly appears that the trial court abused its discretion.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F W. LAWLER, Judge.

Action by the Pacific Rolling-Mill Company against the Telegraph Hill Railroad Company to foreclose a lien for materials supplied. Trial by the court, and judgment for defendant, which was set aside by the court, and a new trial granted. Defendant appeals.

Olney, Chickering & Thomas, for appellant. *T. Z. Blakeman*, for respondent.

BELCHER, C. C. This action was brought to foreclose a lien for materials furnished by plaintiff, and used in the construction of defendant's cable railroad. The complaint alleged that the materials were sold and delivered by plaintiff to defendant. The answer denied this, and alleged that the road was constructed by one Fazackerley, under a contract by which he, for an agreed price, was to, and did, perform all the labor and furnish all the materials necessary therefor at his own cost and expense. The findings and judgment were in favor of defendant, a new trial was asked for and granted, and the appeal is from that order. The motion for a new trial was based upon the alleged insufficiency of the evidence to justify the decision, and upon errors in law occurring at the trial; but it does not appear upon what ground it was granted.

We think the order must be affirmed. It is settled law in this state that motions for new trial on the ground of the insufficiency of the evidence to justify the decision are addressed to the sound legal discretion of the trial court, and that when such motions are granted the orders will not be reversed on appeal unless it clearly appears that there was an abuse of discretion. Phelps v. Mining Co., 39 Cal. 410; Pierce v. Schaden, 55 Cal. 406; Pico v. Cohn, 67 Cal. 258, 7 Pac. Rep. 680; Breckenridge v. Crocker, 68 Cal. 403, 9 Pac. Rep. 426. We see no manifest abuse of discretion here. Without stating particularly what was proved, we think it enough to say that there was evidence tending to sustain the plaintiff's contention. In view of this evidence the court may have thought that it erred in making its findings, and that the ends of justice would be promoted by a new trial. We advise that the order appealed from be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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79 Cal. 409

DREYFUSS *et al.* *v.* GILES. (No. 12,430.)

(*Supreme Court of California.* May 31, 1889.)

FORECLOSURE OF MORTGAGES.

Under Code Civil Proc. Cal. § 1500, a suit may be brought by the holder of a mortgage to enforce the same against the property subject thereto, where all claim against other property has been waived in the complaint, even after settlement and final distribution of the estate.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

J. I. Caldwell and *Cross & Simonds*, for appellants. *Gaylord & Searls*, for respondent.

WORKS, J. This is an action to foreclose a mortgage. The complaint alleges the death of the mortgagor, the settlement of the estate, the distribution of the mortgaged property to his daughter, an only heir, and the sale of the mortgaged property by her to the defendants in this action. It is also averred in the complaint that the mortgage was not due at the time the estate was closed, and final distribution made, and was not presented as a claim against the estate. The complaint expressly waives all claims against any other property of the estate except the lands described in the mortgage. In their answer the defendants plead the settlement and final distribution of the estate as a bar to the plaintiff's right to recover, and this is the only question made on this appeal. It was not necessary for the plaintiffs to present their mortgage as a claim against the estate, and their failure to do so, and the settlement and distribution of the estate, was no bar to their right to foreclose the mortgage. Code Civil Proc. § 1500; Bank v. Connell, 65 Cal. 574, 4 Pac. Rep. 580. It is evident the appeal in this case was taken for delay. Order and judgment appealed from affirmed, with 10 per cent. damages.

We concur: Beatty, C. J.; Sharpstein, J.; McFarland, J.; Thornton, J.

(79 Cal. 342)

Borel *v.* Kappeler *et al.* (No. 11,974.)

(*Supreme Court of California.* May 31, 1889.)

Mortgages—Construction—Payment—Estoppel.

1. S. and K. owned leasehold property; S. owned similar property in severalty; and K. owned personalty,—all which they mortgaged to plaintiff to secure a joint debt. Afterwards S. mortgaged his interest therein to plaintiff to secure a further loan. The first mortgage authorized plaintiff to enter on the premises, and apply the rents and profits in satisfaction of the debt in case of default in any of the payments. The second mortgage authorized the plaintiff to collect the rents during its continuance, and to apply them to the interest of the debt, or to the taxes, insurance, etc., and the residue, if he should desire to do so, to the reduction of the principal. *Held*, that the first mortgage only made it optional with plaintiff to collect the rents in case of default in payment of installments, and did not bind him to apply them to the payment of the first debt, and that he could apply them to the debt secured by the second mortgage.

2. If, with the knowledge and consent of K., the rents and profits of the land were applied to the second mortgage, he would be thereby estopped from objecting to such application.

3. The first mortgage contained a clause allowing plaintiff to purchase one-third interest in the leasehold property owned by S. and K., by paying one-third of the cost of erecting the building thereon. He elected to purchase it, and gave the mortgage a credit of a sum less than one-third of the amount stated in his complaint for foreclosure. The court did not find what the cost was, but allowed the credit as given by plaintiff, and rendered judgment accordingly. *Held* error.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Action by Antoine Borel against Lena Kappeler and others to foreclose a mortgage. Judgment for plaintiff and defendants appeal.

M. B. Malville and *E. D. Sawyer*, for appellants. *Sidney V. Smith*, for appellee.

Works, J. The appellant Joseph Scheerer was the owner of a leasehold interest in a lot of land, and the owner of the buildings thereon, and he and Lawrence Kappeler, the decedent of the other appellants, were the owners of a leasehold interest in a certain other lot of land, and the said Kappeler was the owner of certain personal property. They joined in a mortgage on all of this property, real and personal, to the respondent, to secure him for money to be advanced by him, and used to construct a building on the lot held by said parties jointly. The respondent advanced, under the mortgage, as found by the court, the sum of $52,512.89. The appellant Scheerer, after the execution of the mortgage above mentioned, gave his own mortgage to the respondent on both of said lots of real estate for the sum of $15,000. The joint mortgage of Scheerer and Kappeler contained this clause: "Said Scheerer and Kappeler agree that out of the rents derived from the lease first above mentioned there shall be paid to said Borel, from and after the 1st of January, 1877, and from thence until all the moneys due under this agreement are paid, the sum of $300 per month in said gold coin on account of the indebtedness secured thereby; and that, in case of any default in such payment, said Borel shall have the right to enter upon the premises described in such lease, and to demand all rents due said Scheerer and Kappeler, or either of them, and to apply the same to the satisfaction of such indebtedness." The second mortgage, given by Scheerer alone, contains this covenant: "That during the continuance of said mortgage the plaintiff shall have the right to collect all rents of the buildings erected on said land, and to apply the same, after a deduction of a commission of two and a half per cent. for collection, to the payment of all interest due plaintiff, and of all sums paid by the plaintiff for rent of said land, under said lease, or taxes, or assessments, or insurance as aforesaid, and, then, at his option, in reduction of the principal amount of said note." The complaint contains the following allegation. "That, at the time of the execution of said mortgage of Scheerer to plaintiff, said Kappeler was fully aware of all its provisions and of the facts of its execution, and that said $15,000 was lent to said Scheerer by plaintiff, and said mortgage given by said Scheerer to plaintiff at said Kappeler's express request, and for said Kappeler's benefit, and that it was then fully understood and agreed between said Kappeler and plaintiff that the plaintiff should receive all rents of said buildings, and apply them as in said mortgage provided, and that from that time until his death said Kappeler was fully aware that plaintiff was receiving said rents, and was applying them as in said Scheerer's mortgage provided, and fully assented thereto." And the court finds as follows: "That at the time of the execution of said mortgage of Scheerer to plaintiff said Kappeler was fully aware of all its provisions, and of the fact of its execution, and that said $15,000 was lent to said Scheerer by plaintiff, and said mortgage given by said Scheerer to plaintiff at said Kappeler's express request, and for said Kappeler's benefit, and that from that time until his death said Kappeler was fully aware that plaintiff was receiving said rents, and was applying them as in said Scheerer's mortgage provided." It was also provided in said first mortgage that respondent should have the privilege of buying an undivided one-third interest in the lease owned by said parties, by paying one-third of the cost of the building thereon. The court finds that he elected to buy said one-third interest, and under an agreement between the parties gave the mortgagors credit on the first mortgage for the sum of $17,504.30. After the execution of the second mortgage by Scheerer the respondent applied the rents collected by him to the payment of said second mortgage alone. The court below rendered a decree foreclosing both mortgages, allowing the credits, for rents collected, on the separate mortgage of Scheerer. The defendants appeal.

The main contention of the appellants is that under the covenants in the two mortgages the rents collected should have been applied by the court to the joint mortgage of the parties, which would, with other payments, have fully satisfied the same. We cannot agree with counsel as to the construction to be placed upon the covenants in the two mortgages. The first did not bind the mortgagee to collect and apply the rents. He was authorized to do so upon failure of the mortgagor to make the payments called for. Independent of the second mortgage, he could have sued and collected the amount due on the first mortgage without attempting to collect or apply the rents. Therefore, when he collected and applied the rents to the second mortgage, he did not violate the terms of the first, or deprive the appellants of any of their rights thereunder. Besides, it was expressly alleged in the complaint, and found by the court, that the application of the rents was made with the knowledge and consent of Kappeler, which should estop the appellants from contesting the right of the mortgagee to so apply the same.

Again, it is contended that the amount for which the respondent gave credit on the first mortgage, on account of his purchase of a one-third interest in the property, was less than it should have been. This is placed upon the assumption that the amount to be credited was, by the terms of the mortgage, to have been one-third of the cost of the building, and that the cost of the building was $59,534. The complaint shows the cost of the building to have been $59,534, and the question whether the proper credit was given was directly put in issue by the answer. The court fails to make any finding on this issue, and for this failure the cause will have to be reversed. If the building cost the amount shown by the complaint, the credit given by the respondent, on account of his purchase of the one-third interest in the property, was too small, and the judgment, so far as it includes the difference between the one-third of the amount credited and the amount he should have given credit for and the interest thereon, is erroneous. It is claimed that certain items were improperly included in arriving at the amount due on the mortgages. But we cannot enter upon this inquiry in the absence of the evidence, as the record does not affirmatively show that such items were included, or that the amount found was not the actual amount due, independent of such items, except as above stated. Judgment reversed, and cause remanded.

We concur: BEATTY, C. J.; PATERSON, J.

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79 Cal. 411

SHARP *v.* BLANKENSHIP. (No. 12,802.)

(*Supreme Court of California.* May 31, 1889.)

EJECTMENT—EVIDENCE—DECLARATIONS OF COMMON GRANTOR.

In ejectment, involving the boundary of lands of coterminous owners, it is error to exclude the declarations of the common grantor, made while the owner of both tracts, as to the location of the line between them.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by Peter G. Sharp against John M. Blankenship to recover land. Judgment for defendant. Plaintiff appeals.

J. B. Hall and *W. L. Dudley*, for appellant. *F T. Baldwin* and *J. C. Campbell*, for respondent.

MCFARLAND, J This is an action of ejectment to recover a strip of land lying along the boundary line between two coterminous owners. The verdict and judgment were for defendant. Plaintiff appeals from the judgment and from an order denying a new trial. Plaintiff owns a tract of land which is generally described as the south-east quarter of section 26, according to a plan of survey, called the "Weber Survey," of a grant called the "Campo de los Franceses," and defendant owns the south-west quarter according to the same survey, the two tracts adjoining each other in practically the same manner in which such subdivisions under United States government surveys adjoin. The main issue in the case was, where is the true boundary line between said two quarter sections? Both parties hold under Charles W. Weber, their common grantor, who procured said survey to be made, and to whom the grant was patented. At the trial the plaintiff offered, by witnesses, to prove that said Weber, before he conveyed to defendant, and when the owner of all the land, did, while he was on said land, point out certain posts and points as being on the line between said quarter sections, and made certain declarations concerning the boundaries thereof. To this testimony defendant objected as incompetent, irrelevant, and hearsay. The objection was sustained, and plaintiff excepted. This ruling was clearly erroneous. It is the established law that in a case of a disputed boundary line, which is in doubt, the declarations of a grantor at or before the time of the sale and conveyance are admissible against both him and the parties claiming under him, (Code Civil Proc. § 1849; Stanley v. Green, 12 Cal. 148; McFadden v. Wallace, 38 Cal. 51; McFadden v. Ellmaker, 52 Cal. 349;) and it would be useless to argue that the offered evidence was not material and important. For this reason the judgment must be reversed.

Most of the other points made by appellant go to the sufficiency of the evidence to justify the various findings of the jury, and that said findings are contradictory; but it is not necessary to discuss these points, as a new trial must be granted for the reason above stated. (It may be remarked that the special issues, and the instructions asked, were unnecessarily numerous and long, and that each party seems to have tried the case upon the theory that he would lose, and should therefore set every possible trap for a reversal.) We see no objection to the evidence of the survey of 1878 and the acts and declarations of plaintiff in regard to it. The instructions given at request of plaintiff were very full, and, those having been given, we see no error in the refusal to give instruction *c*, asked by plaintiff, or in giving instructions 2 and 7, asked by defendant. Instructions *a* and *b*, asked by plaintiff, were refused, of course, because they referred to certain acts and declarations of Weber, and the testimony on that subject had been ruled out. Perhaps on another trial some instruction on that subject may be proper. Judgment and order reversed, and a new trial granted.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; WORKS, J.; THORNTON, J.

PATERSON, J., being disqualified, took no part in the decision of this cause.

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79 Cal. 419

PEOPLE *v.* MCNABB. (No. 20,538.)

(*Supreme Court of California.* June 1, 1889.)

APPEAL—PRACTICE—RECORD.

Where the evidence introduced on a murder trial is not made part of the record on appeal, an alleged error, committed by the court in reading to the jury a case decided by the supreme court, saying that the case reported "was in many respects similar to the one at bar," is not sufficient to cause a reversal of the conviction, as the defendant might, under the facts of the case, have been benefited, instead of prejudiced, by the remark.

In bank. Appeal from superior court, Yuba county; PHILIP W. KEYSER, Judge.

W. G. Murphy and *M. C. Barney*, (*Grove L. Johnson*, of counsel,) for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. Appellant was tried on a charge of murder, and convicted of manslaughter. He appeals from the judgment, and his contention here is that the court erred in its charge to the jury. The alleged error consists in the reading by the court of the opinion of this court in People v. Munn, 65 Cal. 211, 3 Pac. Rep. 650, and stating to the jury that that case "was in many respects like the one at bar." Whether this statement was correct we have not the means of verifying, as the evidence is not before us. In the case of People v. Munn the appellant had been convicted of murder in the second degree, and this court held that the facts did not warrant his conviction of a higher offense than manslaughter; and it seems to us that the object of the court in reading the opinion in that case to the jury in this case was to impress on their minds that the defendant in this case should not be convicted of any higher offense than manslaughter, and not, as appellant's counsel contends, that he should be convicted of manslaughter. The reading of that case had better have been omitted. The practice of reading cases to juries is a dangerous one, and we advise against it. In this case the appellant may have been benefited, and not prejudiced, by it. In the absence of the evidence we cannot determine which, and therefore cannot reverse the judgment. Judgment affirmed.

We concur: BEATTY, C. J.; WORKS, J.; MCFARLAND, J.; THORNTON, J.

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82 Cal. 263

CASE *v.* MANUFACTURERS' FIRE & MARINE INS. CO. (No. 11,652.)

(*Supreme Court of California.* May 31, 1889.)

INSURANCE—CONDITIONS OF POLICY—ARBITRATION—EVIDENCE—AMOUNT OF LOSS.

1. An insurance policy for $2,000 provided that the insurer should be liable in case of loss for such proportion as the policy bore to the whole insurance; that the loss should be paid in sixty days after proof of loss; and also provided for arbitration in case of dispute. Plaintiff had other insurance to an equal amount, and his proofs showed a loss of $2,000. *Held*, that after defendant's right to arbitrate, if he had one, had passed, plaintiff could not prove a loss of more than $2,000, or recover more than $1,000.

2. But a clause in the policy that, "in case of differences touching any loss or damage after proof thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, whose award in writing shall be binding on the parties," not providing for the number of appraisers or the mode of their selection, is too vague to give defendant a right to demand arbitration, and plaintiff's refusal of such demand does not deprive him of the right to sue on the policy, or to prove the full amount of his loss, even though it is more than stated by him in the proofs.

3. On plaintiff's calculation, his loss did not amount to more than $3,300. One of his witnesses placed the loss at $3,000. Plaintiff's clerk testified that he usually had a stock worth $5,000; and another witness testified that three weeks before the fire it was worth $5,000, but that during that time large amounts of goods had been sold, and little purchased. Witnesses for defendant put the value of the stock at much less than $4,000. *Held*, that a finding of $4,000 loss was not warranted.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action on insurance policy by George A. Case against the Manufacturers' Fire & Marine Insurance Company. Judgment for plaintiff, and defendant appeals.

John A. Wright and *T. Z. Blakeman*, for appellant. *Van Ness & Roche*, for respondent.

BEATTY, C. J. This is an action on a fire insurance policy for $2,000, issued by the appellant to Alexander Pam, and by him assigned, after loss, to the respondent. The property insured was a stock of goods in a store at Riverside, Ariz., which was totally destroyed September 12, 1884. There was other insurance on the same goods to the amount of $2,000, making the total amount of insurance thereon $4,000. By the terms of its policy the appellant was to be liable in case of loss for only such proportion thereof as its insurance bore to the whole amount of insurance. In other words, it was liable for one-half of any loss on the goods insured, not exceeding $4,000. The plaintiff had judgment in the superior court for the whole amount of the policy, with interest and costs. Defendant appeals from the judgment and from an order denying it a new trial.

As the order appealed from must be reversed on the grounds hereinafter stated, it will be necessary, in view of the further proceedings in the superior court, to pass upon several of the points urged in support of the appeal. These depend mainly upon the following clauses of the policy in suit: "The loss to be paid sixty days after due notice and proofs of the same shall have been made by the assured and received at the office of the company, in accordance with the terms and provisions of this policy." "In case of differences touching any loss or damage after proof thereof has been received in due form the matter shall, at the written request of either party, be submitted to impartial appraisers, whose award in writing shall be binding on the parties as to the amount of such loss or damage." Shortly after the fire, Pam, the insured, gave the defendant notice of the fire, and within a reasonable time furnished the requisite proofs of loss in due form. In these formal proofs he put the total amount of his loss at $2,000. Counsel for respondent claims that this statement of the amount of the loss was a mistake due to his ignorance as to the correct manner of filling out the blank forms furnished by the defendant, and this claim certainly derives some support from the fact that the total value of the goods immediately preceding the fire was stated in the same proofs to have been $5,000, and they were, as we have said, totally destroyed. He also in the same proofs stated the amount of his claim against the defendant to be $2,000, the full amount of the policy. But whether due to mistake or not, the fact remains that in the formal proofs delivered to the defendant Pam stated plainly and unequivocally that his total loss was $2,000. The defendant did not within 60 days after proof of loss make any demand for arbitration as to the amount of loss or damage, but a short time after the expiration of that period, and before the commencement of this action, did make such demand in writing. In this state of the case, the superior judge, in ruling upon defendant's motion for a nonsuit and in instructing the jury, decided two propositions which constitute the principal grounds of controversy between the parties. He held in effect: *First.* That this action is maintainable, notwithstanding it was commenced after defendant's demand for arbitration, and without compliance with such demand. *Second.* That the plaintiff could be allowed to prove a loss to the extent of $4,000, and thereupon recover the full amount of the policy, notwithstanding his statement in his formal proofs that his total loss was but $2,000. The appellant contends that both these propositions are erroneous, and, as they are necessarily involved in any future trial of the case, we will briefly consider them.

We think it clear that if the formal proofs had stated a total loss of $4,000 or over, and defendant had failed to demand arbitration within the 60 days, at the expiration of which the loss was, by the terms of the policy, to become payable, this would have amounted to a waiver by the defendant of its right to make such demand, and the plaintiff would have been entitled, notwithstanding his refusal to arbitrate, to prove the whole amount of loss so stated. The necessity of an appraisement was not absolute upon any construction of the policy. It was not a condition precedent to the right of action, unless demanded. The most that can be said is that either party could demand arbitration within a reasonable time, but, if not so demanded, it was waived. It is not necessary to decide what would, under the circumstances of this case, have been a reasonable time within which to make the demand, if the amount of the loss had been correctly stated in the proofs. It is sufficient to say that a demand made for the first time, after the expiration of the full period of 60 days, or, in other words, after the loss had become payable and a right of action had accrued, would have been too late. And we think it equally clear that if the plaintiff in this action had confined his demand to an amount justly proportioned to the statement of his total loss, his refusal to arbitrate would have been no ground for denying his right to recover, even admitting defendant's right to an arbitration, if seasonably demanded. But the case in fact is like neither of the cases supposed. The plaintiff did not state a loss equal to that which he has been allowed to prove, and he does not confine his demand to one-half of the amount of the loss stated. The question, therefore, which the case presents (assuming, as we do, for the present that the defendant had a right under the policy to demand arbitration as to the amount of the loss, provided he made such demand within a reasonable time after receiving the formal proofs) is this: whether the plaintiff could practically deprive the defendant of such right by stating a loss of $2,000, and, after the time for demanding arbitration had passed, proving twice that amount. It is obvious that if the insured under a policy containing a stipulation to the effect supposed should, in his proofs, state a total loss clearly within the actual amount, the insurer would not be likely to demand arbitration, and, if his failure to make the demand were held to be a waiver of the right, and it should at the same time be held that the insured could, in an action on the policy, prove any amount of loss, however large, the result would be to deprive the insurer of all benefit of the stipulation. This, of course, could not be done indirectly any more than it could be done directly, and it follows that on the assumption of defendant's right to an arbitration—which its counsel claim and the judge of the superior court seems to have conceded—it was error to hold that the plaintiff could prove a loss of more than $2,000, or recover from defendant more than $1,000. We do not wish to be understood that in so holding we are sustaining the contention of appellant that the insured is estopped from proving the actual amount of loss by the mere fact that he has understated it in his proofs. We put our decision upon the ground that in the case supposed the insurer has acted upon the statement,—that he has relied upon it,—and refrained from exercising a right which otherwise he would have exercised, and that he would be injured by allowing the insured to prove a greater loss than he has stated.

But the respondent contends that the defendant, under a proper construction of the policy, never had any right to demand arbitration as to the amount of loss. It is in view of this contention that our observations on the points thus far discussed have been qualified by the statement that what is said is based upon the assumption that defendant had such right. But we think the assumption untenable. The stipulation in the policy upon which the defendant relies is too vague and indefinite to be allowed any validity. It fixes no number of appraisers; it provides no mode of selection. "Either party might withhold its or his assent to the appraiser or appraisers suggested by the other, or the company might suggest one number of appraisers, and the assured another number. In either case, and in others that might be supposed, no appraisement could be made." Williams v. Insurance Co., 54 Cal. 445. It is true that in the case cited the language we have quoted was used with reference to a stipulation substantially equivalent to those which in the more recent decisions of this court have been held to make an arbitration a condition precedent to a right of action on the policy, but it is also to be observed that in all those cases the stipulation relied on was far more certain and definite in its terms than the one in question here. In Adams v. Insurance Co., 70 Cal. 200, 11 Pac. Rep. 627, the provision was for two appraisers, to be mutually chosen by the parties, who, in case of disagreement, were to choose a third, a majority of whom could make a binding award. In other words, the stipulation provided for the number of appraisers, the exact method of selecting them, and the manner of making an award, all of which is totally wanting here. What is said of the case last cited is equally true of the case of Dry Dock Co. v. Assurance Co., 66 Cal. 253, 5 Pac. Rep. 232, and neither case can be considered authority for holding the provision of the policy under consideration to be effective. We hold, on the contrary, that it is of no force. We think that if an insurance company desires to secure to itself the right to the liquidation of damages through the intervention of arbitrators or appraisers, it must definitely provide at least for the number of arbitrators, and the mode of their selection. Mark v. Insurance Co., 24 Hun, 565, affirmed, 91 N. Y. 663. From this view it follows, of course, that the plaintiff here can maintain his action, notwithstanding his refusal to arbitrate; and that, since the defendant has lost no right or advantage by plaintiff's understatement of the amount of his loss, if, in fact, it was understated, there is no reason why he should be denied the right to prove the full amount of the actual loss. Therefore, the rulings of the superior judge on these points, though put upon a ground that we consider untenable, were not, in fact, erroneous, or injurious to the appellant.

But we think that the contention of the appellant that the evidence was insufficient to prove a loss of $4,000 is correct. We have carefully examined this evidence, and we think it shows, without any substantial conflict, a loss of less than $4,000. The plaintiff's principal witness on this point was his assignor, Pam, whose method of arriving at the value of the stock of goods on hand at the time of the fire was to deduct from the total amount of his sales up to the date of the fire the assumed percentage of his profits, and then to deduct the remainder so ascertained from the invoice price of all the goods he had purchased. He had carried on business during the latter part of 1883, and had taken up stock and made an inventory January 1, 1884. The figures show exactly what was the amount of his sales and what of his profits during 1883, and that his gross profits during that year were less than 39 per cent. of the invoice price of his goods. He testifies that his gross profits were larger in 1883 than they were in 1884, but when he comes to figure out the value of his stock of goods at the time of the fire, according to the method stated, he has to assume a profit of 60 per cent. in order to bring out his estimate of $5,810. Taking the percentage of gross profits which he made the previous year, and which he testifies was larger than he made in 1884, and applying it to the known amount of purchases and sales in 1884, it shows that he had on hand less than $4,000 worth of goods at the date of the fire, and of these nearly $800 worth were at a distant mining camp, and were not destroyed. Making every allowance in his favor by the additions of freights and so forth, he did not, on his own basis of calculation, lose more than $3,300. Another of plaintiff's witnesses (Verdugo) put the value of Pam's stock at $3,000. Pam's clerk, Gotthelf, says he usually had a stock worth $5,000; and Steinfeld says that three weeks before the fire it was worth $5,000. But it clearly appears from the books that for several weeks before the fire large amounts of goods were being sold, and scarcely anything purchased. Gotthelf does say in his deposition that he places the value of the goods destroyed at $5,000, but this particular answer was not responsive to the interrogatory, and defendant's motion to suppress it ought to have been sustained. There was no other testimony to sustain a finding of $4,000 loss, and the witnesses for the defendant—apparently fair, capable judges, and with good opportunities and sufficient motives to observe the condition and value of the stock—put it at a very much lower figure. In short, the verdict is in this particular without any substantial evidence to support it, and is evidently the result of prejudice or mistake. For this reason the defendant was entitled to a new trial, and the order denying it must be reversed.

There is nothing in the remaining assignments of error that calls for particular notice. The order overruling appellant's motion for a new trial is reversed, and the cause remanded.

We concur: McFARLAND, J.; PATERSON, J.

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79 Cal. 404

SHARP v. HOFFMAN *et al.* (No. 12,571.)

(*Supreme Court of California.* May 31, 1889.)

WATERS AND WATER-COURSES—WITNESS—CROSS-EXAMINATION—APPEAL—REVIEW—INSTRUCTIONS.

1. Plaintiff sued for damages for deprivation of water. It appeared that he and defendants were riparian owners, his land being further down the stream. It was the general custom in the vicinity to divert water for irrigation, and for 20 years defendants had used all, or nearly all, the water of the stream, and plaintiff had used the surplus. For the years during which he complained that he had been wholly deprived the water-supply was low, and insufficient for defendants' needs. He made no complaint, for the reason, as he stated, that one of the defendants informed him that they had bought the water-right. *Held*, that a verdict for plaintiff should be set aside as contrary to the weight of evidence, as he was only entitled to the surplus after defendants were supplied, and in the years complained of there was no surplus.

2. Since by Code Civil Proc. Cal. § 2048, a witness may be asked, on cross-examination, as to any matter bearing directly or indirectly on any portion of his testimony in chief, a witness for plaintiff, who has testified concerning the stream of water in controversy, that he knew where it crossed a certain lane, may be asked if it was not from the fact that the creek did cross at that point, and washed sand on plaintiff's land, that the controversy between him and defendants arose, as the question tends as well to test the witness' knowledge as to the facts stated by him on direct examination, as also his credibility.

3. Under the same rule a witness who states that plaintiff's grantor claimed half the water of the creek may be asked if said grantor did not tell witness that he had sold the water to one of the defendants, as the question bears on the character and extent of plaintiff's predecessor's interest to the water in dispute.

4. The charge of the court to a jury is a decision upon the law of the case, and must be excepted to at the time it is given, or error therein will not be noticed.

In bank. Commissioners' decision. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

Action by J. P. Sharp against S. Hoffman and L. Hicks for the wrongful diversion of water. Verdict for plaintiff, which was set aside, and he appeals.

Spencer & Raker, for appellant. *Goodwin & Davis* and *W. N. Goodwin*, for respondent.

GIBSON, C. Action for damages for wrongful diversion of water. Verdict and judgment for plaintiff. Defendants moved for and obtained an order granting a new trial, from which plaintiff appeals. The new trial was granted upon two grounds: the insufficience of the evidence to justify the verdict, and of errors of law that occurred at the trial, and which were duly excepted to by defendants. Both plaintiff and defendants are riparian proprietors on Parker creek, in Lassen county; the lands of plaintiff lying below those of defendants. The creek is a small natural stream, fed by snow on the mountains at its source, and has each year a variable and diminishing flow of from several hundred inches, measured under a four-inch pressure, in the early spring-time, to a small quantity about the 1st of July. The *gravamen* of plaintiff's action being the deprivation of water for irrigation during the irrigation seasons in the years 1883, 1884, and 1885, whereby he suffered loss, it is incumbent upon him to show by satisfactory evidence (Code Civil Proc. § 1835) a right to use of the waters of the creek during each of such seasons, an interference with such right, and a consequent injury. Referring to the record upon these points, it appears that during the trial the question of riparian proprietorship was eliminated by an admission to the effect that during the time both parties claimed that their respective rights to the water were acquired irrigation in the neighborhood of the farms of plaintiff and defendants was necessary, and that it was the general custom of the farmers in such neighborhood to divert by means of dams and ditches the waters of streams to irrigate their farms; that defendants had for 20 years used all, or nearly all, of the waters of the stream, and whatever water the plaintiff had obtained prior to 1883 was surplus water, or what water was left after defendants' ditches were supplied; that for the three irrigating seasons that he (plaintiff) received no water, and during which seasons the water supply was low and insufficient for the usual requirements of defendants, he made no complaint, offering as an excuse for his silence, which is an immaterial one, that he had theretofore been told by one of the defendants that such defendant, with his co-defendant, had purchased the water-right for themselves, and that he (plaintiff) believed and was deceived by such statement. If the plaintiff was and is entitled to the use of the surplus water of the stream only,—which we do not decide,—and during the seasons complained of the water was insufficient for the customary use of defendants, who had a prior right to use it, the plaintiff could not have been injured by deprivation of water that he was not entitled to use. Under such a showing the court below might well say as it did, in deciding the motion for a new trial: "I am thoroughly convinced that the weight or preponderance of evidence is clearly against the justness and correctness of the verdict, and the same not only should but must be set aside."

Appellant contends that while a trial court may grant a new trial for insufficiency of the evidence to support the verdict, it cannot grant such a motion upon the ground stated by the trial court in this case, but it is well settled that "it is within the province of the superior court to grant a new trial where in its opinion the verdict is contrary to the weight of evidence. Bauder v. Tyrrel, 59 Cal. 99; Irving v. Cunningham, 58 Cal. 306. And this court will not interfere with its discretion in so doing, except in extreme cases, or except in cases where it is apparent the court below has proceeded upon an erroneous hypothesis." Bennett v. Hobro, 72 Cal. 178, 13 Pac. Rep. 473.

On cross-examination the witness Fry, called for plaintiff, was asked: "You stated in your direct examination that when you went there Thompson [through whom plaintiff deraigns title] claimed half of the water in Parker creek. Now, do you recollect, in talking about this water matter at the time you lived there, of Mr. Thompson telling you about selling Mr. Hoffman the water of his place?" Objected to as not in cross-examination. Objection sustained. Defendants except. The cross-question of witness Jellison, also called for plaintiff, was asked: "You say you know where the water crossed the lane near Buntingville. Now, was it not because it did cross the road there and wash sand on Sharp [plaintiff] that gave rise to this dispute?" Objected to by plaintiff as immaterial and not in cross-examination. Objection sustained. Defendants except. The object of cross-examination is to test the credibility, knowledge, and recollection of a witness as to his testimony on direct examination. (1 Greenl. Ev. § 446;) and a witness can be, on cross-examination, interrogated as to any matter which has a bearing directly or indirectly upon any portion of his testimony on direct examination. Code Civil Proc. § 2048. The testimony sought to be elicited from witness Fry tended to test his recollection as to the character and extent of the claim of plaintiff's predecessor in interest to the water-right in dispute, and that from witness Jellison, to test his knowledge of his direct testimony, and his credibility as a witness, and should have been allowed.

To repel the assault made upon the instructions to the jury, it is sufficient to say that a careful examination of the transcript, which is so arranged as to prevent an expeditious examination of it, fails to show that the instructions to the jury, or any of them, were excepted to. The charge of a court to a jury is a decision made by the court during the trial, that the law thus declared must be applied by the jury to the facts established by the evidence; and such decision, to be reviewable upon a motion for a new trial, or upon appeal, must be excepted to when it is made. Id. § 646.

The explanation of appellant's counsel of his reflection in his brief upon the trial judge is hardly sufficient. We can easily conceive of a case where counsel in the heat of argument, during the excitement incident to a trial, might exceed the bounds of propriety and be excusable, but find it more difficult when counsel, after the excitement of the trial has passed, and the asperities it may have engendered been smoothed by the hand of time, deliberately, in the quietude of his chambers, pens in his brief that which is a reprehensible breach of the duty he owes to the court, and has sworn to perform. We think the order appealed from ought to be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For reasons given in the foregoing opinion the order is affirmed.

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79 Cal. 490

BURTON *v.* BURTON *et al.* (No. 12,955.)

(*Supreme Court of California.* June 19, 1889.)

EXECUTORS AND ADMINISTRATORS.

1. In an action to have certain land adjudged to be the property of the estate of a decedent, brought against the widow and others as holders of the legal title, it appeared that the title had come to decedent by mesne conveyances from P., who was the original grantee from the Mexican government, and that after the death of decedent a patent was issued by the United States to his widow and children. The theory of the case, as established on a former appeal, was that the widow and children took the patent as representatives of the estate of decedent. *Held*, that whether there was or was not any consideration for a deed by P. to the widow, executed before the issuance of the patent, to "confirm the claim of title to the heirs of" decedent, was not material, as the widow took as trustee for the estate.

2. In such equitable action it is not an abuse of discretion for the court, after having determined the issue submitted to it, to refuse to take the entire administration away from the usual probate jurisdiction, and to proceed to settle the estate and close the administration.

3. Although findings of fact and of law should be separately stated, the mere fact that one finding is placed under the wrong heading will not justify a reversal.

In bank. Appeal from superior court, San Diego county; JAMES A. GIBSON, Judge.

Chapman & Hendrick, Collier & Haines, and *Welborn, Parker & Stevens*, for appellants. *Conklin & Hunsaker* and *H. L. Titus*, for respondent.

MCFARLAND, J. This action was brought to have it adjudged and decreed that a certain tract of land known as the "Rancho Jamul" is the property of the estate of Henry S. Burton, deceased, and subject to the administration thereof, and that the legal title thereto held by either of the defendants is held in trust for said estate, etc. The defendant Maria A. Burton (widow of said deceased) admitted all the allegations of the complaint, and set up by way of cross-complaint that she was entitled to a certain particularly described part of said rancho as a homestead, which had been set apart to her by the probate court. The defendants Leach and Capron denied most of the averments of the complaint, set up certain special defenses, and prayed that plaintiff take nothing by the action, and that their title to the premises be forever quieted as against the plaintiff. The court, sitting without a jury, rendered judgment for plaintiff against Leach and Capron, but awarded the defendant Maria A. Burton her homestead. Leach and Capron appeal, as against both plaintiff and defendant Maria A. Burton, from orders denying a new trial.

The case was before this court on a former appeal from a judgment in favor of the present appellants. McDonald v. Burton, 68 Cal. 445, 9 Pac. Rep. 714. On that appeal nearly every question in the case was determined in favor of the respondents herein, and against the appellants herein, and we shall not enter again upon the discussion of the matters thereby definitely settled. The former appeal, it is true, was from the judgment alone, and the decision on appeal was based mainly on the findings; while the present appeal, being from an order denying a new trial, presents the question of the sufficiency of the evidence to support the findings. And consequently the arguments of appellants are addressed mainly to the point that the evidence does not justify a large number of the findings. The findings are numerous, and the evidence voluminous, and it would serve no useful purpose to review the evidence here in detail. It is enough to say that in our opinion there is sufficient evidence to support each finding of the court. This being so, there is no substantial difference between the case as presented now and as presented at the former appeal, except as hereinafter mentioned. On the former appeal it appeared that a certain deed, executed by Pio Pico to the defendant Maria A. Burton, was without consideration, while on the present appeal that want of consideration does not affirmatively appear, and counsel for appellants contend that this difference is material. But we do not think so. Pico was the original grantee of the rancho from the Mexican government, and his agent, Foster, sold it to certain parties, through whom the title came to Henry S. Burton, deceased. Pico ratified the sale, and never afterwards claimed the property. While said Burton was prosecuting proceedings in the United States courts to procure a patent he died. Afterwards his widow, Maria A. Burton, defendant herein, and his children, Nellie and Henry H. Burton, heirs of said deceased, were substituted on the record as claimants for the patent. In due time a patent issued to said last-named persons, "widow and heirs of H. S. Burton, deceased." Now, the whole theory of this case, as established on the former appeal, is that the widow and children took the patent, not in their individual capacity, but as representatives of the estate of Burton, deceased, and that the rancho continued to be the property of said estate. Now, when Pico made his deed of the rancho, above noticed, to Maria A. Burton, (which was made before the patent issued,) he made it, as the court finds, "to confirm the claim of title 'to the heirs of Gen. Henry S. Burton;'" and, whether Pico executed the deed with or without consideration, Mrs. Burton took it in her representative capacity and as trustee for the estate. The point that the complaint does not state a cause of action, if it could be raised on a motion for new trial, was settled on the former appeal.

The contention of appellants that the court erred in ruling out certain evidence rests upon the proposition that in this equitable action the court not only had jurisdiction, but was bound by its duty to settle the whole estate of Henry S. Burton, deceased; to pass upon all disputed claims against it; to examine and adjudicate the accounts of all its administrators; and to proceed to the final distribution of the estate, and the winding up of the entire administration. When, during the administration of an estate, it is necessary to call in the aid of a court of equity to accomplish some particular thing, it is, perhaps, a doubtful question whether such court has the power to take the entire administration away from the usual probate jurisdiction, and it is not necessary here to decide that question. Certainly it has not been settled that in all such cases the court must assume such jurisdiction. The purpose of the bill in the case at bar was to have it adjudged that the Rancho Jamul is the property of the estate of Burton, deceased, and subject to the administration thereof; and the court, after having determined that issue, cannot be held to have abused its discretion because it did not proceed to settle the estate and close the administration. It had the right, under the facts of this case, at least, to allow those matters to reach their natural termination in the tribunal and proceeding in which they were pending.

The finding on the issue of the statute of limitations was sufficient. Findings of fact and of law should, of course, be separately stated, but the mere fact that one finding was placed under the wrong heading would be a very feeble reason for the reversal of a judgment; and in other respects we think that the findings are amply full and responsive to all the material issues. We see nothing to invalidate that part of the judgment which awards to the respondent Maria A. Burton, her homestead. Her right to the homestead is substantially the same as it was at the former appeal. The orders appealed from are affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J

WORKS, J., did not participate in the decision of the above cause.

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79 Cal. 388

KAHN v. BOARD OF SUPERVISORS OF THE CITY AND COUNTY OF SAN FRANCISCO. (No. 11, 765.)

(*Supreme Court of California.* June 1, 1889.)

MUNICIPAL CORPORATIONS—PUBLIC IMPROVEMENTS—MANDAMUS.

1. Act Cal. April 1, 1872, (St. 1871-72, p. 911,) passed to establish a street in San Francisco, provided (section 5) that, on petition to the mayor by the owners of a majority in frontage of the property described in such act, "as said owners are or shall be named in the last preceding annual assessment roll for the state, city, and county taxes," for the opening of said street, the board constituted by the act to carry it into effect should proceed. *Held*, that the signatures to the petition of persons other than those to whom the property was assessed on the last preceding assessment roll could not be counted in order to make up the owners of a majority of the frontage.

2. Nor could the signatures of executors, administrators, and agents be counted, in the absence of evidence of their authority to sign the petition.

3. Nor could the signature of a homestead and railroad corporation, made by its president and secretary, be counted, in the absence of evidence that such officers were authorized to affix the signature, or that that duty appertained to their offices.

4. On application, by a holder of bonds issued for improvements made under the act, for *mandamus* to compel the city to levy a tax for the payment of the bonds, the facts that, on presentation of the petition to the mayor, he certified that it was signed by the requisite property owners, and that the county court affirmed the report of the board of the proceedings taken by it under the petition, do not estop the city to deny the sufficiency of the petition.

In bank. Petition for *mandamus* by Leopold Kahn against the board of supervisors of the city and county of San Francisco.

D. M. Delmas and *A. L. Rhodes*, for petitioner. *George Flournoy, Jr.*, City and County Atty., (*Philip G. Galpin*, of counsel,) for respondent.

THORNTON, J. This is an original proceeding in this court, asking for a writ of mandate to compel the board of supervisors of the city and county of San Francisco to levy a tax for the payment of interest on the Montgomery avenue bonds. The action is brought by the holder of several of the bonds mentioned, and the levy sought to be ordered is to be made on a certain district of land situate in the city and county aforesaid, described in the fourth section of an act of the legislature of this state, approved the 1st of April, 1872, passed for the purpose of opening and establishing a public street in the city and county of San Francisco, to be called Montgomery avenue, etc. St. 1871-72, p. 911. For the purpose of opening and establishing the street, a strip of land was described in the first section of the act, to be taken to that end. By the fourth section of the act, the district on which the cost of opening the street was to be assessed was fixed and described. The street improvement above mentioned was to be carried out through the agency of a board of public works, which was created by section 19 of the act, and consisted of the mayor, the tax collector, and the city and county surveyor of the city and county of San Francisco. This board so constituted was authorized, empowered, and directed to perform all and singular the duties enjoined by the act upon the board of public works. It was prescribed by the fifth section of the act that, whenever the owners of a majority in frontage of the property described in section 4, "as said owners are or shall be named in the last preceding annual assessment roll for the state, city, and county taxes, shall petition the mayor of said city and county, in writing, for the opening of Montgomery avenue, according to the provisions of this act, the board of public works * * * shall proceed to organize by the election of a president." Upon this organization having been made, the board was required to proceed to the work designated in the statute. In section 6 of the act it was provided that the "board shall also proceed to ascertain and determine, and separately state and set down, in a written report, a description of the several subdivisions and lots of land included in the district defined in section 4 of this act, following, when possible, the descriptions and deeds and other instruments filed with said board; and opposite to such description shall set against each lot or subdivision the sum or amount in which, according to the judgment and determination of said board, the said lot or subdivision has been or will be benefited by reason of the taking and opening of said avenue relatively to the benefits therefrom accruing to the other lots or subdivisions respectively within said district. Said board shall also set against each lot or subdivision as aforesaid the names of the owners, occupants, and claimants thereof, so far as the same can be ascertained conveniently by said board. The said board shall adopt a general map or plan of the said Montgomery avenue, and of the lands herein declared to be benefited thereby; and it shall also adopt a map or maps of each block or piece of land taken for said avenue, and also the property injured thereby, and also each lot and subdivision of land liable to be assessed to pay the costs and expenses of opening said avenue as the same are defined in this act. Such report, as soon as the same is completed, shall be left at the office of said board daily, during ordinary business hours, for 30 days, for the free inspection of all parties interested, and notice that the same is so open for inspection for such time and such place shall be published by said board daily for 20 days in two daily newspapers printed and published in said city and county." It is provided by section 7 that "any person interested in any piece or parcel of land situated within the district defined and described in section 4 of this act, or in any of the lands taken for said avenue, or in any improvements damaged by the opening of said avenue, feeling himself aggrieved by the action or determination of the said board, as shown in said report, may, at any time within the 30 days mentioned in section 6 of this act, apply by petition to the county court of the city and county of San Francisco, setting forth his interest in the proceedings had before said board, and his objections thereto, for an order on said board requiring it to file with said court the report of said board, and such other documents or *data* as may be pertinent thereto, in the custody of said board, and used by it in preparing said report. Said court is hereby authorized and empowered to hear said petition, and shall set the same down for a hearing within 10 days from the date of the filing thereof; and the party filing said petition shall, on the day he files the same, serve a copy thereof on at least one of the members of the board of public works, and said board may appear, by counsel or otherwise, before said court in response to said petition. Said board may file a written answer to said petition with said court. Testimony may be taken by said court upon said hearing, and the process of the court may be used to compel the attendance of witnesses and the production of books or papers or maps in the custody of said board or otherwise. It shall be in the discretion of said court, after hearing and considering said application, to allow said order or deny the same; and, if granted, a copy thereof shall be served on said board, and it shall proceed to obey the same according to the terms of the order to be prescribed by the court; but in case no such petition shall be filed with said county court within the time above limited for the filing thereof, the said report shall be presented by the said board to the said county court, with a petition to the court that the same be approved and confirmed by the court."

The section (seventh) then proceeds to declare that the court mentioned above shall have power to approve and confirm said report, or refer it back to the board with directions to alter or modify the same in the particulars specified by the court, and the board shall thereupon proceed to make such alterations and modifications, and, when so made, the county court should approve or modify the report. By the same section an appeal was allowed to this court within a specified time by any party dissatisfied with said report, or any part thereof, who shall have filed a petition to the county court as above provided. After the passage of the act above mentioned, a petition in writing was presented to the mayor of the city and county for the opening of Montgomery avenue. This petition was signed by several thousand persons who were owners of frontage of the property described in section 4, above referred to, as said owners were named on the assessment roll referred to in section 5 of the said act. On the presentation of this petition to the mayor, he made and attached it to a certificate that it had been signed by the names of a majority in frontage of the property, as required by the act of 1872. This certificate bore date on the 19th day of June, 1872, and on the next day the board of public works was organized by the officials above named. This board subsequently proceeded to the performance of the duties required by the act, made up the report required by the sixth section, which remained in the office of the board for the period of time required by the act, for the free inspection of all persons interested, and notice that the report was so open for inspection was published as required by the said sixth section. On the 2d day of November, 1872, the report was presented to the county court above named, with a petition to said court that it do approve and confirm said report, and, no objections then appearing to the report, it was on the 14th day of November, 1872, approved and confirmed.

It is contended that the proceedings taken by the board of public works, and had in the county court, were without jurisdiction and void, for the reason that the names of a majority in frontage of the property described in section 4 of the act of 1872, required by section 5 of the same act, did not sign the petition to the mayor of the city and county of San Francisco. That a petition signed by a majority of the owners designated above was necessary to give the board of public works jurisdiction to organize and proceed under the act, we have no doubt. This point was fully considered and determined in Mulligan v. Smith, 59 Cal. 206. This ruling we approve and adhere to. We also approve of the ruling made in the case cited, that the mayor was not charged with the duty of determining whether the petition was signed by the required majority, and that his decision to that effect did not conclude or estop any one from disputing and showing that, in fact, the petition was not signed by the required majority. The question whether the petition was in fact signed by such majority is here presented for decision. We have examined the evidence and weighed the arguments on this question, and are of opinion that the petition was not signed by such majority as the provisions of the act required. The learned counsel for the petitioner has presented in an elaborate brief his view of the question. He estimates the entire frontage of the district to be 424,096 feet, one-half of which is 212,048. The majority required in this view would be 212,049 feet. According to the contention of the learned counsel, the owners of 212,965.7¼ feet of frontage did sign the petition. But there are included in this contention of counsel certain signatures which will be found in the record on pages 147, 148. These signatures are set forth in a table designated by the letter "G," printed on the pages of the record just above given. This table sets forth the signers of the petition whose names are other than those to whom the property was assessed on the assessment roll mentioned in the fifth section of the act of 1872. It will be observed that the act (section 5) requires that the petition to the mayor shall be signed by the "owners of a majority in frontage of the property described in section 4 of this act, as said names are or shall be named in the last preceding annual assessment roll for the state, city, and county taxes." The requirement of the above is that the same persons who are assessed on the assessment roll designated by the act shall sign the petition. This is the nature of the legislative requirement, and the courts are not at liberty to disregard it. We are bound to heed this legislative mandate, and the plain and manifest meaning of the language employed inhibit us from holding that the signers whose names are set forth in Table G are such as are required by the act referred to. These signers, which are included in the view of petitioner's counsel, and which go in his contention to make up the majority required, represent 6,050¾ feet, and deducting these from the number of signers, according to his calculation, the result would be that the number of feet signed for would fail of a majority by over 5,000,—5,132.5½.

The signatures by executors, administrators, and agents, counted to make the majority by petitioner's counsel, must also be excluded. We hold that they must not be counted for the reasons given in the opinion of Mr. Justice McKee, in Mulligan v. Smith. In relation to these signers of the petition, the following language, which we adopt, is used in the opinion: "Executors and administrators are but the legal personal representatives of the decedents whom they represent. They are but agents of their constituents, created by law, whose duties and powers are prescribed by law. Whatever they do must be done according to law, and within the authority of the law; for the acts of an agent are binding only when done within the scope of the authority conferred upon him. In any transaction in which executors or administrators pretend to act as such, they cannot create any liability on the estate of which they are the representatives. They have no power to charge, or incumber, or sell and convey, the real property of the estate, unless authorized by the law under which they are acting. In favor of such an act there is no legal presumption. If it purports to be done by authority, the authority should be produced. The signatures of the executors, administrators, and agents to the petition were, therefore, ineffectual as signatures of the frontage for which they signed."

We are also of opinion that the signature of the North San Francisco Homestead & Railroad Association, the frontage of which amounted to 41,510.7, should be stricken out. This was signed for by the president and secretary, as we are convinced by the evidence, without competent authority. In the face of the evidence in the record, we cannot presume that the parties signing had authority so to sign. We see no ground in the evidence for presuming that the president and secretary of the corporation had authority to affix the signature of the corporation to the petition. The affixing a signature to such a paper as the petition was no part of the duties devolved on the president and secretary of the corporation. No such duties appear by the evidence to have appertained to the officers mentioned. Under these circumstances, the power to authorize the affixing of the name of the corporation to the petition rested with the board of directors, as managing agents of the corporation, to be exercised by their direction. We are of opinion that, in any view which we are justified in taking of the question, the petition was not signed by the owners of the majority of the frontage, as required by the act of the legislature.

But it is argued that the county court having decided, as it did, that the required majority of owners had signed the petition, such determination is conclusive on all parties concerned and cannot be again controverted. This point was made and decided by this court in Mulligan v. Smith, supra, and we do not feel inclined to disturb that decision. It is unnecessary to discuss the question again, as we are satisfied with the conclusion there reached, and are willing to adhere to the ruling there made. We cannot see that it should make any difference in our rulings on the questions just passed on that the action in Mulligan v. Smith was brought against a property owner and tax-payer by a purchaser at a sale made for non-payment of the tax claimed under the provisions of the act of 1872, while here the action is brought by a bondholder. The question of jurisdiction was to be alike looked to by the tax-payer and the bondholder, and the same facts were to be examined by each. The same record was to be considered by bondholder and tax-payer. If the facts did not show jurisdiction as to the tax-payer, we cannot see how they showed jurisdiction as to the bondholder. The legislature intended that, in every case, the jurisdiction to exercise the powers conferred by the act of 1872 should depend on the existence of the jurisdictional fact, viz., that the petition was signed by the required majority of owners; and, if the petition was not so signed, the board of public works should have no jurisdiction to proceed. Nor should this jurisdiction be held to attach, whatever court may have ruled that the petition was signed by a majority, when, in fact, it was signed only by a minority, of the owners designated by the statute. Jurisdiction exists in the superior court to grant letters of administration on the estate of a deceased person. When its power to grant such letters is invoked, the court must necessarily pass on the question of the death of the party whose estate is sought to be administered. The court by its grant of letters necessarily decides that such party has died. But, should the party be in fact alive, its judgment is not conclusive that he is or was dead. It being made to appear to the court that the person alleged and held to be dead is, in fact, alive, the judgment of the court is void, and must be so held. Such is the decision of this court in Stevenson v. Superior Court, 62 Cal. 60. In deciding that case it was said, in the opinion of Ross, J.: "Administration may lawfully be had upon the estate of a dead man, but not upon that of one in life. Until death occurs there is no 'subject-matter' over which it is possible for any court to exercise jurisdiction. It is true that the court of probate, before issuing letters of administration, must first determine affirmatively the question of death; but, notwithstanding such determination, the fact that the supposed intestate is alive may still be shown, and, when shown, establishes the nullity of the entire proceedings." In this Justices McKinstry, Sharpstein, Morrison, and McKee concurred. So in this case it should be held that jurisdiction of the subject-matter vested in the board of public works when the required petition was presented. If no such petition was presented, though the county court held that such a petition was presented, the jurisdiction did not attach.

The foregoing remarks show that the city is not estopped by action of the mayor, or by judgment of the county court. This question is thoroughly discussed by Field and Sawyer, JJ., in Liebman v. City and County of San Francisco, 11 Sawy. 147, 24 Fed. Rep. 705, where the same conclusion is reached. We refer particularly to the able opinion of the justices mentioned in the case cited. The case of Lent v. Tilson, 14 Pac. Rep. 71, is in accord with these views. There the initial step to give jurisdiction was the adoption by the board of supervisors of a resolution authorizing the work to be done, by expressing their judgment that such work would be expedient, and, in addition, the publication of the resolution as prescribed by the act of the legislature under which the proceeding was taken. This was done. The act was in this respect complied with. In the case before us the act was not complied with, for the required petition was not filed. In the case cited, as the act had been complied with, and jurisdiction attached for executing the work, we cannot see how the taxpayer was injured, conceding that the county court had jurisdiction to determine conclusively the fact that the resolution required had been adopted and published. Conceding that the determination of the county court in this case was *prima facie* evidence that a proper petition had been presented, still it was not conclusive. The facts as to jurisdiction were open to the examination of the bondholder, and it was incumbent on him to inquire into them, and ascertain whether the requirements of the act had been followed. We cannot regard the petitioner, who is a holder of bonds issued under the act of 1872, as exempt from the obligation to ascertain whether the bonds were issued in compliance with the act of 1872. A purchaser of bonds is bound by the law under which such bonds were issued, and the law informs him that the bonds impose no obligation unless issued in accordance with law.

The application for the writ must be denied. So ordered.

We concur: Beatty, C. J.; Works, J.; Sharpstein, J.; McFarland, J.

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79 Cal. 323

Jennings *v.* Bank of California. (No. 11,629.)

(*Supreme Court of California.* May 29, 1889.)

Corporations—Transfers of Stock—Liens.

1. A corporation has power to prescribe in a certificate of stock that such stock will not be transferred on its books until the payment of all indebtedness due the corporation by the person in whose name the stock stands on the books, though the terms on which stock may be transferred are prescribed by statute.

2. When the stockholder accepts a certificate containing such a condition without objection, and thereafter borrows money from the corporation, a bank, he assents to the condition, and the bank has an equitable lien on the stock for the amount due it.

3. The fact that the condition was inserted in the certificate by the president, cashier, and secretary of the bank, without authority of the board of directors, is immaterial as against the borrower, as such officers will be presumed to have authority to arrange the terms of the loan.

4. A reorganization of the bank, and the adoption of by-laws providing that certificates of stock "shall be transferable by indorsement and delivery thereof, the transfer to be complete and binding upon the bank only when recorded upon the books of the bank," is not a waiver of the stipulation in the certificate or of the lien created thereby.

5. The fact that there was no usage from which such a lien could arise is no defense to its enforcement, where it does not appear that there was any usage against it.

6. The facts that the bank's cashier testified that "if a party is in good standing, we don't question his right to a transfer," and that the stockholder was allowed a large overdraft, do not show that the loan was made on his personal credit alone, so as to waive the lien on the stock.

7. Under Civil Code Cal. § 324, providing that a transfer of stock by indorsement, and delivery of the certificate, "is not valid, except between the parties, until the same is entered on the books," an assignee of the certificate takes subject to the bank's equity, and, as the condition is sufficient to put him on inquiry, he is not a *bona fide* purchaser.

8. When such assignee gives the bank no notice of the transfer, the lien extends to advances subsequently made by the bank to the assignor.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Newlands, Allen & Herrin, for appellant.

Lloyd & Wood, for respondent.

Hayne, C. Action for damages for the refusal of the defendant to make a transfer upon its books of certain stock to the plaintiff. Judgment for plaintiff. Defendant appeals. The material facts are as follows: In 1879 one Bowman became the owner of certain stock in the bank, and this stock was transferred to him upon the books of the corporation. The certificate was as follows: "No. 131. This is to certify that A. W. Bowman, of San Francisco, is the proprietor of sixty-seven shares of the capital stock of the Bank of California, which is transferable only upon the books of the bank, personally or by attorney, upon the surrender of this certificate, after compliance with the conditions printed on its back. San Francisco, October 21, 1879. S. FRANKLIN, Secretary. THOMAS BROWN, Cashier. WILLIAM ALVORD, President." The condition referred to in the body of the certificate was as follows: "No transfer of the stock described in this certificate will be made upon the books of the bank until after the payment of all indebtedness due the bank by the person in whose name the stock stands on the books of the bank, except with the written consent of the president or cashier." There was no by-law of the corporation, nor any resolution of the board of directors, authorizing the insertion of such a condition in the certificate; but from the time of the organization of the bank, in 1864, such a condition was always inserted, although the bank had never refused to make transfer by reason of the indebtedness of a stockholder, except in the present instance. It does not appear, however, that occasion for such refusal had ever arisen. Bowman received the stock without objection. He was a depositor of the bank at the time, and on May 4, 1883, was indebted to the bank on overdrafts in upwards of $80,000. On that day he transferred his stock to the plaintiff for value, and indorsed and delivered the certificates to him. No notice of this transfer was given to the bank until October 16, 1884, when the plaintiff demanded a transfer of the stock to him upon the books. In the mean time the bank continued to pay the quarter-yearly dividends to Bowman, and to lend him money on overdrafts. On October 13, 1884, which was two days before the notice of the transfer, Bowman owed the bank $98,786. This indebtedness was subsequently reduced to $30,394.75, which sum remains due. The bank refused to transfer the stock to the plaintiff upon its books until Bowman's indebtedness to it was discharged.

1. As between Bowman and the bank, we think that the latter had an equitable lien upon the stock for the sum due to it. The counsel for the respondent makes several points in this regard.

(*a*) It is argued that the terms upon which shares of stock may be transferred are prescribed by the statute, and that the corporation had no power to annex other conditions. So far as the power of corporate legislation is concerned, this may be conceded, and it may be assumed for the purpose of the case that a corporation could not make a by-law which would operate in and of itself to create a lien upon the stock for the indebtedness of the stockholder. But the power to legislate is one thing, and the power to contract is quite another. In the language of Angell: "What may be bad as a by-law, as against common right, may be good as a contract; since a man may part with a common right voluntarily of which it would be impolitic and unjust to deprive him by a by-law passed without his assent, or, perhaps, knowledge, by those who might not know or would not consult his individual interests." Ang. Corp. (8th Ed.) § 342. And to say, as is said by the learned counsel, that no additional limitation can be added by contract in a particular case, seems to us to be going altogether too far. No statute has been called to our attention which prohibits a corporation like the defendant from lending money on its own capital stock, and, in the absence of such a prohibition, we think that such a loan is not *ultra vires*. If this be so, it cannot be doubted that, if the authorized officers of the bank had taken the certificate in pledge for the indebtedness, the bank would have had a lien thereon, and, having such a lien, could not be compelled to transfer the stock until the indebtedness secured by the lien had been discharged; and we can see no difference in principle between the case put and one where the loan is made upon an agreement that the stock shall stand upon the books as security for the indebtedness. The only possible difference is in the kind of security taken, and this does not affect the question.

Then was there a contract for an equitable lien? We think that such a contract must be implied from the conduct of the parties. We do not say that the mere acceptance by the stockholder of the certificate without objection would constitute a contract, in the absence of subsequent dealings with reference thereto. It is not necessary to express an opinion upon such a case; but we think that the acceptance, without objection, of the certificate containing such a condition, and the subsequent borrowing of money from the bank without anything to exclude the idea that the condition was to be binding, amounts to an assent to it, so far as the particular loan was concerned, and that a contract is to be implied that the stock was to stand upon the books as security for the loan. "An implied contract is one, the existence and terms of which are manifested by conduct," (Civil Code, § 1621,) or, in the language of a learned writer, "is inferred from the conduct, situation, or mutual relations of the parties, and enforced by the law on the ground of justice." (Metc. Cont. 4.) In the present case every consideration of justice leads to the implication of an agreement for security. The stockholder knew from the conditions of the certificate of the terms upon which he could borrow money from the bank. With such knowledge, he borrowed the money without raising any objection to the terms, and we think that he must be held to have assented to them and to be bound by them; and the result of the contract so made is the creation of an equitable lien in favor of the bank. In Waln v. Bank, 8 Serg. & R. 89, which was an action like the one before us, there was no by-law or written regulation of the board giving a lien upon the stock, but the court held that a lien arose from the borrowing of money from the bank with knowledge of its usage in that regard, and said: "A course of dealing, a usage, an understanding, a contract, express or implied, is the law of the parties and a law to them, provided they are not repugnant to the charter or the laws of the land. * * * The understood notice to Mr. Waln, his continuing to deal with the bank, with full knowledge of this term and condition, is equally binding on him and the present plaintiffs as if it were a written regulation, a by-law, a provision in the charter, or clause inserted in the very certificate of stock. The bank had an undoubted right to say to any stockholder, 'We discount your note; but, remember, until it is paid, we shall hold your stock in security. You shall not be permitted to transfer it until you pay us.' * * * Call this answer of the bank what you please,—lien, set-off, legal or equitable, pledge, retainer, stoppage, course of dealing, general undertaking, usage, contract, express or implied,—it is a bar, in law and equity, to this action." The case of Vansands v. Bank, 26 Conn. 144, is precisely in point. That, like the present case, was an action for damages for the refusal to transfer stock upon the books of a corporation. It was conceded that no lien upon the stock was given to the bank, either by the by-laws or the charter or by statute. The certificates of stock, however, contained a condition, like that in the case before us, to the effect that the transfer upon the books should be subject to the indebtedness of the stockholder. The court held that the acceptance of such a certificate without objection, and a subsequent loan by means of the discount of a note, effected a contract which created an equitable lien for the amount of the indebtedness. And STORRS, C. J., delivering the opinion, said: "To consider it otherwise than as an agreement would be to disregard the plain intention of the parties, which courts will always, if possible, carry into effect, and to sanction the perpetration of a fraud on the defendants. Smith having received the certificate proffered to him by the defendants with that restriction, neither he nor his assignee should be permitted to deny his assent to it, and that would be sufficient to constitute an agreement."

(*b*) It is urged that the fact that there was no by-law, and no action by the board of directors, is fatal to the existence of an agreement or lien; in other words, that the action of the president, cashier, and secretary, in putting such a condition in the certificate, was unauthorized. But, so far as the contract between the borrower and lender is concerned, we think that this is immaterial. It might, perhaps, be argued that the fact the condition was inserted in every certificate of stock since the organization of the bank shows that the proceeding was sanctioned by the board, although there was no formal authorization of it; for under such circumstances it cannot be supposed that the board was ignorant of it. But, waiving this, the officers from whom Bowman obtained his loan must be held to have had authority to arrange the terms of the loan. The officers who transact the ordinary business of a corporation are presumed to have authority to do all acts which are usual and incidental thereto. McKiernan v. Lenzen, 56 Cal. 63, 64; Donnell v. Lewis Co. Bank, 80 Mo. 171; Reynolds v. Collins, 78 Ala. 97; Case v. Bank, 100 U. S. 455. And the authority to arrange the security upon which a loan is to be made is certainly incidental to the making of the loan itself; so that, even if the party who obtained the loan could raise a question as to the authority of the officers with whom he dealt, it must be held that there was ample authority, so far as the particular case is concerned.

(*c*) It is contended that the bank, by its by-laws, subsequently adopted, modified the force of the stipulation contained in the certificate. This contention is based upon the fact that the bank reorganized under the Code, and adopted by-laws which, after providing for the issuance of certificates of stock, declare that "these certificates shall be transferable by indorsement and delivery thereof, the transfer to be complete and binding upon the bank only when recorded upon the books of the bank," and do not provide for any lien such as is claimed here. But we see nothing in this which forbids the contract for a lien upon particular shares to secure a loan to a stockholder, or which requires a transfer of the shares, notwithstanding the existence of such a lien. It would have been an unnecessary precaution to have added to said by-law the words "but no such transfer shall be made in cases where the bank acquires by contract a lien upon the stock." As we have stated above, the lien is independent of the by-laws, and there is nothing in them which forbids the acquirement of a lien in the manner specified.

(*d*) It is said that there was no usage from which a lien could arise; that, as a matter of fact, the bank never insisted upon any lien upon a shareholder's stock, except in this single case. But, while we have cited a case to show that a contract could arise from dealing with reference to a known usage, as being an analogous case, we have not placed the matter upon the ground of usage. Our opinion proceeds upon the proposition that the acceptance of the certificate of stock containing the condition in question, and the subsequent borrowing of money, without anything to exclude the idea that the condition was to govern, creates an implied contract from which an equitable lien arises. This was the ground of decision in the Connecticut case, which expressly states that it did not proceed on the ground of usage. We should reach the same conclusion if this had been the only certificate and transaction of the kind which had ever occurred. Nor can it be said that there was any usage against such a transaction; for, while this was the only instance in which the lien was sought to be enforced, it does not appear to have been necessary to insist on it in any other case. For aught that appears to the contrary, the other shareholders may have all been able to discharge their indebtedness, if any existed, and may have in fact done so.

(*e*) It is argued that the bank waived its lien by lending money upon the personal credit of the stockholder; but there is nothing in the record which shows that the advances were made upon personal credit alone. The findings do not so state. It appears from the statement on motion for new trial, that the cashier said in the course of his testimony: "If a party is in good standing, we don't question his right to a transfer. We waive it by transferring. We do not pretend to claim the right to refuse a transfer against a shareholder in good credit." This is the only thing which we find in the evidence in relation to the matter. It certainly does not show that the advances in this case were made on personal credit alone; for, aside from any other reason, it does not appear that the shareholder was "in good credit." This cannot be inferred from the mere fact that he was allowed a large overdraft; for it may be that this was allowed in view of the lien upon the stock. It may be that his credit was not good enough for so large an advance without taking into consideration the security upon the stock, and, unless it appeared that the advances were made on personal credit alone, or on some other security, without reference to the stock, there would be no waiver. See, generally, Bank v. Laird, 2 Wheat. 390.

2. The assignee of Bowman is not protected by the rule as to *bona fide* purchasers for value. Without considering the question as to the negotiability of certificates of stock, it is sufficient to say, in the first place, that, as against the bank, the plaintiff was not the assignee of the legal title. The Code provides that the transfer by indorsement and delivery of the certificate "is not valid, except between the parties, until the same is entered upon the books," etc. Civil Code, § 324. As against the bank, therefore, the assignee took a mere equity, which must yield to the superior equity of the defendant. Vansands v. Bank, 26 Conn. 153, 154; Taylor v. Weston, 20 Pac. Rep. 62; Stebbins v. Insurance Co., 3 Paige, 361; Bank v. Laird, 2 Wheat. 393; McCready v. Rumsey, 6 Duer, 582. In the next place, the condition in the certificate was sufficient to put the plaintiff upon inquiry. The case of Bank v. Bank, 63 Cal. 362, is not in conflict with this. There no condition was embodied in the certificate, and the by-law relied upon was not referred to therein or printed thereon. Nor is the plaintiff in any better position as to advances made after the transfer; for, according to the terms of the certificate, the indebtedness secured was that "of the person in whose name the stock stands on the books of the bank," and the plaintiff gave no notice of the transfer, but allowed his assignor to continue to draw the dividends and to act as owner. The equities of the bank were specially set up in the answer, and constitute an equitable defense to the action. The findings contain all the material facts. We therefore advise that the judgment and order be reversed, and the cause remanded, with directions to enter judgment for the defendant.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and cause remanded, with direction to the court below to enter judgment for the defendant.

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79 Cal. 140

GAGE *et al.* *v.* DOWNEY *et al.* (No. 12,377.)

(*Supreme Court of California.* June 5, 1889.)

In bank. On application for rehearing. For former opinion, see 19 Pac. Rep. 113.

Glassel, Smith & Patton and *Henry T. Gage*, for appellants. *Levi Chase, Bicknell & White* and *O'Brien & Morrison*, for respondents.

BEATTY, C. J. The rehearing is denied. The sentence "all the land set apart as a homestead to Warner and wife with other land is included in the patent to Warner" is stricken from the opinion. As to the defense of the statute of limitations, which it is claimed is found in favor of defendants, in our opinion, no adverse possession is found by the court in the finding referred to. The case in this respect is similar to Packard v. Johnson, 57 Cal. 182, where it was held that adverse possession was found, the court remarking as to the finding that, "while the facts found tended to prove adverse possession, yet the facts did not necessarily constitute adverse possession." It will be observed that the action was commenced against all the defendants, except the Merchants' Exchange Bank of San Francisco, within five years after the patent was issued, and so was in time. The statute of limitations did not then run against such defendants. As to the bank, as stated above, there is no finding of adverse possession by it.

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79 Cal. 439

OAKLAND PAVING CO. *v.* BAGGE *et al.*, two cases. (Nos. 11,678, 11,699.)

(*Supreme Court of California.* June 11, 1889.)

APPEAL—REVERSAL.

Where, in a suit on a street assessment, the judge finds the assessment void for want of sufficient publication of "notice of intention," which conclusion and judgment are conceded by respondent to be erroneous, and there is no reason to suppose the evidence would be different on a second trial, the court on reversing the judgment will remand the case, with instructions to render judgment for plaintiff.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; NOBLE HAMILTON, Judge.

These were two suits by the Oakland Paving Company against Bagge and others to recover on street assessments. Judgments for defendants, and plaintiff appeals.

Henry Vrooman, *J. C. Martin*, and *C. T. H. Palmer*, for appellant. *E. F. Preston*, for respondents.

FOOTE, C. In both of the above-styled causes the questions involved are the same, and a decision as to one is conclusive as to the other. The appeals were taken by the plaintiff from judgments rendered in favor of the defendants, and are here upon the judgment roll alone. There was no motion for a new trial in the court below. Upon the first call of one of the cases, respondents, who had not then filed any points or authorities, offered to allow the judgment to be reversed, and the cause to be remanded for a new trial. To this appellant would not consent, and filed additional points and authorities, urging a reversal of the judgment, and that the court below be directed to enter a judgment in its favor on the findings. This is resisted by respondents, on points and authorities filed in one of the causes, urging that the judgment should be reversed and cause remanded for a new trial. The action was upon a street assessment. The court below, from the findings, drew the conclusion of law that the city council of Oakland never acquired jurisdiction to order the street work on which the assessment was made, because of the want of sufficient publication of "the notice of intention."

This conclusion and the judgment are conceded by the respondents to be wrong upon the findings. The charge of fraud set up in the answer was abandoned, as the findings show, and there seems to be no question as to the regularity and sufficiency of the other proceedings subsequent to the publication of the "notice of intention," as was found by the court below. There is no reason whatever to suppose that the evidence upon the question as to how the publication was made would be different on a retrial from what it was before. The causes in hand are very similar to that of Dyer v. Chase, 57 Cal. 284, where the court below found that the board of supervisors had not acquired jurisdiction to order the work, but it also found all the facts as giving jurisdiction to the board. The appellate court reversed the judgment, with directions to the court below to enter a judgment for the plaintiff upon the findings, as prayed for in the complaint. And this was done within the rule laid down by the appellate court in Schroeder v. Versicherungs Gesellschaft, 60 Cal. 467, citing and affirming Griffin v. Marquardt, 17 N. Y. 28, "that extreme caution ought to be exercised in refusing new trials where judgments are reversed. The discretion of the appellate court should be exercised in that direction only in cases where it is plain, either from the pleadings or from the nature of the controversy, that the party against whom the reversal is pronounced cannot prevail in the suit." We think, therefore, that the judgments should be reversed, and the causes remanded, with directions to the court below to render judgments for the plaintiffs upon the findings, as prayed for in the complaint.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgments are reversed and the causes remanded, with directions to the court below to render judgments for the plaintiffs upon the findings, as prayed for in the complaint.

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79 Cal. 428

PEOPLE *v.* STEPHENS. (No. 20,492.)

(*Supreme Court of California.* June 3, 1889.)

LIBEL—CRIMINAL PROSECUTION—FORMER JEOPARDY.

Under Pen. Code Cal. § 687, providing that "no person can be subjected to a second prosecution for a public offense for which he has been prosecuted and convicted, or acquitted," an acquittal on an indictment for libel contained in a certain article, published at a certain time, in a certain paper, is a bar to a subsequent prosecution for libel contained in the same article, published at the same time, in the same paper, though the defamatory words alleged are not the same. MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

C. C. Stephens and *G. Wiley Wells*, for appellant. *George A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. Appellant was tried and convicted of libel, upon an information which alleged that he published of and concerning one Horace Bell that "it was a common report, at the time his wife went crazy, that it was because that, just subsequent to confinement, she detected him *in flagrante delicto* with a female negro servant." In addition to the plea of not guilty, the defendant pleaded once in jeopardy and former acquittal. On the trial the defendant offered to prove by competent evidence that he had been indicted, tried, and acquitted upon a charge of libel based upon the publication of the same article upon which the information in this case is based. To the introduction of such evidence the prosecution objected on the ground that it was incompetent, immaterial, and irrelevant. The objection was sustained, and the defendant excepted. The question presented by this exception is whether there may be as many prosecutions for libel maintained upon a single article, published in a single issue of a newspaper, as there are false and defamatory statements concerning a single individual in such article. So far as we know, this question has not heretofore arisen, or been passed upon by any court, in a case of libel. "No person shall be twice put in jeopardy for the same offense" is the language of the constitution. The Penal Code provides that "no person can be subjected to a second prosecution for a public offense for which he has once been prosecuted and convicted or acquitted." Pen. Code, § 687. The only question in this case is whether the second prosecution is for the same offense as the first. If so, it cannot be maintained. The first prosecution was for a libel contained in an article published by the defendant in a newspaper. The second prosecution is for a libel contained in the same article, and published in the same issue of the same newspaper as the first. The words alleged to be defamatory are not the same in both informations. If they were, the case would be a plain one. But the publication in both cases was one and the same act. "The act which is the essential element in the wrongs, slander, and libel is a wrongful publication of language." Townsh. Sland. & Lib. 121. The essential element of the offense was the same act in both cases. In Reg. v. Elrington, 9 Cox, Crim. Cas. 86, COCKBURN, C. J., said: "It is a fundamental rule of law that out of the same facts a series of charges shall not be preferred." Bishop says: "To give our constitutional provision the force evidently meant, and to render it effectual, 'the same offense' must be interpreted as equivalent to the same criminal act." 1 Bish. Crim. Law, § 1060. "The state cannot split up one crime, and prosecute it in parts. A prosecution for any part of a single crime bars any further prosecution based upon the whole or a part of the same crime." Jackson v. State, 14 Ind. 327. In State v. Lewis, 2 Hawks, 98, the first indictment was for the burglary accomplished by the actual commission of the larceny; and the conviction on it was for the larceny only. The second indictment was for the robbery, and it was held to be barred by the first. In State v. Cooper, 13 N. J. Law, 361, it was held that a defendant could not be convicted and punished for two distinct felonies growing out of the same, identical act, and when one is a necessary ingredient in the other, and the state has selected and prosecuted one to conviction. By the same act, and with the same intent, F. took a horse, wagon, and harness, the property of H. Two indictments were found against F. One for stealing the horse, the other for stealing the wagon and harness. On the trial for stealing the horse, F. pleaded not guilty, and was acquitted. This acquittal was held to be a good plea in bar against the indictment for stealing the wagon and harness. Fisher v. Com., 1 Bush. 211.

To an information charging the prisoner with having in his possession a forged bank-note or bill of the Troy Bank, with intention to alter and pass the same, and to defraud the said bank of Troy, he pleaded a former information filed against him for having in his possession a bank note of the Mechanics' Bank, with the intent to alter and pass the same, and to defraud said Mechanics' Bank. Upon which last information, the plea averred, trial had been had, the prisoner had been found guilty, and judgment thereon impended. To this plea there was a demurrer, and the court adjudged the plea sufficient. The court said, among other things, that the act of possessing the several notes was one and the same offense, as much as the act of stealing a number of articles at the same time and place, and the information might have specified each note which the prisoner had in his possession, as was done in the several cases cited in King v. Sutton, Cas. *t.* Hardw. 372. "Had that been done," said the court, "it would hardly be claimed that there could have been several punishments. The offense, then, is one and the same offense." State v. Benham, 7 Conn. 414. The whole matter published might have been set forth in the information, and, if it had been, no one would claim that there might have been several punishments, or that the acquittal on the trial of that information would not be a bar to a subsequent information for any defamatory matter contained in the article. The law does not permit a single individual act to be divided, so as to make out of it two distinct, indictable offenses. Drake v. State, 60 Ala. 43. Although, when a man has done a criminal act, the prosecutor may carve as large an offense out of the transaction as he can, yet he is not at liberty to cut but once. Here the essential ingredient of the offense was the publication of an article containing several alleged libels. There was but one criminal offense, and that cannot be split up and prosecuted in parts, without violating the rule of law "that a man shall not be twice vexed for one and the same cause." "There is," said PIERPOINT, C. J., in the case of State v. Smith, 43 Vt. 324, "considerable conflict in the authorities upon this subject, but we think the rule is now well established that, when one offense is a necessary element in and constitutes an essential part of another offense, and both are in fact but one transaction, a conviction or acquittal of one is a bar to the prosecution for the other." We think the court erred in not admitting the evidence offered to prove a former acquittal of the offense charged in the information in this case.

The other alleged errors are not, in our opinion, entitled to much consideration. The more serious of them are not well founded in fact. Under the circumstances, we do not feel called upon to discuss them *seriatim.* Judgment and order reversed.

We concur: BEATTY, C. J.; WORKS, J.; THORNTON, J.; PATERSON, J.

MCFARLAND, J. dissent. I do not think that appellant had any defense under the pleas of "once in jeopardy" and "former acquittal." If a man in one part of his newspaper says that a certain person is a thief, and, in another part, that he killed his mother, the two libels are just as distinct as are the crimes of larceny and matricide. Putting the two things under one head-line, or "article," makes no difference. If the two libels should appear in the same issue of the newspaper, there would be an identity of time of publication; but they would be distinct in every other respect. That identity of time would no more make the two libels one than would a unity of time alone make a joint tenancy at common law.

(79 Cal. 420)

CURDY v. BERTON. (No. 11,949.)

(*Supreme Court of California.* June 4, 1889.)

WILLS—TRUSTS.

Testatrix gave by will all her money and property in France to one B., to be distributed "according to private instructions I give him." At the same time she verbally instructed B. to distribute the property among certain relations in France. B. carried out his instructions. *Held*, in a suit by an heir to whom nothing had been left to have it declared that B. held the property in trust for all the heirs, and for an accounting and distribution, that, though the laws of California require a will to be in writing, yet equity would charge the legatee with a constructive trust in favor of the beneficiaries intended by the testatrix, and B. properly distributed the property in accordance with the instructions given him which he at the time promised to fulfill.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action by Frank Curdy against G. A. Berton, executor of Francis Berton, deceased, to declare a trust, and for an accounting. Judgment for defendant, and plaintiff appeals.

D. M. Delmas, for appellant. *D. W. Douthitt* and *Smith, Wright & Pomeroy*, for respondent.

MCFARLAND, J. Madeline Curdy died February 9, 1877, in Alameda county, Cal. She left a will duly executed, in which, after bequests to several persons, including the plaintiff herein, there occurs the following: "I give in trust to Francis Berton, now Swiss consul in San Francisco, all the moneys I possess in France, and principally my share of the Italian *rentes* deposited in the banking-house of Messrs. Hentsch, Lutscher & Co., of Paris, to be distributed according to the private instructions I give him." Berton was present when the will was made, and wrote it for the testatrix at her request; and at the time of the making of the will she verbally instructed him to distribute said property or its proceeds to certain relations and others in France, other than the plaintiff herein, and gave him an order for said property. The facts in proof show that he at least impliedly agreed to accept the trust. After her death, and before the commencement of this action, said Berton faithfully distributed said property in accordance with the said instructions of said testatrix. This action is brought by plaintiff, a brother of the deceased, and one of her heirs-at-law, to have it decreed that Berton held the legal title to said property in trust for the heirs of said deceased, for an accounting, and for the payment to him of his proportionate share of said property, with interest, profits, etc. Francis Berton died during the pendency of the action, and his executor, George A. Berton, was substituted as defendant. The court gave judgment for defendant, and plaintiff appeals from the judgment, and from an order denying a new trial.

Upon the main point in the case the position of appellant is, in brief, that, as the statute law of this state requires a will to be in writing, therefore, "where a testator devises property in trust to be applied to such uses as the testator has verbally specified to the devisee, the trust attempted to be created by parol fails, and the devisee takes the property in trust for the heirs of the testator." The contention of respondent is, in brief, that, independent of the statute of wills, where a testator bequeaths property in trust to a legatee without specifying in the will the purposes of the trust, and at the same time communicates those purposes to the legatee orally, or by unattested writings, and the legatee, either expressly or by silent acquiescence, promises to perform the trust, and the trust itself is not unlawful, there a court of equity will raise a constructive trust in favor of the beneficiaries intended by the testator, and will charge the legatee as a constructive trustee for them, upon the ground that the legatee will not be countenanced in perpetrating a fraud by encouraging the testator to make a bequest which would not otherwise have been made, and then refusing to execute his promise. We think that respondent's view of the law, as above stated, is correct. There are some cases which support the proposition of appellant, notably, the case of Olliffe v. Wells, 130 Mass. 221; but the weight of authority and the better reason are the other way.

Obviously, the clear intention of the testatrix, as expressed in the written will, was that the property in question should not go to plaintiff. He, however, says, in effect: "True, the property was not to come to me. It was given to Berton upon the understanding, between him and the testatrix, that it was to go to the benefit of certain other persons; but, as they cannot establish their rights as beneficiaries, according to the statute of wills, Berton must be held to be my trustee, against the intention of the testatrix. I stand upon what I claim to be the dry law." Evidently, in a doubtful case, no just impulse would move a court to lean towards a proposition involving such consequences; and, as the question is an open one in this state, we are at liberty to follow those authorities, and that line of reasoning which appear to us to be most in consonance with the true principles of equity and justice.

We find in the Case of O'Hara, 95 N. Y. 403, a very full statement of the considerations which, in our opinion ought to govern the decision of the case at bar. In that case the testatrix, by her will, practically disinherited her relations in favor of strangers, giving the bulk of her estate to three legatees, who were her lawyer, her doctor, and her priest. The will was attacked by the heirs, on the ground of want of testamentary capacity and undue influence. As there was considerable evidence to support these charges, the legatees finally, to establish some reasonable explanation of a diversion of the estate to strangers having influence from confidential relations, showed that they were not to have any beneficial interest in the estate, but were to devote it entirely to certain charitable uses, according to instructions given them by the testatrix at the time the will was made. It appeared, however, that these charitable uses were in direct violation of the statute law of the state. The heirs at law then began an action in equity to establish a trust, which, failing as to the intended beneficiaries on account of illegality, should result to them. The legatees then, although intending to carry out the wishes of the testatrix, stood upon their rights under the terms of the will, which upon its face gave them the property absolutely; denied that they had accepted any trust, or that any could be proven by extrinsic matter lying outside the will; and insisted that the property was theirs absolutely. The question thus presented was, in substance, the one presented here. The only difference is that in the O'Hara Case the instructions were in writing, while in the case at bar they were oral. But neither in the argument of counsel, nor in the opinion of the court, was there any distinction made between written and oral instructions or promises. The principles announced applied equally to both. There was no claim that the letter of instructions came within the rule that an extraneous paper may be incorporated into a validly executed will by a direct reference to it in the will itself. There was no reference whatever in the will to the letter. The court in the O'Hara Case, after stating that "the proof is uncontradicted that the testatrix made the residuary devise and bequest in its absolute and unconditional form in reliance upon a promise of the legatees to apply the fund faithfully and honorably to the charitable uses dictated in the letter of instructions," proceeds to discuss the question whether or not one of the legatees, McCue, expressly promised to accept the trust. After reviewing the evidence (which was somewhat contradictory) on that point, the court says; "Where, in such case, the legatee, even by silent acquiescence, encourages the testatrix to make a bequest to him, to be applied by him to the benefit of others, it has all the force and effect of an express promise. Wallgrave v. Tebbs, 2 Kay & J. 321; Schultz' Appeal, 80 Pa. St. 405. If he does not mean to act in accord with the declared expectation which underlies and induces the devise, he is bound to say so, for his silent acquiescence is otherwise a fraud. Russell v. Jackson, 10 Hare, 204." The court then proceeds to state the principles which should determine the main question under discussion, as follows: "If, therefore, in her letter of instruction the testatrix had named some certain and definite beneficiary, capable of taking the provision intended, the law would fasten upon the legatee a trust for such beneficiary, and enforce it, if needed, on the ground of fraud. Equity acts, in such case, not because of a trust declared by the testator, but because of the fraud of the legatee. For him not to carry out the promise by which alone he procured the devise and bequest is to perpetrate a fraud upon the devisor, which equity will not endure. The authorities on this point are numerous." (Here follows a long list of cases.) "The circumstances in these cases were varied and sometimes peculiar, but all of them either recognize or enforce the general doctrine. It has been twice applied in our own state. Brown v. Lynch, 1 Paige, 147; Williams v. Fitch, 18 N. Y. 546. In the last of these cases the making of a bequest to the plaintiff was prevented by an agreement of the father, who was next of kin, to hold in trust for the plaintiff; and the English cases were cited with approval, and the trust enforced. All along the line of discussion it was steadily claimed that a plain and unambiguous devise in a will could not be modified or cut down by extrinsic matter lying in parol, or unattested papers, and that the statute of frauds and that of wills excluded the evidence; and all along the line it was steadily answered that the devise was untouched; that it was not at all modified; that the property passed under it, but the law dealt with the holder for his fraud, and out of the facts raised a trust *ex maleficio*, instead of resting upon one as created by the testator. The character of the fraud which justifies the equitable interference is well described in Glass v. Hulbert, 102 Mass. 40. It was said to consist 'in the attempt to take advantage of that which has been done in performance or upon the faith of the agreement, while repudiating its obligation under cover of the statute.'" The other parts of the opinion discuss the question whether, as the charitable uses could not be enforced, because forbidden by the statute, the legatees could be held as trustees for the heirs, but that question does not arise in the case at bar.

We have thus referred at length to the O'Hara Case because it contains a lucid statement of the principles which apply to the case at bar, and for the additional reason that in the opinion of the court and the briefs of counsel nearly all the authorities bearing upon the question are cited. We also refer especially to the case of Williams v. Vreeland, 32 N. J. Eq. 135, which declares the doctrine above stated; and in the notes to which are collated extracts from about 40 different cases, all of which are confirmatory of said doctrine. See, also, Hooker v. Axford, 33 Mich. 453; In re Fleetwood, L. R. 15 Ch. Div. 594; In re Boyes, L. R. 26 Ch. Div. 531; and Riordan v. Banon, 10 Ir. Eq. 469. The cases cited will show that it is immaterial whether the instructions given by a testator are oral or in writing. Indeed, in the opinion of the court in the O'Hara Case, (above quoted,) where the phrase "lying in parol, or unattested papers" is employed, the word "parol" is evidently used in its usual meaning, as synonymous with "verbal" or "oral," and not in its broader meaning of "not under seal." The California cases of De Laurencel v. De Boom, 48 Cal. 581; Estate of Shillaber, 74 Cal. 144, 15 Pac. Rep. 453; and Estate of Brooks, 54 Cal. 475,—while in harmony with the principles above stated,—are not directly to the point involved in the case at bar. Our conclusion is that the court below correctly decided that Francis Berton, deceased, properly distributed the property in France, in accordance with the instructions given him by the testatrix when the will was made, and which instructions he, at that time, agreed to carry out. Of course, the case must be distinguished from one where a testator, intending to give certain property directly to a certain person, for that person's sole benefit, fails to designate in the will either the property or the person. In such a case no question of trust could arise. These views make it unnecessary to determine the other two points made by respondent: (1) That the order for the property in France, given by the testatrix to Berton at the time the will was made, constituted a transfer of the property *in præsenti;* and (2) that the action was barred by the statute of limitations. The judgment and order are affirmed.

We concur: THORNTON, J.; SHARPSTEIN, J.

(79 Cal. 433)

WALLACE *v.* MAPLES *et ux.* (No. 12,896.)

(*Supreme Court of California.* June 10, 1889.)

SET-OFF—VENDOR AND VENDEE—EJECTMENT.

1. Plaintiff agreed to convey certain land on payment to her of certain sums annually, as rent, and the taxes and assessments, and on the breaking and sowing of a portion of the land, and the payment of a gross sum at the end of the term. It was conceded in ejectment for the land that defendants had failed to pay the water assessments. *Held*, that it was no excuse for such failure that the water company was indebted to one of defendants, such claim being no set-off to the assessment against plaintiff.

2. The tender of all that was due, and payment into court, would not avail where defendants failed to break and sow the land, as required by the contract.

3. Evidence of what defendants had instructed their men to do if the weather changed, when the land, being dry, was not in condition to be plowed, was incompetent.

4. A question to defendants as to whether they had performed all the conditions of the contract was properly excluded, as calling for a conclusion.

5. The fact that defendants had made improvements on the land would not defeat recovery in ejectment.

In bank. Appeal from superior court, Tulare county; W. W CROSS, Judge.

A. B. Hunt and *P. D. Wiggington*, for appellants. *A. N. Drown* and *Oregon Sanders*, for respondent

WORKS, J. This is an action in ejectment. The defendants answered, denying the allegations of the complaint; and, by way of counter-claim, set up an equitable title to the land in controversy. The answer discloses about this state of facts: The respondent was the owner of five separate tracts of land. She leased four of these tracts to the appellant T. W. Maples for the term of four years, in consideration of which he agreed, in the contract of leasing, that he would sow certain named quantities of the land in certain designated crops, and pay certain assessments that were expected to be made against the respondent by certain water companies for water used on the land, and pay the state and county taxes. At the same time, the respondent executed to both of the appellants, who are husband and wife, an agreement to convey to the wife the other tract of land, above mentioned, on certain conditions to be performed. It was stipulated in said last-named contract: "Provided, always, that said parties of the second part shall and do yearly, on or before the last day of each year of said period, pay to said party of the first part the sum of $584, lawful money of the United States of America, and pay and discharge, as the same becomes due and payable, all state, county, and school-district taxes that may be levied or assessed upon said land during the period they occupy the same under this agreement; and provided, also, that the said T. W. Maples, one of said second parties hereto, shall, at all times, well and truly perform all the stipulations, promises, and agreements on his part contained in that certain written farming contract bearing even date with these presents, wherein the party of the first part hereto is the party of the first part, and said T. W. Maples is the party of the second part, and not otherwise." And upon said conditions being complied with, and the sum of $5,840 paid, the respondent bound herself that she would on the 1st day of October, 1888, convey the property to the wife by a good and sufficient deed. The appellants took possession of this last-named tract of land under said agreement to convey, and this action is to recover the possession thereof. The appellants alleged in their counter-claim that they had fully complied with the terms of the said contract on their part. Whether they had or not was the question litigated in the case. It was found against them by the court below. A new trial was denied, and they appeal. The main contention of the appellants is that the findings of the court, that the appellants had not complied with the terms of the "farming contract," as it is termed, in that the land was not cultivated as provided for, and the assessments for water and the taxes were not paid, are not sustained by the evidence. There was evidence sufficient to warrant the court in finding that the appellant T. W. Maples failed, without sufficient excuse, to break and sow a large part of the ground. It is conceded that the water assessments were not all paid. It appears that the appellant paid the greater part of the assessments, and he seeks to avoid the effect of a failure to pay the balance by showing that the water company was at the time indebted to him in a sum sufficient to make up the amount. But, conceding this, it furnished no excuse for a failure to pay an assessment which was against the respondent, not him, and against which his claim was not an offset. He should have paid the assessment and looked to the companies for the amount due him from them. As it was conceded that the respondent was the owner of the legal title to the property, the appellants were bound, in order to prevent a recovery, to make out a complete equitable title, and the right to possession thereunder. Blum v. Robertson, 24 Cal. 141; Love v. Watkins, 40 Cal. 565; Willis v. Wozencraft, 22 Cal. 615. This they failed to do.

It is urged that, as to the failure to make the payments referred to, time was not of the essence of the contract, and that, as it appears that the money was tendered soon after, and was tendered and paid into court, with the answer, this was sufficient. But, if this be conceded, it cannot aid the appellants' case, as the failure to comply with the contract in respect to the cultivation of the land could not be thus remedied, and such failure was sufficient to defeat their equity. There was evidence on the part of the appellants tending to show that a part of the land was not broken because of the extreme dry weather. The appellant T. W. Maples was asked this question in that connection: "What were your instructions, provided the rains should come, as to planting that land after that?" This was objected to, and the objection was sustained. We see no error in this ruling. The appellant was allowed to show that the season was a very dry one, as a reason for his having failed to plow the ground. What his instructions to his men were, in case the weather should change, was immaterial. The court also sustained an objection to this question: "State whether or not you have performed all the conditions and covenants mentioned in Exhibit 2." The ruling was right. The question called for a conclusion. It was asking the witness to decide a question that was for the court alone to determine from the facts proved. The appellant also offered to prove that the respondent had, before and after the making of the agreements above mentioned, verbally promised to let him have money to carry out the farming contract, and the evidence was excluded. There was no error in this ruling. The promise was not a part of the contract in controversy, nor did it appear to have been made upon any consideration. Therefore evidence to prove it was immaterial and irrelevant. There is objection made to a ruling of the court sustaining an objection to a question to the appellant, whether he did certain work "with regard to building ditches or conveying water upon the land," but the transcript does not show any such ruling by the court. It is contended that certain other findings of the court were not sustained by the evidence, but we think there was evidence to support them. Error is assigned on the ruling of the court against the right of the appellant to prove the indebtedness of the water companies to him, as an excuse for the failure to pay the balance of the assessments. For the reasons above stated, we think the ruling was correct. The fact that the appellants had sowed alfalfa and planted fruit trees on the land could not defeat a recovery in this action, it appearing that they had failed to make good their equitable title by a performance of their part of the contract. Willis v. Wozencraft, 22 Cal. 613, relied upon by the appellants, is not to the contrary, as in that case it was not claimed that the defendant had failed in any respect to comply with his contract, nor was the question of improvements involved in the case. Certain special issues were submitted to a jury, and answered in favor of the appellants. The court disregarded these findings, and rendered findings of its own in favor of the respondent. The legal title of the respondent having been admitted, the matter to be tried was purely equitable, and, being so, the findings of the jury were not binding on the court. Freeman v. Stephenson, 63 Cal. 499; Sweetser v. Dobbins, 65 Cal. 529, 4 Pac. Rep. 540. We think there was evidence sufficient to sustain the action of the court in disregarding the findings of the jury and rendering findings in favor of the respondent. Judgment and order affirmed.

We concur: THORNTON, J.; McFARLAND, J.; SHARPSTEIN, J.; PATERSON, J

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79 Cal. 442

McDONALD *v.* HANLON. (No. 11,832.)

(*Supreme Court of California.* June 11, 1889.)

UNLAWFUL DETAINER.

1. Civil Code Cal. § 821, provides that one to whom real property has been transferred or devised on which rent is reserved, or to whom such rent is transferred on default, shall be entitled to the same remedies as his grantor and devisor. Defendant was in possession of land under one G., the owner in fee, as tenant from month to month. G. rented to plaintiff *in præsenti* for five years, who never went into possession, but raised the rent, and notified defendant, who neither attorned to plaintiff nor paid the rent. *Held,* that plaintiff was a "successor in estate" of the landlord, and could sue in unlawful detainer, under Code Civil Proc. Cal. § 1161, subd. 1.

2. The lease being *in præsenti*, it was immaterial that plaintiff did not enter into possession.

3. Under Civil Code Cal. § 1111, providing that grants of rents are good without attornment, none was necessary by defendant.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Joseph Kirk, for appellant. *Thomas E. Curran* and *S. B. McKee, Jr.*, for respondent.

HAYNE, C. Action of unlawful detainer. Judgment for plaintiff. Defendant appeals. The defendant was in possession of the property as tenant from month to month under one Gallagher, who was the owner in fee. In this condition of affairs Gallagher made a lease *in præsenti* to the plaintiff for five years. The defendant did not attorn to the plaintiff, and the latter never entered into possession, but gave notice to defendant raising his rent, and, no rent having been paid, gave the three-days notice, and commenced the present action to have defendant removed from possession, and for the increased rent. No objection is made to the sufficiency of the notices. The sole point relied on to reverse the judgment is that the plaintiff is not the "successor in estate" of the landlord, within the meaning of subdivision 1, § 1161, Code Civil Proc.; and that if the plaintiff has any right he cannot resort to this kind of proceeding, but must pursue his ordinary remedies. We do not think that the point is well taken. A lease or estate for years is an estate in real property. Civil Code, § 761. And it is expressly provided that "a person to whom real property is transferred or devised, upon which rent has been reserved, or to whom any such rent is transferred, is entitled to the same remedies for the recovery of rent, for non-performance of any of the terms of the lease, or for waste or cause of forfeiture, as his grantor or devisor might have had." Id. § 821. No attornment by the defendant was necessary, (Id. § 1111,)[1] and, inasmuch as the lease to plaintiff was one *in præsenti*, the fact that he did not enter into possession is immaterial, (Potter v. Mercer, 53 Cal. 672.) We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

79 Cal. 475

HOFFMANN *v.* SUPERIOR COURT. (No. 20,479.)

(*Supreme Court of California*. June 18, 1889.)

WRIT OF REVIEW—RECORD.

Where the affidavits on which a petition for review is based state facts different from those in the record, the latter will prevail, and the affidavits will not be received to contradict, add to, or amend, the same, which can be done only by an application to the court below to correct the record.

In bank. Application for writ of review to the superior court, city and county of San Francisco; EUGENE R. GARBER, Judge.

J. B. Southard and *N. S. Wirt*, for petitioner. *J. D. Page*, Dist. Atty., for respondent.

PATERSON, J. The petitioner was convicted of a misdemeanor in the police judge's court of the city and county of San Francisco, and appealed to the superior court. The record shows that on March 10th the judgment appealed from was affirmed by the superior court, and that on March 15th, for good cause shown, the *remittitur* which had been issued in the case was recalled, and by stipulation in open court, on the part of the people by the district attorney, and on the part of defendant by her attorney, B. F. Napthaly, Esq., the cause was again submitted to the court for decision upon the statement on appeal, both parties expressly waiving a jury trial, and consenting that the cause might be tried by the court; that on the same day the defendant was tried by the court and found guilty as charged; that a motion for a new trial was made on various grounds, among others because the trial was had in the absence of defendant and of counsel employed by her; that on June 9th a motion for a new trial was denied, and on June 11th the court sentenced petitioner to pay a fine of $250, with the usual statutory alternative. The petitioner bases her application for a writ of review upon an affidavit in which she claims that the superior court granted a new trial on the 7th day of March, and that on the following day her counsel demanded a jury trial, which was refused; that on the 10th day of March, at the opening of court, her counsel appeared and again demanded a jury; that the court again refused the demand for a jury, and, against the objection and exception of counsel, immediately vacated and annulled the order granting a new trial, made on March 7th, and affirmed the judgment of the police court without allowing petitioner an opportunity to produce her witnesses. She claims, therefore, that all orders subsequent to the order alleged to have been made on the 7th of March are void, and that she is entitled to a new trial,—a jury trial.

It is sufficient to say that the record sent to us, and certified by the clerk, shows an entirely different state of facts from that set forth in the affidavits. We cannot receive the affidavits to contradict, add to, or amend, the record; for the latter imports absolute verity. If the minutes do not correctly show the proceedings had in the court below, an application should be made in that court to correct the same. It appears from the record that the petitioner had the benefit of a new trial after the judgment was affirmed. She certainly cannot complain of this. It further appears that she was represented by counsel, who stipulated with the district attorney that the case might be tried by the court without a jury. Here, again, the record is conclusive. Whether Napthaly was her attorney, authorized to represent her in that case, is not open to inquiry here. Nevertheless it appears that that question was raised on a motion for a new trial, and the order denying a new trial is, in effect, an adjudication that the record which recites that she appeared by her attorney is correct. The application for a writ of review is denied.

We concur: BEATTY, C. J.; THORNTON, J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.

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[1] Civil Code Cal. § 1111, provides that grants of rents are effectual without attornment by the tenants, but that no tenant who before notice of the grant has paid rent to the grantor shall suffer damage thereby.

79 Cal. 460

STONE *v.* McCANN, Judge. (No. 13,294.)

(*Supreme Court of California.* June 12, 1889.)

HOMESTEAD—APPRAISEMENT.

Petitioner, a judgment creditor, applied to the court for the appointment of appraisers to value land claimed as homestead, giving the notice, etc., required under Civil Code Cal. §§ 1245-1254. The court gave the homestead claimant five days to answer the petition. *Held*, in an application for *mandamus* to compel the court to proceed to a hearing forthwith, that, the Code making no provision for an answer, the five days' delay would be treated as a reasonable continuance to allow claimant to prepare for a hearing, and the writ would be denied.

In bank. Application for *mandamus* to compel F. J. McCann, judge of the superior court, Santa Cruz county, to proceed to the hearing of a petition by Frank M. Stone for the appointment in the matter of a claim of homestead.

Frank M. Stone, pro se.

PATERSON, J. The petitioner alleges that he recovered judgment against one Card in the superior court of the city and county of San Francisco, and procured an execution thereon to be levied by the sheriff of Santa Cruz county upon certain real estate situated in said county, upon which the wife of said Card had filed a claim of homestead; that, thereafter, he filed with the clerk of the superior court of the county of Santa Cruz a petition duly verified, setting forth the facts above stated, and the further fact that the homestead claim by Mrs. Card exceeds in value the sum of $5,000, and praying for the appointment of appraisers to appraise the value of the property and determine whether or not the land clained as a homestead could be divided without material injury; that due notice was given the homestead claimant of the filing of said petition, and the time of hearing thereon; that, on the day appointed for the hearing, the court allowed the homestead claimant five days in which to answer the petition, and refused to hear any testimony until such answer was filed. Upon these facts, and the provisions of sections 1245-1254 of the Civil Code, petitioner asks for a writ of mandate commanding the respondent to immediately proceed to a hearing of the petition for the appointment of appraisers. Under the provisions of the Civil Code for the appraisement of a homestead, no demurrer or answer to the petition is authorized. If the petition sets forth the facts required by the provisions of section 1246, and a copy thereof, with notice of the time and place of the hearing, has been served upon the homestead claimant at least two days before the hearing, it is the duty of the judge, upon proof thereof, to appoint three disinterested residents of the county to appraise the value of the homestead. We do not perceive, therefore, the object of the court in allowing time to answer the petition. In such cases, if the petition does not state the facts required by the statute, the court should refuse to entertain it; but if it does state the requisite facts, no plea should be allowed. The court should proceed as directed by the statute. The court and counsel for the homestead claimant seem to have proceeded upon the theory that an issue of fact might be framed and tried as in an action at law. This would lead to delays not contemplated by the statute—findings, motion for new trial, etc. No such procedure is authorized by the Code. Of course, the homestead claimant is entitled to a hearing; that is the object of the statute in requiring a notice; but no pleadings on the part of the claimant are necessary. If there is a judgment valid on its face, and the court finds that the execution has been levied on a homestead which appears to be of a greater value than $5,000, he cannot be injured until the court acts upon the report of the appraisers. When that report is filed, a time should be fixed for the hearing, due notice thereof given to the claimant, and the questions whether the homestead exceeds in value the sum of $5,000, and whether it can be divided without material injury, should be determined upon the evidence produced by the parties. These two questions are the only ones involved in the inquiry. They are the issues, and the only issues, and they are provided for by statute. No answer is necessary to raise them. They are the same in all cases under the provisions of the statute. Treating the order of the court allowing five days to answer as a mere continuance of the hearing, however,—and so it may be considered,—the writ herein prayed for should not be issued. The court was not compelled to hear the application of the petitioner immediately. The claimant was entitled to a hearing as well as the petitioner, and the court was clothed with the discretion to allow a reasonable time in which to prepare for the hearing. Five days was not an unreasonable delay. Furthermore, the time granted —the five days' time in which to answer— has expired. We must presume that the court will now, unless there be reason for further delay, proceed to a hearing. The writ, therefore, should not issue. We place our refusal to issue the writ, prayed for, upon the ground that the court did not abuse its discretion in continuing the hearing for five days, and regard the order allowing an answer to be filed as of no consequence. Application for the writ denied.

We concur: BEATTY, C. J.; MCFARLAND, J., SHARPSTEIN, J., WORKS, J., THORNTON, J.

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79 Cal. 463

BANK OF BRITISH NORTH AMERICA *v.* CAHN. (No. 11,625.)

(*Supreme Court of California.* June 13, 1889.)

BANKS AND BANKING—STATUTES—REPEAL BY IMPLICATION.

Act. Cal. April 1, 1876, provided that each banking company should file with the recorder of the county wherein its principal office was, certain sworn statements, showing the amount of capital employed by it, and the condition of its assets and liabilities, which statements should be published semi-annually in a local newspaper. Any bank failing to comply with these provisions was debarred from suing in any court of the state. Acts 1877-78, p. 740, created a board of bank commissioners, whose office was to be at San Francisco, and whose duty it was to investigate and report upon violations of the banking law. All banks were required to report to them semi-annually upon the state of their business, and these statements were to be preserved and kept for inspection. No mention was made of filing statements in the recorder's office, or of publishing them in newspapers. All inconsistent acts were repealed. *Held*, that there was no inconsistency in the acts, and that the former was not repealed by the latter.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by the Bank of British North America against Israel Cahn, a stockholder of the Pacific Jute Manufacturing Company, to recover money loaned by plaintiff to the last-named corporation. Judgment for defendant. Plaintiff appeals.

Sidney V. Smith, for appellant. *Jarboe, Harrison & Goodfellow*, for respondent.

FOOTE, C. The plaintiff, a banking corporation, loaned a large sum of money to another corporation, in which the defendant was a stockholder. A portion of that sum remaining unpaid, the plaintiff brought this action to recover from the defendant, as a stockholder in the corporation which had borrowed the money, his proportionate share of the indebtedness. An answer was filed, alleging, by way of defense, that the plaintiff had not complied with the provisions of an act of the legislature of the state of California, approved April 1, 1876, entitled "An act concerning corporations and persons engaged in the business of banking." The delinquency of the plaintiff being stated to consist in its failure "to publish in a newspaper, or any newspaper, or to file in the recorder's office of the city and county of San Francisco, or in the office of any recorder, a sworn statement, or any statement, of the amount of capital actually paid into said corporation, or into such banking business," and that at all those times the plaintiff had further failed to so publish or file for record "a sworn statement, or any statement, of the actual condition and value of its assets and liabilities, or where said assets are situated." The plaintiff demurred to the answer as not showing facts sufficient to constitute a defense. The demurrer was overruled, and a trial had by the court without a jury. The findings of fact are to the effect that all the allegations of the complaint and answer are true. The conclusion of law is that defendant is entitled to judgment in his favor. From the judgment made and entered in the premises this appeal is taken.

The appellant contends for a reversal of the judgment on the ground that the act of April 1, 1876, with which the plaintiff did not confessedly comply, and by section 3 of which it was debarred from the right to maintain its action, is repealed by the act creating a board of bank commissioners, (St. 1877-78, p. 740,) the point made on this contention being that "when a later statute covers the whole ground of a former one, the latter repeals the former." In Railway Co. v. U. S., 127 U. S. 409, 8 Sup. Ct. Rep. 1194, Mr. Justice FIELD says: "When there are two acts or provisions of law relating to the same subject, effect is to be given to both, if that be practicable. If the two are repugnant, the latter will operate as a repeal of the former to the extent of the repugnancy; but the second act will not operate as such repeal merely because it may repeat some of the provisions of the first one, and omit others, or add new provisions. In such cases the later act will operate as a repeal only where it plainly appears that it was intended as a substitute for the first act. As Mr. Justice STORY says, it 'may be merely affirmative, or cumulative, or auxiliary.' Wood v. U. S., 16 Pet. 342-363." The legislature, in passing the later act, evidently had the question of repeal under consideration, and gave expression to the extent of its intention in that regard, in section 21 of the act, which shows the repeal of the former acts, only to be "in so far as they are inconsistent" with the provisions of the later act. The provision for publication in each particular country, provided for in the act of 1876, is not inconsistent with any of the provisions of the "act creating a board of bank commissioners," etc., of March 30, 1878. There is nothing in section 9 of the act last passed which is inconsistent with the provisions of section 1 of the act of 1876, in reference to filing in the recorder's office of the county where the principal office of the corporation may be situated, a sworn statement of the amount of capital actually paid into such corporation, and the publication of the same in January and July in at least one newspaper published in the county, etc. Nor are the provisions of section 2 of the same act, requiring publication in a newspaper and filing in the recorder's office a "sworn statement of the actual condition and value of the assets and liabilities," and where situated, of the "corporation" or "persons doing a banking business in this state," repealed by section 9 of the act of 1878, which requires a report twice in each year, in January and July, to be made to the "bank commissioners." Nor is section 3 of the act of 1876, which denies to such corporations or persons as shall fail to comply with the provisions of the act the right to "maintain any action or proceeding in any court of this state" until they shall have filed the statements provided for and otherwise complied with the act, inconsistent with any of the provisions of the latter act. The last act is evidently not a substitute for the first act, the main purpose of which was to afford information to all concerned in the immediate locality especially of the condition and standing of banking corporations and persons engaged in such business. The later act provides a supervision of all "banks, saving banks, savings and loan societies, or other society, association, company, or institution," etc., by the state, through a board of bank commissioners. It requires, among other things, thorough investigations into the affairs of banks, banking corporations, etc., by officers appointed for that purpose. If the commissioners, upon examination, ascertain that a bank is violating any of the provisions of section 11 of the later act, they shall communicate with the attorney general, and have the remedies applied which the section, supra, authorizes. The report and statements to be made by such corporations or associations are to be made to the bank commissioners, for their information, that they may the better be enabled to perform the functions and duties appertaining to their office, and the more effectually protect the interests of those dealing with such institutions. The first act, as we have before seen, was not so broad in its nature. It was for the benefit mainly of those locally interested, by bringing the necessary information to their immediate attention and knowledge, by local publication and recording. The provision in the former statute, relating to filing statements in the recorder's office, and publishing the same in a newspaper published in the county where the principal office of the corporation is situated, etc., is not to be found in the later statute, nor is any mention made of it. By section 1 of the later act the office of the commissioners with whom the statements are to be filed is in San Francisco, and by section 15 of the same act such statements are to be kept on file there for public inspection. This certainly is no substitute for the recording of such statements in the recorder's office of the proper county, as contained in the act first passed. The first act provides for local publication, also; the second act does not, and provides no substitute for such publication. Our conclusion is that there is no repeal of the first act by the second in the respects contended for, and we advise that the judgment be affirmed.

We concur: VANCLIEF, C., GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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79 Cal. 477

LORD *v.* DUNSTER. (No. 13,084.)

(*Supreme Court of California.* June 18, 1889.)

CONSTITUTIONAL LAW—CONSTRUCTION—ELECTIONS—CONTESTS—RES ADJUDICATA.

1. Before the adoption of Const. Cal. 1879, art. 6, § 4, which gives the supreme court jurisdiction of appeals in a number of cases at law, and other cases, special proceedings not being therein enumerated, the same provisions were substantially contained in the constitution of 1863. Under this constitution it was repeatedly held that an appeal to the supreme court would lie from judgments in special proceedings, and after the adoption of the constitution of 1879 these rulings were frequently followed. Code Civil Proc. § 1126, allows an appeal from the superior court to the supreme court in election contests. *Held*, in view of the length of time during which the courts and legislature had construed the constitution as allowing appeals from judgments in special proceedings, that the section mentioned was constitutional.

2. In a contested election for sheriff, defendant had been certified as elected by a majority of 58 votes. The recount made under direction of the court showed no material change, except in one precinct, where it showed a difference, in favor of contestant, of 132 votes out of a total vote of 315. This result was announced on Saturday, and on Monday, before a decision was made, defendant moved a continuance, and presented the affidavit of the three commissioners of election at that precinct, stating that steps were being taken to discover the authorship of the fraud. Accompanying it was a certificate signed by more men, who claimed to have voted for defendant, than the recount showed him to have received votes; and the affiants alleged that they could procure many more signatures, and the personal attendance of these voters, all whom had stated that they would swear that they voted for defendant. It was impossible to have procured the attendance of these witnesses without an adjournment of the case. *Held*, that the court erred in refusing an adjournment.

3. Such evidence is competent on the issue as to whether the officers conducting the election were guilty of fraud; as the fact that the ballots were changed after they were cast tended to disprove the inference of fraud, arising from the result of the recount.

4. A dismissal of a prior contest, before citation was served on defendant, is not a *retraxit*, and is no bar to a subsequent contest.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Contest by George Lord for the office of sheriff of Nevada county, to which G. W. Dunster had been declared elected. Judgment for contestant, and defendant appeals.

Thomas S. Ford, *Crittenden Thornton*, and *F. H. Merzbach*, for appellant. *Fred Searles* and *George L. Hughes*, (*H. L. Gear*, of counsel,) for respondent.

PATERSON, J. Plaintiff and defendant were candidates for the office of sheriff of Nevada county at the general election held in November, 1888. The returns, as canvassed by the board of supervisors, showed that Dunster had received a majority of 80 votes, and a certificate of election was issued to him. This proceeding was commenced by plaintiff to contest the election and cancel the certificate of defendant on the ground that the judges of election in several precincts had, through negligence and malconduct, made incorrect returns, and had counted and tallied votes for Dunster which had been cast for Lord. A special session of the court was ordered for December 27, 1888, a citation was issued and served, and defendant answered, denying specifically the allegations of plaintiff's statement of contest, and pleading a former judgment in a proceeding commenced by plaintiff for the same relief and on the same grounds. The trial commenced on December 27th, was continued to Friday, December 28th, concluded on Saturday, December 29th, and taken under advisement until Monday, December 31st. Upon the convening of court on Monday morning a motion for continuance was made, which we shall consider further along. At the threshold of our consideration of the appeal, respondent makes an objection, challenging the jurisdiction of this court, and claiming that there is no warrant in the constitution for an appeal from the superior court on this or any other contested election case; that it is a "special proceeding," not included in the "cases at law" of which this court is given appellate jurisdiction by the constitution, and that the act of the legislature providing for an appeal in cases of this kind (section 1126, Code Civil Proc.) is void. He concedes that "the mere classing of a civil action under the head of special proceedings in the Code is not absolutely determinative of jurisdiction, * * * and that, unless it can be shown that an election contest is a special case in its essential nature as distinguished from any case at common law, or remedy known to its frame-work, objection to the jurisdiction of this court cannot be sustained." In support of his contention that it is a special statutory proceeding as distinguished from a "case at law," and particularly as distinguished from the common-law writ of *quo warranto*, he cites, among others, the following cases: Dickinson v. Van Horn, 9 Cal. 207; Saunders v Haynes, 13 Cal. 152; Dorsey v. Barry, 24 Cal. 449; Casgrave v. Howland, Id. 457; Norwood v. Kenfield, 34 Cal. 332; Keller v. Chapman, 34 Cal. 635; Houghton's Appeal, 42 Cal. 56; Bixler's Appeal, 59 Cal. 554.

It must be admitted that the decisions bearing upon the question what are special cases and proceedings are "incongruous mixtures of opinion." Thus, when the authority of the county court to hear and determine a case of this kind under the constitution of 1862 was challenged on the ground that it was a "case at law" within the meaning of article 6, § 6, the court decided that the proceeding was not according to the course of the common law, but gave new rights and remedies, and was a "special proceeding" over which the county court had jurisdiction, (Saunders v. Haynes, supra;) and this construction was followed through a long line of cases without dissent, and as long as the county court existed. When the jurisdiction of the supreme court was challenged on the ground that it was "a special proceeding," and not included in "cases in equity," "cases at law," or "cases arising in the probate court," to which the appellate jurisdiction of the supreme court was limited under the constitution of 1862, the court held, basing its conclusion largely upon the rule of construction, *contemporanea exposito est fortissima in lege*, that it was the intention of the people to give an appeal from judgments of the county court in such cases, and that the supreme court had jurisdiction. Knowles v. Yates, 31 Cal. 82. This case was followed in Day v. Jones, 31 Cal. 261, and approved in Railroad Co. v. Galgiani, 49 Cal. 140. So far as the appellate jurisdiction of this court in contested election cases is concerned, the law as laid down in Knowles v. Yates has stood unquestioned until now, with the exception of some criticisms upon it in one of the concurring opinions in Houghton's Appeal, 42 Cal. 56, although about 20 of such cases have been before it. When the constitution of 1879 was framed and adopted, decisions in 10 of such cases had followed Knowles v. Yates into the reports of this court, and in none of them was the question of jurisdiction raised or considered. Under these circumstances, and in view of the fact that there is nothing in the language of the constitution of 1879 making the original jurisdiction of the superior court final or conclusive to any extent greater than was that of the county court in such cases, or restricting the right of appeal to this court, we do not feel called upon to say whether the reasoning of the court in Knowles v. Yates is sound. It is sufficient to say that the conclusion therein reached has been sanctioned by long acquiescence on the part of the legislature and the courts. It has been decided that "a contemporaneous exposition, even of the constitution of the United States, practiced and acquiesced in for a period of years, fixes the construction." 1 Kent, Comm. 465, note; Packard v. Richardson, 17 Mass. 143; Curtis v. Leavitt, 15 N. Y. 217; People v. Fitch, 1 Cal. 523; Civil Code, § 3535. When the framers of the constitution employ terms which have received judicial interpretation, and have been put into practice under a former constitution, so as to receive a definite meaning and application, it is safe to give them the signification which has been sanctioned by such interpretation, unless it is apparent from the language used that a more general or restricted sense was intended. In determining the meaning of a constitutional provision it will be presumed that those who framed and adopted it were conversant with the interpretation which had been put upon it under the constitution from which it was copied, and this is the rule even as to provisions taken from the constitutions of other states,—the judicial construction placed upon them in the states from which they are taken will be followed by the courts in the state which adopts them. Daily v. Swope, 47 Miss. 367; End. Interp. St. § 507. Under the constitution of 1863 the supreme court had appellate jurisdiction "in all cases in equity; also in all cases in law which involve the title, etc.; also in all cases arising in the probate courts." The constitution of 1879 gives it appellate jurisdiction "in all cases in equity except such as arise in justices' courts; also in all cases at law which involve the title, etc., [same as in constitution of 1863;] also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law." These provisions, so far as they affect the question before us, are the same in both constitutions. There is certainly nothing in the language to indicate any intention of limiting or restricting the right of appeal to any less number of cases than the court had jurisdiction of under the former constitution. The fact that four classes of cases are specially named in the latter, and only one in the former is immaterial. It is not the enumeration of cases which determine whether they are "special proceedings," but the nature of the remedy and the relief afforded. Neither Houghton's Appeal nor Bixler's Appeal were contested election cases, and the exigencies of this case do not require us to approve or disapprove what was said therein. We conclude, therefore, that we have no right to decline to exercise jurisdiction of the appeal.

The court erred in denying the motion for a continuance made on the opening of court Monday morning, and before a decision was made in the case. At the conclusion of the recount under the direction of the court, it appeared that Lord had received 2,114 votes and Dunster 2,056 votes, giving Lord a majority of 58 votes. No material change was made by the recount except in Boston Ravine precinct. The official returns of the board of supervisors gave Lord 140 votes in this precinct and Dunster 175 votes, a majority of 35 votes for Dunster. The recount of this precinct in court gave Lord 206 votes and Dunster 109 votes, a majority for Lord of 97 votes. Here was a difference of 132 votes in one precinct. In support of his motion to reopen the case, and for a continuance, defendant filed an affidavit signed by Wiley, Morateur, and Mulroy, in which it was stated that they had acted as members of the election board of said precinct; that, since the adjournment of the case on Saturday, a meeting of the citizens of Boston Ravine precinct had been held for the purpose of ascertaining who had perpetrated the fraud; that the citizens of the precinct were greatly surprised by the result of the recount, and in the interests of public justice wished to ascertain who has committed the fraud; that affiants were authorized to get the signatures of all persons who would certify that they had voted for Dunster, and that 139 voters of the precinct had signed a certificate to the effect that they had voted for Dunster for the office of sheriff; that, if granted further time they could obtain many more signatures to the certificate, and the personal attendance of all persons who had signed the certificate, to testify that they had voted for Dunster, as they had been informed that they would be required to give evidence in court of the facts therein stated, and all had expressed a willingness to swear to the same. Attached to the affidavit was the certificate signed by 139 voters, in which they stated that they had voted for Dunster at the general election held November 6, 1888. If the facts stated in that affidavit were true, if, in fact, 139 electors in that precinct voted for Dunster, he received a majority of all the votes cast in the county, and was elected, because it was proved during the trial that, in the entire county outside of Boston Ravine precinct, Lord had received 1,908 votes, and Dunster 1,947 votes. The showing was so strong, we think the court abused its discretion in refusing a continuance. A postponement was requested only until Wednesday, January 2d. Tuesday being New Year's day, and a legal holiday, the postponement, if granted, would have been for one day only. It was made clear to the court that some one had committed a gross fraud. Either the officers of election had been guilty of a felony in conspiring together to defeat the will of the people, or a correct canvass of the votes had been falsified by a felonious tampering with the ballots which were returned to the county clerk. As stated in Minor v. Kidder, 43 Cal. 236: "It is the wholesome purpose of the statute to invite inquiry into the conduct of popular elections. Its aim is to secure that fair expression of the popular will in the selection of public officers, without which we can scarcely hope to maintain the integrity of the political system under which we live. * * * The investigation proposed is one in which the public at large are deeply concerned. It necessarily involves a question of broader import than the mere individual claim of a designated person to enjoy the honors and emoluments of the particular office brought directly in contest. * * * The public interests imperatively require that the ultimate determination of the contest should in every instance, if possible, reach the very right of the case." As in divorce cases, a judgment cannot be taken by default. Searcy v. Grow, 15 Cal. 117. It cannot be said that no diligence had been shown when it appeared that the affiants had obtained the signatures of 139 electors between the adjournment of court on Saturday afternoon and Monday morning at 10 o'clock. It would have been impossible for the defendant to have issued and served 139 subpœnas without asking for a postponement. The trial commenced on Thursday and ended on Saturday.

The contention of respondent that the testimony proposed was not within the issues is not well taken. The case was tried upon the theory that the issue included the question whether the ballots had been altered. Counsel for appellant stated during the trial that he desired a full investigation of the case. The fact that the evidence of a change in the ballots would tend to show that some one had committed a fraud does not destroy its admissibility to disprove plaintiff's charge that the officers had been guilty of malconduct. The ballots on their face show that plaintiff's allegation that the officers of election had been guilty of malconduct was true; that the votes actually cast for Lord had not been counted by them. Evidence that the ballots had been changed after the officers counted them was proper in rebuttal of plaintiff's evidence. Other objections made to the continuance are equally groundless.

The dismissal of the prior contest was made by plaintiff's attorney before the citation was served upon defendant, and before any appearance was made therein. It did not operate, therefore, as a *retraxit*, and is no bar to this proceeding. Davenport v. Turpin, 43 Cal. 597; McCreary v. Casey, 45 Cal. 128. The appellant makes other points against the validity of the judgment, but we find nothing in them calling for a reversal. For the error in refusing to grant a continuance, however, the judgment must be reversed, and the cause remanded for a new trial. It is so ordered.

We concur: BEATTY, C. J.; WORKS, J.; MCFARLAND, J.; SHARPSTEIN, J.

79 Cal. 472

WRISTEN *v.* DONLAN. (No. 13,070.)

(*Supreme Court of California.* June 17, 1889.)

ROAD OVERSEERS—ELIGIBILITY.

Defendant was a resident of the town of A., incorporated under act Cal. 1856, authorizing the trustees, among other things, to lay out and repair streets, etc., and levy taxes for payment thereof, but not compelling them so to do. Pol. Code, § 2641, provides for dividing counties into suitable road-districts. Section 4102 provides that no person shall be a district officer who is not an elector of the district. Act 1883, relating to highways, (section 2,) provides that no incorporated town in which improvements in the streets are done under any law relating to street work shall belong to a road-district. *Held*, in a suit to contest defendant's eligibility as road overseer in a district including the town of A., that the burden was on contestant to show that the town of A., being incorporated, did work on the streets under a law relating to street work, and was therefore improperly included in such district; and, not having done so, it would be assumed that the town was properly included, and respondent was an elector in the district, and eligible.

Commissioners' decision. In bank. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Proceeding by A. C. Wristen to contest the election of Peter Donlan as road inspector. Wristen appeals from a judgment for defendant.

Chase & Chase, for appellant. *G. W. Bowie* and *W. S. Tinning*, for respondent.

BELCHER, C. C. An election for road overseer in road-district No. 1 of supervisor district No. 5, in Contra Costa county, was held on the 6th day of November, 1888. The votes were afterwards canvassed by the board of supervisors, and the respondent was declared duly elected to the office. This proceeding was commenced to contest the respondent's right to hold the office, on the ground that he was, at the time of the election, a resident of an incorporated town, and therefore not eligible. The court found that at the time of the election respondent was a resident of the town of Antioch; that the town was incorporated and was within the said road-district; that respondent was an elector of the district, and was duly elected road overseer thereof; that there was no evidence that the board of trustees of the town, if there were any, ever laid out or accepted any streets or collected any taxes or money, and expended the same on any streets within the incorporation; and, as conclusions of law, that respondent was eligible to the office, and was entitled to hold the same. Judgment was accordingly entered dismissing the proceeding, and from that judgment the appeal is prosecuted, and rests on the judgment roll.

It is admitted that the town of Antioch was incorporated in 1872, under the provisions of the act passed in 1856, "to provide for the incorporation of towns." St. 1856, p. 198. By this act the town trustees were clothed with power, under proper ordinances to be enacted by them, to lay out, alter, keep open, and repair the streets and alleys of the town, and to levy and collect taxes, licenses, and fines, and use the money for such purpose; but there is nothing in the act compelling them to lay out, open, or repair any streets, or to levy or collect any taxes. Section 4102 of the Political Code provides that "no person is eligible to a district or township office who is not of the age of twenty-one years, a citizen of the state, and an elector of the district or township in which the duties of the office are to be exercised or for which he is elected." Section 2 of the act passed in 1883, amending the chapter of the Political Code on highways, provides that "all laws concerning roads and highways in conflict with this act, and all laws applicable to particular counties of this state concerning roads and highways, are hereby repealed: * * * provided, further, that nothing herein contained shall be deemed to authorize the levy or collection of a road poll-tax, or property road-tax, within municipalities existing under the laws of this state, wherein work and improvements upon the streets is done by virtue of any law relating to street work and improvements within such municipality, nor shall any such incorporated city or towns be by the supervisors of the county included or embraced in any road-district by them established under this act." St. 1883, p. 20. And section 2641 of the Political Code provides that "the board of supervisors of the several counties shall divide their respective counties into suitable road-districts." In view of the foregoing statutory provisions, the question is, was the respondent rendered ineligible to the office of road overseer because he was a resident of the incorporated town of Antioch? It is clear that he was not eligible to the office unless he was an elector of the road-district. Could the town be included or embraced in the district? Under section 2 of the act of 1883, above cited, no incorporated city or town, "wherein work and improvements upon the streets is done by virtue of any law relating to street work and improvements within such municipality," could be included or embraced in a road-district. But this clearly does not forbid—on the contrary, by implication, it expressly permits—the board of supervisors, in dividing a county into road-districts, to include in them incorporated towns in which no work is done upon the streets by virtue of any law relating to street work. Now, if Antioch was of the class of towns which could not be so included, the burden was upon the contestant to show that fact. But this, as we have seen from the findings, he wholly failed to do. We must assume, therefore, in the absence of any showing to the contrary, that the town of Antioch was rightly included in and made a part of the road-district, and that respondent was an elector in the district, and was eligible to the office of road overseer. The judgment should be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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79 Cal. 468

TAYLOR *et al.* *v.* OPPERMAN. (No. 11,954.)

(*Supreme Court of California.* June 14, 1889.)

CONVEYANCES TO WIFE.

Certain land was conveyed to a husband and wife. The former executed a quitclaim deed of the same to his wife. The wife died intestate, leaving a minor child. The father then conveyed the land to a third party. *Held*, that the conveyance to the wife by the husband vested her with the entire title, and the child had an interest in the land, as an heir of her mother, which was not divested by the later deed of her father.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

A. D. Splivalo, for appellant. *J. C. Bates*, for respondents.

BELCHER, C. C. The facts involved in this case are as follows: In February, 1858, the then owner of certain real property in the city of San Francisco conveyed the same to Patrick Fay and Anne Fay, his wife, for the expressed consideration of $1,250. In January, 1864, the husband executed to the wife a quitclaim deed of the same property, and the deed contained this clause: "To have and to hold to her sole use, all and singular, the above mentioned and described premises, together with the appurtenances, unto the said party of the second part, her heirs and assigns, forever." The consideration expressed in the deed, and acknowledged to have been received by the party of the first part from the party of the second part, was $500. The parties lived together on the premises from the time of their purchase, in 1858, until December, 1870, when the wife, Anne Fay, died intestate, leaving her surviving her husband and four children, of whom the plaintiff, Emily Taylor, then five years of age, was one. Five months later, in May, 1871, Patrick Fay conveyed the premises to Christian Opperman by a grant, bargain, and sale deed, which expressed a consideration of $2,200. There was never any administration upon the estate of Anne Fay. In September, 1885, the plaintiffs, Emily Taylor and her husband, commenced this action against Christian Opperman, who has since died, to recover an undivided one-sixth part of the property, with rents and profits. The complaint alleged that the said Emily acquired title to the demanded interest by descent from her mother, and was the owner, and entitled to the possession, thereof. The answer denied her ownership, and set up the statute of limitations. The court gave judgment according to the prayer of the complaint, from which, and from an order denying a new trial, the defendant has appealed.

No point is made for appellant on the statute of limitations, and it seems, therefore, to be conceded, as we think it must be, that the court properly found that the action was not barred.

It is claimed, and this is the only point made, that under our laws all property conveyed to husband or wife, after their marriage, is presumed to be community property, and that this is so whether the property be conveyed by one of the spouses to the other, or by a third party to one or both of them. And it is said that the property in question, on being conveyed to Patrick and Anne Fay, in 1858, became their community property, and that the subsequent deed from him to her, in the absence of proof that it was intended as a gift, or that the consideration therefor was paid by her out of money belonging to her separate estate, did not change the character of the property or affect it in any respect. Attention is also called to the fact that the deed was a quitclaim; but there is nothing in that. Quitclaim deeds are as effectual to pass whatever title the grantor has as any other deeds. Graff v. Middleton, 43 Cal. 341; Frey v. Clifford, 44 Cal. 343; Rego v. Van Pelt, 65 Cal. 254, 3 Pac. Rep. 867. If appellant is right in his contention as to the deed of January, 1864, then the making of the deed was a perfectly idle and useless ceremony. It is true, as claimed, that when a stranger conveys property to a husband or wife the property is presumed to be community property; but the question is, does the same presumption arise when the husband conveys to his wife? A very similar case to this was once before the supreme court of Texas, where the law in relation to the property rights of husband and wife is almost the same as ours. In that case two lots of land were conveyed to John Farrell and his wife, and were community property. Subsequently Farrell executed a deed for the lots to his wife. The deed expressed a consideration of $100, but no consideration was in fact paid. Afterwards the wife died, leaving one child, who was the plaintiff in the action; and after the wife's death the husband sold and deeded the lots to the defendant in the action. The action was brought to determine the plaintiff's title, and recover the lots. The court said: "It is not questioned that, under our law, the husband may make a gift or grant of property to his wife by conveyance to her directly, without the intervention of trustees. It has been so held in repeated decisions. * * * In the absence of any evidence of intention outside of the deed, it must be taken as evidencing the intention which upon its face it imports; that is, to convey to the wife the estate of the husband in the property. It must have been intended to have some operation upon the estate of the grantor, and that must be taken to have been to change the estate from community into separate property of the wife, in the absence of evidence of any other or different purpose in the making of the conveyance. To deny it that effect would be to render the deed wholly inoperative and void. The grantor could have made an effectual conveyance to a stranger of the whole estate, and it is not perceived that there is any legal impediment to his conveying to his wife his interest, thereby investing her with the whole estate. * * * There can be, in this case, no presumption, as in the case of a purchase from a stranger in the name of the wife, that funds of the community were employed in making the purchase, and therefore it is community property. But the conveyance being of community property of the parties between whom the conveyance is made, *prima facie*, the presumption must be that it was intended to change its character from community to the separate property of the wife. The subsequent sale of the property by the husband cannot be deemed sufficient to rebut this presumption." Story v. Marshall, 24 Tex. 305. And in Platt, Prop. Rights Mar. Wom. § 34, the law is thus stated: "The *prima facie* presumption arising from a deed of the husband to the wife of community real property is that it was intended to change its character from community property to the separate property of the wife, and that the deed is effectual against a subsequent purchaser." In Burkett v. Burkett, 20 Pac. Rep. 715, it was held by this court that a declaration of homestead by a husband on his separate property vests a joint title thereto in himself and wife, and a subsequent conveyance of the property by him to his wife is valid, and passes a complete title to the wife subject to the homestead.

We think the law correctly declared in the Texas case above cited, and that the same rule should be applied here. We therefore advise that the judgment and order appealed from be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed

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79 Cal. 443

CASTRO *v.* BARRY. (No. 11,855.)

(*Supreme Court of California.* June 11, 1889.)

QUIETING TITLE—PLEADING.

1. Code Civil Proc. Cal. § 738, provides that an action may be brought by any person against an-

other who claims an estate or interest in real property adverse to him for the purpose of determining such adverse claim. Sections 3412, 3413, Civil Code, provide for the bringing of an action to cancel instruments which may be deemed a cloud upon title making an exception in the case of instruments void on their face. *Held*, that the two actions are different in purpose, and that the former action may be brought to determine any adverse claim whatever, and the plaintiff need not set forth the nature of defendant's claim.

2. In an action to determine an adverse claim plaintiff alleged that defendant's claim was founded on a mistake in the description of a deed, the description calling for the course "down the said slough north 72° west," when the course should have been "north 12° west." *Held*, that such allegation merely showed that defendant's claim was based on a harmless error of description, as the wrong course was controlled by the direction, to go "down the said slough" to a specified point, and hence defendant could not contend that the complaint was really one to reform a deed.

Commissioners' decision. Department 2. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

Wm. H. Webb, for appellant. *Geil & Morehouse*, for respondent.

HAYNE, C. The complaint in this case alleged in substance that the plaintiff was the owner of certain real property; that the defendant claimed an interest therein adverse to the plaintiff; that such claim was without right; and that the defendant had no right, title, or interest whatever in the property. There were other allegations, which will be noticed below. The prayer was that defendant be required to set forth the nature of his claim; that it be adjudged to be void; and that defendant be enjoined from asserting it. The trial court found the above allegations to be true. Judgment was entered for the plaintiff, and the defendant appeals.

It is contended for the appellant, in the first place, that "an action to quiet title, or to remove a cloud from title, will not lie where the facts alleged, if true, would not legally affect the plaintiff's title." But in this the learned counsel overlooks the distinction between actions to determine adverse claims, which are provided for by the Code of Civil Procedure, and which in this state are commonly referred to as "actions to quiet title," and suits to have an instrument canceled, or adjudged to be void, which are usually called "actions to remove a cloud." Suits to have an instrument canceled or adjudged to be void were quite common in the old chancery practice, and constituted one of the applications of the principle *quia timet*. 2 Story, Eq. Jur. § 701. This suit is preserved by the Civil Code, which has the following provision on the subject: "Sec. 3412. A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or canceled. Sec. 3413. An instrument, the invalidity of which is apparent upon its face, or upon the face of another instrument which is necessary to the use of the former in evidence, is not to be deemed capable of causing injury, within the provisions of the last section." In this kind of action, therefore, it is expressly provided by statute that if the instrument is void upon its face, or when construed with another instrument with which it is necessarily connected, the relief will not be granted. This provision is the embodiment in statutory form of an old and well-settled rule of equity, and, as a matter of course, in order to obtain the relief, it is necessary that the complaint should state a case within the rule. In the language of SANDERSON, J., in Society v. Ordway, 38 Cal. 681: "In an action to remove a cloud there can be no question but that the facts which show the apparent validity of the instrument which is said to constitute the cloud, and also the facts showing its invalidity, ought to be stated." Suits to determine adverse claims, such as exist in this state, were not known to the old chancery practice, but were provided for by statute. The provision of the Code of Civil Procedure is as follows: "Sec. 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Compare section 254 of old practice act, (Laws 1851, pp. 92, 93.) The distinction between the two kinds of action is clear. They are different not merely in form, (for we have no forms of action in the old sense,) but in purpose. In the former case the proceeding is aimed at a particular instrument, or piece of evidence, which is dangerous to the plaintiff's rights, and which may be ordered to be destroyed in whosesoever hands it may happen to be; while in the latter the proceeding is for the purpose of stopping the mouth of a person who has asserted or is asserting a claim to the plaintiff's property. It is not aimed at a particular piece of evidence, but at the pretensions of an individual.

The statutory action to determine an adverse claim is an improvement upon the old bill of peace. The statute enlarges the class of cases in which equitable relief could formerly be sought in the quieting of title. It is not necessary, as formerly, that the plaintiff should first establish his right by an action at law. "He can immediately upon knowledge of the assertion of such claim require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined, and the question of title be thus forever quieted." Curtis v. Sutter, 15 Cal. 262, 263. And see Stark v. Starrs, 6 Wall. 409. Nor is it necessary that the adverse claim should be of any particular character. As said by BALDWIN, J., delivering the opinion in Head v. Fordyce, 17 Cal. 151, the statute "does not confine the remedy to the case of an adverse claimant setting up a legal title or even an equitable title; but the act intended to embrace every description of claim whereby the plaintiff might be deprived of the property, or its title clouded, or its value depreciated, or whereby the plaintiff might be incommoded or damnified by the assertion of an outstanding title already held or to grow out of the adverse pretention." See, also, Horn v. Jones, 28 Cal. 204; Joyce v. McAvoy, 31 Cal. 287, 288. And the rule may be even more broadly stated, viz., that the action may be maintained by the owner of property to determine any adverse claim whatever, for, if the defendant, by his answer, disclaims all interest whatever, judgment may, nevertheless, be entered against him, though in such case it must be without costs. Code Civil Proc. § 739. Compare Brooks v. Calderwood, 34 Cal. 566, and Scorpion Co. v. Marsano, 10 Nev. 380, 381. The plaintiff, therefore, is not required to set forth the nature of the defendant's claim. People v. Center, 66 Cal. 562, 5 Pac. Rep. 263, 6 Pac. Rep. 481; Scorpion Co. v. Marsano, 10 Nev. 380, 381; Railroad Co. v. Oyler, 60 Ind. 392. The defendant must set forth his claim if he has one, in view of which the complaint may in one aspect be said to be a bill for discovery. The pleading is very simple, and it is well settled that the allegations above mentioned are sufficient. Rough v. Simmons, 65 Cal. 227, 3 Pac. Rep. 804; Heeser v. Miller, 19 Pac. Rep. 375. It is argued for the appellant, however, that the complaint contains something besides the allegations above mentioned; that it is really a complaint to reform a deed; and that, when so considered, both the complaint and findings are insufficient, because it is neither alleged nor found that the deed sought to be reformed embraced the property in controversy. The complaint, after the allegations above mentioned, proceeded to set forth the nature of the defendant's claim. It alleged that said claim was founded on a mistake in the description of a deed. The mistake was this: After reaching a post on the west bank of Moro slough, the description called for the following course, viz.: "Thence down the said slough north 72° west, 61.50 chains, to a stake in a small slough at a point known as the 'Bolsita,'" while it was alleged and found that instead of "north 72° west" the course should have been "north 12° west." Now, if it had appeared that the land in controversy was included in the deed as made, so as to pass thereby, the plaintiff could not have maintained an action under the statute to determine an adverse claim; for it has been held that a mistake in the description of a conveyance cannot be corrected in such an action. Brewer v. Houston, 58 Cal. 345. In such case the legal title would have passed by the conveyance; and the holder of a mere right in equity, to have the conveyance reformed, cannot maintain an action like the present against the holder of the legal title. Von Drachenfels v. Doolittle, 19 Pac. Rep. 518. But, according to the appellant's own statement, this does not appear, and we think that the contrary appears affirmatively; for the description contained in the deed made is given in the complaint and in the findings, and it appears therefrom that the mistake in the course is immaterial. The wrong course is controlled by the direction to go "down the said slough" to a specified point. Courses and distances yield to visible boundaries. Spring v. Hewston, 52 Cal. 442; Serrano v. Rawson, 47 Cal. 55; More v. Massini, 37 Cal. 436. It affirmatively appears, therefore, both from the complaint and findings, that there was nothing requiring reformation, and no basis for the defendant's claim. As above stated, it was not necessary for the complaint to set forth the nature of the defendant's claim. But the unnecessary allegations merely show that the defendant's claim was based upon a harmless error of description, and do not change the character of the action; and the judgment does not undertake to reform the deed, but merely quiets the plaintiff's title. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(3 Cal. Unrep. 98)

McGRATH *et al.* *v.* HYDE. (No. 11,666.)

(*Supreme Court of California.* June 14, 1889.)

DEED—DELIVERY.

A husband signed and acknowledged a deed conveying land to his wife, stating to the notary before whom he acknowledged it that he wished to give the property to her. The wife testified that her husband put the deed on the table, told her what it was, and directed her to put it away, saying that it could be recorded at any time. She stated that she put the deed in the trunk, and at another time said that her husband did so. Their daughter corroborated her mother, and stated that her father said he would put it away for her mother, and that she could record it any time. An inmate of the house stated that she was in position to have heard any such conversation, if it had occurred, but that she neither saw nor heard anything of the deed, but her testimony was vague as to the continuousness of her presence. *Held*, that the deed was delivered.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Honora McGrath and James McGrath, her husband, to cancel a deed made by Michael Hyde to Ellen Hyde, his wife; the female plaintiff being the daughter and heir of Michael Hyde, who died after the deed was made. Judgment for plaintiffs, and defendant appeals.

E. B. Holladay and *S. W. Holladay*, (*Craig & Meredith*, of counsel,) for appellant. *M. Cooney*, for respondents.

HAYNE, C. This was a suit to cancel a deed from a husband to his wife, upon the grounds that the grantor had not sufficient capacity to make it, and that it was not delivered. The trial court found that the grantor had capacity to make it, but that it was not delivered, and rendered judgment for the plaintiffs. The defendant appeals. We think that the finding that the deed was not delivered is not sustained by the evidence. The notary who drew the deed testified that he did so at the request of the grantor, without the intervention of any other party; that the grantor instructed him to draw the deed, and signed and acknowledged it before him, stating at the time that "he wished to give the property to his wife." The wife testifies that her husband came home one day, when the following occurred: "He puts a deed on the table, and I says to him, 'What is this?' and he says, 'It is a deed to you.' He says: 'Deeding the West Mission-Street property all to you,—especially to you.' So I picked it up, and I looked at the date, and I began to cry. I thought then sure he was going to die, because he deeded the property to me, and I called Mary's attention at the same time, and I said: 'Here, Mamie, look at this;' and then he says: 'It is not recorded, but it will do,' he says, 'any time, and say nothing now,' he said, 'but just put it away.'" The daughter testifies as follows: "I just came home from town, and father and mother were sitting at the table, and this was before them, and my mother was in tears, and I asked her what was the matter, and she said that father was just after deeding the property to her, and with that my father got up, and walked away, and I said: 'What of it?' Well, she said: 'Oh, he is going to die;' and I said: 'No; that is no reason he is going to die; it is best he should do it now.' *Question.* What was the position of the deed? *Answer.* It was lying on the table between them. *Q.* Did your father say anything? *A.* He said, after we had got through talking, he said: 'Give it to me, and I will put it in the trunk, and there is no need of recording it until afterwards;' and he said: 'You can have it recorded at any time.'" The memory of the mother was at fault as to who put the deed in the trunk. In one place she says that she did, and in another place that her husband did. The daughter says that her father put it in the trunk, and we assume that such was the fact. The only evidence against this was the testimony of one Maggie Murphy, who lived in the house, and testified that she saw the parties "every day at that time," and was in a position to hear if there had been much conversation, and that she neither saw nor heard anything of the deed at the time. But the testimony of this witness is so vague as to the continuousness of her presence, and as to why she "was in a position" to hear and see, that we think it amounts to nothing. From the whole testimony, we think that it appears without substantial conflict that the husband instructed the notary to draw the deed, signed and acknowledged it, stating that he intended to give the property to his wife; went home and threw it on the table, saying, in substance: "There is a deed of that property to you; put it away;" that the wife took it up, and looked at it, and, after some conversation to the effect that it was not necessary to have it recorded then, the husband put it away in his trunk. It further appears that the husband did not want it recorded then, alleging as a reason that he wished to make some improvements on the property, which we think shows nothing more than that he wished to appear to be still the owner of the property, so far as outsiders were concerned.

We think that this shows a delivery of the deed. Delivery is a question of intention. Hibberd v. Smith, 67 Cal. 554, 4 Pac. Rep. 473, and 8 Pac. Rep. 46. The term signifies any manifestation whereby the grantor makes known his intention that the deed is complete and is to take effect. It is not necessary that there should be any actual manual transfer of the instrument. In Touchstone it is said: "Delivery is either actual, *i. e.*, by doing something and saying nothing, or else verbal, *i. e.*, by saying something and doing nothing, or it may be both; and either of these may make a good delivery and a perfect deed." 1 Shep. Touch. *57. And it is well settled that no particular form of words is necessary to manifest the intention. In the language of RYAN, C. J., in Bogie v. Bogie, 35 Wis. 667, "there is no set ritual of delivery; that when a deed is executed, and the minds of the parties to it meet, expressly or tacitly, in the purpose to give it present effect, the deed is validly delivered; and that such meeting of minds may be gathered from acts or signs, words or silence, in multitudinous variety of circumstances." Now, we think that if after throwing the deed on the table, and saying to the grantee, "There is a deed of the West Mission-Street property to you; put it away," the grantor had done nothing further, but had left the paper there, it would have been entirely clear that there was a perfect delivery. Shelton's Case, Cro. Eliz. 7; Souverbye v. Arden, 1 Johns. Ch. *255. Was this manifestation of intention, which was complete and sufficient of itself, overcome by the fact that the grantor took the deed and put it in his trunk? We think not. The retention of the deed by the grantor is not conclusive. There may be a good delivery, although the grantor has never parted with the possession of the instrument. Hastings v. Vaughn, 5 Cal. 318; Ruckman v. Ruckman, 32 N. J. Eq. 261; Otis v. Spencer, 102 Ill. 627, 628; Newton v. Bealer, 41 Iowa, 334; Scrugham v. Wood, 15 Wend. 546; Bunn v. Winthrop, 1 Johns. Ch. *336; Souverbye v. Arden, 1 Johns. Ch. *240; Garnons v. Knight, 5 Barn. & C. 692; 4 Kent, Comm. 455. The case of Folly v. Vantuyl, 9 N. J. Law, 153, is very like the present. There the obligor executed a bond, and, holding it in his hand, said to the obligee: "Here is your deed; what shall I do with it? and added: "I will take care of it for you;" and had put it in his trunk. Held a sufficient delivery. See, also, Otis v. Spencer, 102 Ill. 622. In addition to the above it is to be remembered that in cases of a family settlement like the present the law presumes more in favor of delivery than in other cases. Bryan v. Wash, 2 Gilman, 568; Reed v. Douthit, 62 Ill. 352. Taking all the circumstances together, we think that the intention to pass the title was complete, and that the retention of the deed by the grantor was merely for its safe-keeping, which, considering the relation of the parties, was quite natural and proper. The other matters do not require special notice. We therefore advise that the judgment be reversed, and the cause remanded for a new trial.

We concur: Foote, C.; Gibson, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial.

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79 Cal. 594

Pehrson *et al.* *v.* Hewitt *et al.* (No. 12,518.)

(*Supreme Court of California.* July 1, 1889.)

Fraudulent Conveyances—Insolvency.

1. A bill to set aside certain "pretended confessions" of judgment, alleged to have been made by the debtor with intent to delay and defraud plaintiffs, creditors of the debtor, is bad on demurrer, where the facts are not set forth by which the court can judge whether such confessions are fraudulent or not.

2. Where a defendant confesses judgment for debts justly due, it is not fraudulent for the judgment creditors to agree to buy the property levied on under their executions, and give it to the execution debtor if they see fit.

3. Where an insolvent debtor applies for a discharge in insolvency, a court of equity cannot set aside the adjudication in insolvency nor dismiss the proceedings.

In bank. Appeal from superior court, Shasta county; Aaron Bell, Judge.

Wiley & Dozier and *F. P. Primm*, for appellants. *Clay W. Taylor* and *J. Chadbourne*, for respondents.

Thornton J. The plaintiffs bring this action to have certain judgments, and the executions issued thereon, and the levies made under them, vacated and set aside; that an adjudication in insolvency may be vacated, and the proceedings dismissed; and for an injunction restraining certain defendants, etc., from selling certain property described in the complaint. The defendants contend that the complaint does not state facts sufficient to constitute a cause of action, and that, therefore, the judgment and order denying a new trial should be reversed. The defendants demurred to the complaint on the above-stated ground. The complaint sets forth that the defendant Hewitt was indebted to the several plaintiffs in several sums for divers matters; that they commenced actions against Hewitt in a justice's court to recover these amounts, and sued out writs of attachment, which were levied by the sheriff of the county upon the property of defendant Hewitt, set forth in the complaint; that before the commencement of these actions Hewitt filed in the same justice's court certain pretended confessions of judgment in favor of several defendants for certain amounts alleged to be due to each of the defendants, which confessions of judgment were accepted by the several defendants in whose favor they were made. Plaintiffs further allege that said pretended confessions of judgment were made by Hewitt and accepted by defendants with the intent and design of hindering, delaying, and defrauding the plaintiffs and other creditors of Hewitt by a combination among them, by which they were to levy executions upon all the property of Hewitt, and have the same sold for the amount of said confessions to said defendants, or some of them, and that after said sale had been made that Hewitt was to be placed again in full possession and control of the property for his own use and benefit, and fraudulently protected by such proceedings against the claims of plaintiffs, and thus rendering any judgments which plaintiffs might recover against Hewitt ineffectual. It is further averred that executions afterwards issued on the judgments above mentioned, and came into the hands of the defendant Eckels, who was a constable, and that the constable made a pretended levy under the said executions on the property above mentioned; that this levy was made and abandoned prior to the levy of the attachments of plaintiffs above set forth, and that since the abandonment the constable has never had possession or control of any of the property above referred to; that the constable pretends that the levies made by him are in full force, and that he is proceeding to sell said property under these levies. The defendant Hewitt is insolvent and was insolvent when he made the confessions of judgment above stated, and that in furtherance of the above stated agreement by defendants, and to carry out and complete the fraudulent scheme of defendants, did, on the 16th of March, 1886, file his petition in insolvency; that this petition was not filed in good faith, but for the wrongful and fraudulent purpose of defeating the attachment liens of plaintiffs, to the end that the pretended levies of the executions might hold the property, and a sale of the same might be made in such manner as to fraudulently cover it, and protect it from the claims of plaintiffs.

We see no element of fraud by defendants in the matters averred in the complaint. It is not averred that the debts for which the judgments were confessed by Hewitt, in favor of the several defendants, were not justly due by Hewitt to them. Styling the confessions of judgments "pretended," as was done by the plaintiffs in the complaint, did not show that they were so. The facts should have been set forth from which it would appear that they were pretended and simulated, and not real and genuine. There was no law in existence when the confessions were made which prevented Hewitt from confessing a judgment in favor of a *bona fide* creditor, and there is nothing alleged in the complaint which tends to show that the defendants were not honest creditors to whom Hewitt was justly indebted. The word "pretended" is a mere epithet, which, in the absence of facts showing the pretended character of the confessions or of the judgments, imports nothing impugning either the confessions or the judgments. It sufficiently appears that confessions of judgment were filed in the justice's court, that judgments were entered on them, and executions issued on the judgments. It is not sufficient to allege that confessions or judgments are fraudulent, but the facts showing that they are such must be averred, so that the court can perceive that such instruments are fraudulent. The facts showing the fraud must be made to appear by averment. See Kinder v. Macy, 7 Cal. 206; Harris v. Taylor, 15 Cal. 348; Meeker v. Harris, 19 Cal. 289, 290.

The debts for which the judgments were confessed being justly due by Hewitt, we see no fraud in the defendants agreeing to buy the property at the sale had on their executions, and, if they did buy it, giving it to Hewitt, if they elected to do so, To hold that they could not do so would be to hold that a man could not do what he chooses with his own property. The defendants, if they bought at the sale under execution, would pay their own money for the property bought, and when so bought and paid for it would belong to them, and they could do with it what they chose to do. They might give it away to Hewitt or any one else, or might destroy it if they saw fit. We cannot see how a court of equity can set aside an adjudication in insolvency or dismiss such a proceeding. It is averred that Hewitt was insolvent, and if so he had a right to apply for a discharge under the statutes in relation to insolvency. There can be no fraud in the pursuance of a remedy allowed by law. Hewitt, in applying for his discharge in insolvency, was taking the steps provided by law for having his property equitably and fairly subjected to the satisfaction of his creditors. Of this, no creditor has a right to complain. If he has no right to apply to be discharged from the claims of his creditors, they will have an opportunity of showing that, and preventing his discharge, in the insolvency proceeding. If the confessions of judgment made to defendants are prohibited by the insolvent laws, the assignee in insolvency can have them adjudged void, and on a proper proceeding they will be so adjudged, but no such proceeding is before us in this case. As the agreement made by defendants described above was free from fraud, we cannot see that the application in insolvency to carry out such arrangement could or would be fraudulent. We are of opinion that the complaint does not state facts sufficient to constitute a cause of action, and therefore the judgment and order are reversed, and the cause remanded, with directions to the court below to sustain the demurrer to the complaint, and for other proceedings according to law. So ordered.

We concur: BEATTY, C. J.; WORKS, J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J

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79 Cal. 553

PEOPLE *v.* CHIN BING QUONG. (No. 20,496.)

(*Supreme Court of California.* July 1, 1889.)

ASSAULT WITH INTENT TO KILL.

In a trial for assault with intent to kill, where it appeared that defendant and one W. were near the person assaulted, and defendant knocked him down with a pistol, and told W. to stab him, which he did, and that two shots were fired, though it was not proven that defendant fired them, it was not error to admit testimony of the stabbing, and to allow the knife used to be shown to the jury.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Wells Whitmore, for appellant. *G. A. Johnson*, Atty. Gen., for the People.

MCFARLAND, J The defendant was charged with and convicted of the crime of an assault with intent to commit murder upon Ny Sam Ock, the assault being alleged to have been made with a pistol. The transcript contains only one ruling of the court, to which exception was taken. There are no points and authorities or briefs on file, and there is no ground for reversing the judgment, unless the evidence is insufficient to justify the verdict, or the said ruling was erroneous.

1. The evidence was amply sufficient to support the verdict.

2. The ruling of the court excepted to was as follows: It was proven clearly that defendant and one Ung Wong approached or were near said Ock, when defendant drew a pistol and struck Ock with it, knocking him down. At the same time the defendant directed Ung Wong to "stab him," which Wong then and there proceeded to do, leaving the knife in Ock's body. At that moment two shots were fired, although it was not proven that defendant fired them. The court allowed proof of the stabbing, and allowed one of the witnesses who swore to it to produce the knife in court; and to this ruling appellant excepted. There was no error in admitting evidence of the stabbing. In the first place, it tended to show the intent with which defendant made the assault; and, in the second place, it was so inseparably mixed up with the transaction as to be necessarily a part of the *res gestæ*. Allowing the witness to exhibit the knife, after the facts as to the stabbing had been shown, was not important enough, under the circumstances, to merit discussion. Judgment and order denying a new trial affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; WORKS, J.; THORNTON, J.

79 Cal. 554

PEOPLE *v.* SMITH *et al.* (No. 20,504.)

(*Supreme Court of California.* July 1, 1889.)

BURGLARY—AUTRE FOIS ACQUIT.

A motion to set aside an information for burglary, on the ground that defendants had once been discharged from arrest for the same offense, on the same evidence as that given at the preliminary examination, is properly denied where there is no proof that the evidence was the same at both examinations.

In bank. Appeal from superior court, Solano county; A. J. BUCKLES, Judge.

Charles A. Hubbs, for appellants. *Geo. A. Johnson*, Atty. Gen., for the People.

PER CURIAM. Information for burglary, and conviction of defendants. The defendants moved to set aside the information, on the ground that they had once been discharged from arrest for the same offense, based on the same evidence as was had at the first preliminary examination by the superior court of Solano county. We find no proof in the record that the evidence was the same on both of the examinations. The basis of the motion is lacking. The court did not err in denying the motion. The information was sufficient, and in accordance with law, and the court did not err in directing judgment to be entered on the verdict. The evidence is sufficient to support the verdict. On an examination of it, and taking it altogether, we find it of such a character that we cannot reverse on the ground of insufficiency of the evidence. There is no error in the transcript. Judgment and orders affirmed.

PATERSON, J. I do not concur. The evidence in my opinion is insufficient to support the verdict and judgment.

THORNTON, J. I dissent on same grounds as Justice PATERSON.

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79 Cal. 540

PAYNE *et al.* *v.* ENGLISH *et al.* (No. 12,976.)

(*Supreme Court of California.* July 1, 1889.)

NAVIGABLE WATERS—WHARVES—EMINENT DOMAIN—INJUNCTION.

1. A city map not made until after plaintiffs acquired title to their lot, and which shows the lot to be smaller than it is described to be in their deed, and smaller than it appears to be by an official map made before the execution of the deed, is not admissible against plaintiffs, to prove the true boundaries of the lot.

2. Act Cal. March 26, 1851, which establishes a water front for the city of San Francisco, gives the use and occupation of the land therein included to the city for a term of years, and provides that the act shall not be construed as a surrender by the state of its right to so regulate the erection of wharves that they shall not interfere with the commercial interests of the bay and harbor, does not deprive the state of jurisdiction, by its harbor commissioners, over Channel street of said city; said street being a mere navigable arm of the bay. Following People v. Williams, 2 Pac. Rep. 393.

3. Whether or not the erection by the harbor commissioners of a wharf in Channel street, in front of plaintiffs' property, on which a wharf built at great expense had been used for years, would constitute a taking or damaging of private property for public use, within Const. Cal. art. 1, § 14, an injunction will not lie to restrain the commissioners from building the wharf.

4. Civil Code Cal. § 3423, providing that an injunction shall not lie to prevent the execution of a public statute by officers of the law for the public benefit, does not prohibit an injunction against the erection of such a wharf on plaintiffs' land, as no public statute authorizes the taking of land without proceedings under eminent domain.

In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

On March 26, 1851, the legislature of California passed the "Water-Lot Act," (St. 1851, p. 307,) by which all the lots of land within certain boundaries, according to the survey of the city of San Francisco and the map then in the recorder's office, were designated as the "San Francisco Beach and Water Lots." A boundary line was established, to be the permanent water front of the city, and the duty of keeping the space beyond the line for a distance of 500 yards clear of obstructions was imposed on the city. The use and occupation of all the land described was given to the city for 99 years, and the city was required to file a certified map of the water-front boundary in the office of the city surveyor, as well as in other offices mentioned, and this was afterwards done; the map being known as the "Red Line" or "Eddy" map. The act further provided that it should not be construed as a surrender by the state of its right to regulate the construction of wharves, so that they shall not interfere with the commercial interests of the bay and harbor of San Francisco. William D. English and others, defendants, were the board of harbor commissioners of the state, and Nancy Payne and S. P. Dewey, the plaintiffs, owned a lot contiguous to the water front mentioned. Defendants undertook to build a wharf in front of plaintiffs' lot, and plaintiffs brought this action to enjoin them from so doing. Judgment for defendants, and plaintiffs appeal.

Cope, Boyd & Fifield, for appellants. *T. C. Coogan*, for respondents.

MCFARLAND, J. Defendants are state harbor commissioners. Plaintiffs are owners (being seised of a term of years therein) of those certain premises in the city of San Francisco known generally as "Block 12 of South Beach Water-Lot Property;" lying between Channel street on the southerly side, Berry street on the northerly side, Third street on the easterly side, and Fourth street on the westerly side. Channel street is an arm of the bay of San Francisco, running up from the open bay through a portion of the southern part of the city, past and beyond the said block 12. It is covered by the waters of the bay; the tide ebbs and flows in it; it is navigable, and is used and navigated by vessels engaged in commerce; it has been dedicated to public use for purposes of navigation and commerce; and it is claimed by defendants to be of the width of 200 feet up to a point beyond the said land of plaintiffs. By an act of the legislature approved March 26, 1868, (St. 1867–68, p. 355) it was declared that a canal 140 feet wide, located in the middle of said Channel street, should forever remain open for purposes of drainage and navigation; and it is contended by defendants that there is thus left on each side of said 140 feet canal a strip 30 feet wide, which is part of said Channel street, and within their jurisdiction and control as harbor commissioners. And upon what is claimed by defendants to be the 30-foot strip next to plaintiffs' block 12, on the northerly side of what is claimed to be Channel street, defendants entered and were about to drive piles upon and along a part of the same, and to erect a wharf thereon, when plaintiffs commenced this action to enjoin them from so doing. Plaintiffs claim that this strip is a part of their said block 12. The court below found against plaintiffs, and entered judgment for defendants; and from the judgment and an order denying a new trial plaintiffs appeal.

The land in controversy, together with large quantities of other land in that vicinity, originally belonged to the state of California, and were granted by the state to the city of San Francisco for the term of 99 years, by an act of the legislature passed March 26, 1851, and generally known as the "Water-Lot Act." It is admitted and found that the title of the city under said act to said block 12 passed to plaintiffs on December 30, 1852, through a deed to them of that date, executed by one Lewis Peck, to whom the title had regularly come through sufficient conveyances. The court found that more than 20 years ago plaintiffs erected, and still maintain, upon said block, including said strip 30 feet in width, wharves and other structures for the loading and unloading of ships and vessels and the storage of merchandise, and "have continuously, for more than twenty years next before the commencement of this action, used and occupied the whole of said lot or parcel of land, including said strip 30 feet wide, for the purposes aforesaid, and still continue to so use and occupy the same." But the court found that while plaintiffs' land, block 12, is 825 feet long from Third to Fourth street,—the length claimed by plaintiffs,—it is only 245 feet wide from Berry to Channel street, instead of 275 feet, as claimed by plaintiffs; and that, as 245 feet southerly from Berry street would not include any of the 30-foot strip, as claimed by defendants, therefore plaintiffs do not own any of the land upon which defendants propose to operate. The main issue of fact, therefore, was as to the width of plaintiffs' land,—whether 275 feet wide, as claimed by them, or only 245 feet, or less.

Plaintiffs contend—*First*, that this issue should have been found in their favor upon the evidence introduced, and upon the application of the true rules of construction to their title-deeds; and, *secondly*, that, if the finding of the court on that point could be held as supported by the evidence at all, it could be so held only by taking it as based on evidence erroneously received and considered, against the objections and exceptions of plaintiffs.

If we construe plaintiffs' deeds according to courses, distances, and quantities therein expressed, then the amount of land, and its length and width, are exactly as plaintiffs claim. The description in the deed to plaintiffs, dated December 30, 1852, (and the prior deeds were substantially the same,) is as follows: "All those three certain 100-vara water-lots situated in the city of San Francisco, and being subdivisions number one, (No. 1,) number two, (No. 2,) and number three, (No. 3,) of the block known on the official map of said city as 'Number Twelve (No. 12) South Beach Water-Lots,' bounded as follows, to-wit: Beginning at the point forming the south-westerly corner of Third and Berry streets, and running thence south-westerly on the line of Berry street three hundred varas, to Fourth street; thence south-easterly, along the line of Fourth street, one hundred varas; thence north-easterly, at right angles, along Channel street, three hundred varas; and thence north-westerly, along the line of Third street, one hundred varas, to the place of beginning." Three 100-vara lots would include a piece of land 825 feet long (the length claimed by plaintiffs and found by the court) and 275 feet wide, (the width claimed by plaintiffs.) Moreover, the further descriptions of 300 varas between Third and Fourth streets, and 100 varas along the lines of Third and Fourth streets, make the block of the exact length and width claimed by plaintiffs. It is argued, however, by respondents, that in cases of disputed boundaries, courses and distances and quantities must give way to monuments. That is undoubtedly the general rule. But before the rule can be applied, there must not only be monuments which will stand still, and not float or fly, but the place where the alleged monuments were at the time the conveyance was made must be satisfactorily located. The monument which is claimed to be controlling in this case is the northerly line of Channel street; but where that line was or is constitutes the unknown quantity of the problem. In 1852, when plaintiffs got their deed, the land in controversy, and the place where Channel street is claimed to be, and all the country round about there, was a wide waste of waters. There was not only no designation of Channel street on the surface, but it can hardly be said to have had any definite dimensions or boundaries, even in mental contemplation. Of course, if there had been proper evidence sufficient to locate the line of that street as the court must have located it, we would not be prepared to say that such line should not control the other descriptive parts of the deeds. But as to that point we think the court erroneously admitted evidence upon which it must have based its findings.

Plaintiffs received their deed and acquired their title, as before stated, in December,

1852. At that time there was a map of the city certified and indorsed by the mayor and city surveyor, in accordance with the requirement of section 5 of said act of March 26, 1851, by which the land in question was granted by the state to the city. This was called the "Eddy" or "Red Line" map; and being thus recognized by the state and city, and in existence at and before the time when the deed was made, and being referred to in the deed itself, it was properly introduced in evidence,—plaintiffs contending that it shows their land to be as they claim. But the court allowed the defendants, over the objections of plaintiffs, to introduce a number of maps of the city of San Francisco and parts of it, made long after plaintiffs' title had accrued, as follows: A map called "City Engineer's Map," of the date of January 30, 1866; a map of the city front and water lot property, made under the directions of the state harbor commissioners in 1864; a map made under directions of the board of tide-land commissioners in 1869; a map of the city known as the "Humphrey's Map," made in 1870; a map called the "Turner Map," made in 1869; and also other maps, surveys, and *data* in the surveyor's office, all made long after 1852. On these maps and surveys—at least, on most of them—the said block 12 appeared as of less width than 275 feet, some of them showing a width of only 240 feet, and nearly all the testimony of the witnesses of defendants tending to show the smaller width of the block was based on said maps and surveys. It is apparent, therefore, that the evidence was material, and that the court must have given great weight to it. Indeed, without the maps and the testimony founded on them, there would not be sufficient evidence to support the finding. And we are satisfied that these maps and surveys were erroneously admitted in evidence. Counsel for respondents argued that they were admissible as acts and declarations of parties. Of what parties? Certainly not of plaintiffs, or of persons who could bind them. They were declarations either of third parties entirely unconnected with the issues involved, or of parties in their own interest who were hostile to plaintiffs, and in either event they were clearly inadmissible. If a man has already acquired title to land, he cannot afterwards be mapped out of it by other persons.

For the foregoing reasons the judgment must be reversed; but, as there may be another trial, there are one or two other things which need brief mention.

1. Appellants contend that by said act of March 26, 1851, the state conveyed all the premises in question here, including the whole of Channel street, to the city; and that, therefore, neither the state, nor the state harbor commissioners, have any jurisdiction or control over them. But it was held by this court in People v. Williams, 64 Cal. 498, 2 Pac. Rep. 393, that by said act the state did not surrender control over the navigable waters of the bay, of which Channel street is a part. We do not desire to disturb the ruling in that case, and therefore this contention of appellants must be determined against them. (It may be remarked that the point as above stated was about all that was determined in People v. Williams.)

2. Plaintiffs have erected on their land, at large expense, and have maintained for many years, a number of wharves, with slips between, and ships load and unload both at the ends of the wharves and in the slips. If defendants were to erect a wharf along the line of Channel street, in front of plaintiffs' land, vessels would be prevented from coming into the slips, and plaintiffs' business and property would be greatly injured. And plaintiffs, therefore, contend that by the erection of a wharf along the line of Channel street on the 30-foot strip, even though the latter is not part of their land, their property would be "damaged for public use without compensation," etc., within the meaning of section 14, art. 1, of the state constitution. If, however, the state should, in aid of commerce and navigation, erect a wharf of usual and reasonable dimensions, and in a reasonable manner, on the navigable waters of Channel street, and not on plaintiffs' land, and without taking any of their property, we are disposed to think that the resulting injury to plaintiffs' business and land would not be the damage contemplated by said section of the constitution. In such event plaintiffs would probably be held to have contemplated this exercise of governmental power when purchasing their land. City of Denver v. Bayer, 2 Pac. Rep. 6. But, however that may be, we are satisfied that in such a case an injunction would not lie against the officers of the state.

3. Respondents contend that an injunction would not lie in this case under any alleged state of facts, because the Code provides that "an injunction cannot be granted to prevent the execution of a public statute by officers of the law for the public benefit." Civil Code, § 3423. But there is no public statute or other law which authorized defendants to take plaintiffs' land, at least without proceedings under the power of eminent domain. We perceive in the record no other matter of importance necessary to be noticed. Judgment and order appealed from reversed, and a new trial ordered.

We concur: BEATTY, C. J.; THORNTON, J.; WORKS, J.; PATERSON, J.; SHARPSTEIN, J.

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79 Cal. 600

VAN CLEAVE *v.* BUCHER, Sheriff. (No. 12,369.)

(*Supreme Court of California.* July 1, 1889.)

SHERIFFS—RETURN OF EXECUTION.

1. A complaint in a suit against a sheriff, for failure to return a writ of execution, is not demurrable because it did not allege that the sheriff's fees were paid.

2 Where an execution states that the judgment was recovered "in the superior court of the coun-

ty of L.," it is not void for failing to state the county where the judgment roll was filed, as required by Code Civil Proc. § 682, as it will be presumed that the clerk of the court did his duty, and filed the same in the county where the judgment was recovered, as provided by Code Civil Proc. § 670.

3. Under Code Civil Proc. § 128, subd. 8, providing for the amendment of process, an execution which does not clearly set out the amount due thereon is voidable, but not void.

4. Under Civil Code § 139, providing that, on granting a divorce for an offense of the husband, the court may compel him to provide for the support of the wife and children, and Code Civil Proc. § 1007, providing that an order by a court for the payment of money may be enforced by execution, an execution in such case is not void because issued without an order for defendant to show cause why he had not obeyed the order of the court.

Beatty, C. J., and Paterson, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Modoc county; G. F. Harris, Judge.

Spencer & Raker, for appellant. *Ewing & Claflin*, for respondent.

Foote, C. This is an action for damages against a sheriff, for the alleged failure to return a writ of execution. A demurrer was filed to the amended complaint, stating as grounds therefor: "(1) That said amended complaint does not state facts sufficient to constitute a cause of action against the defendant as sheriff of Modoc county. (2) That said amended complaint does not state facts sufficient to constitute a cause of action. (3) That said amended complaint is ambiguous and uncertain in this: It does not appear with certainty therein whether or not this action is sought to be maintained against the defendant as sheriff of Modoc county or against him in his individual and private capacity." This demurrer was sustained, and the plaintiff declined to amend. Judgment was duly given in favor of the defendant, from which this appeal is prosecuted.

It is urged upon us, because of the want of an allegation in the complaint, that the sheriff's fees were paid, that the pleading in question was demurrable. That was a matter which the sheriff might perhaps have set up in an answer by way of defense, joined with a statement that he had refused to receive and serve the writ until such fees were paid, but the complaint was not demurrable for not stating that such payment was made. It is claimed that the execution does not state the county where the judgment roll was filed, and was therefore void under section 682, Code Civil Proc. The writ states that "on the 8th day of November, 1884, in the superior court of the county of Lassen, and state aforesaid," the judgment was recovered. The statute provides that a judgment roll shall be filed in the county where the judgment is recovered. Section 670, Code Civil Proc. It is to be presumed that the clerk of the superior court, whose duty it was to make up and file the judgment roll, did so; and therefore it intelligibly appeared, upon the face of the writ, that the judgment roll was filed in Lassen county. It is further alleged that the writ was void because it did not state the amount of the judgment, or the amount actually due thereon. It is true that neither the amount of the judgment, nor the amount actually due thereon, are stated in such manner as that the exact amount either due, or for which the judgment was rendered, can absolutely and without doubt be ascertained, but it is certain that the sheriff was informed by the language of the writ that the judgment was rendered for at least the sum of $390, which he was commanded to make by levy, distress, and sale out of the defendant's property. These imperfections in the writ could have been amended. Section 128, subd. 8, Code Civil Proc. If amendable the writ was not void, but only voidable, and should have been served and returned by the sheriff. Freem. Ex'ns, § 103; Hibberd v. Smith, 50 Cal. 511. It is further argued that the writ was void, because issued under an order incident to a decree of divorce, before the defendant had been given an opportunity to show cause why he had not obeyed the order of the court. Sections 139, Civil Code, and section 1007, Code Civil Proc., are as follows: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support * * * as the court may deem just. * * *" Section 139, Civil Code. "Whenever an order for the payment of a sum of money is made by a court, pursuant to the provisions of this Code, it may be enforced by execution in the same manner as if it were a judgment." Section 1007, Code Civil Proc. In view of these provisions, we fail to see any force in that contention on the part of the respondent. We think, from an inspection of the whole complaint, that it was not doubtful in what capacity the defendant was sued. It is clear that the action was brought against him as the sheriff of Modoc county. For these reasons the judgment should be reversed, and the court below directed to overrule the demurrer.

We concur: Belcher, C. C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment is reversed, and the court below directed to overrule the demurrer.

We dissent: Beatty, C. J.; Paterson, J.

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79 Cal. 575

Farnum v. Hefner. (No. 12,351.)

(*Supreme Court of California.* July 1, 1889.)

Leases—Assignment—Renting on Shares.

1. A covenant by a lessee not to assign the lease or underlet the premises without the lessor's consent is not broken by an involuntary sale of the leasehold under execution against the lessee.

2. A written acknowledgment of forfeiture of the lease by the lessee, and a surrender of the

premises to the lessor, after the levy of the execution thereon, is invalid as against the levy, it not appearing that there was in fact any cause for forfeiture.

3. Under a lease providing that the crop shall be the property of the lessor until it is delivered to him, when he shall immediately redeliver two-thirds of it to the lessee, one who purchases the leasehold interest at execution sale may harvest the crop and fulfill the lessee's agreement, and if the lessor refuses to divide the grain, or to receive it, unless the delivery is free from any claim to a return of one-third part of it, and afterwards accepts a warehouse receipt for one-third, he cannot recover for its conversion.

McFARLAND, J., dissenting.

In bank. Appeal from superior court, Butte county; LEON D. FREER, Judge.

Action by C. E. Farnum against Philip Hefner for the conversion of a quantity of wheat. Judgment for plaintiff, and defendant appeals.

H. V. Reardan, for appellant. *Carter P. Pomeroy*, for respondent.

WORKS, J. Action to recover damages for the conversion of a lot of wheat. Judgment for the plaintiff, from which, and an order denying his motion for a new trial, the defendant appeals. The respondent, being the owner of certain real estate, leased the same to one Butler for a term of years. The lease contained the following covenants: "And the said party of the second part does hereby covenant and agree that he will not underlet any portion of said premises, nor assign this lease, without the written permission of the said party of the first part, his agent or attorney, and he will during the said term of lease keep the buildings, corral, and other improvements now on said premises, or which may be put thereon during the term of this lease by the said party of the first part, in good repair, damages or loss by fire excepted; that he will not commit or suffer waste to be committed thereon. And the said party of the second part further covenants that he will in good and farm-like manner, at his own cost, charge, and expense, till and cultivate the said premises as follows, not otherwise, to-wit: That in due and proper season in the fall of 1884 he will plow to the depth of four inches, or deeper, and sow to wheat the east one-half of said premises, and in due and proper season, in the spring of 1885, he will plow to the depth of four inches, or deeper, the west one-half of said premises, and sow the same to wheat in the fall of 1885; that he will, at his own cost, charge, and expense, well and carefully tend, take care of, and protect the crops while growing on said premises during said term of this lease; and that as soon as the same is suitable for harvesting he will without delay, and at his own cost, charge, and expense, harvest, thresh, glean, and sack, in good and new merchantable sacks, all the grain raised on said premises, and, as soon as threshed and sacked, deliver to said party of the first part, his agent or attorney, without charge, all of the grain, one-third thereof, quality and quantity considered, to be delivered in the town of Biggs, in Butte county, Cal., and the remaining two-thirds to be delivered on the said premises. * * * And the said party of the first part hereby covenants and agrees that upon said wheat or hay, or wheat and hay, being delivered as aforesaid, he will immediately deliver and transfer to the said party of the second part two-thirds of said wheat or hay, quality and quantity considered. And it is mutually covenanted and agreed that until such delivery and transfer by the said party of the first part all of said wheat and hay shall be the property of the said party of the first part, and the said party of the second part shall have no right to dispose of or incumber any portion thereof." The appellant brought his action and recovered a judgment against Butler, the tenant, and levied his execution upon this leasehold interest in the respondent's property. After the levy of said execution, and while the lien thereof was in force, the tenant executed to the respondent the following acknowledgment of forfeiture of the lease: "Whereas, on account of financial embarrassment, I am unable to perform my obligations under a certain lease made by C. E. Farnum to myself on the 15th day of October, 1884, in the city and county of San Francisco, Cal., to [describing the property,] and having already, to the detriment of the said C. E. Farnum, committed breach of covenant of said contract; and whereas, said C. E. Farnum demands forfeiture of said lease or contract, in order to secure himself from loss on account of such breach of contract: now, therefore, in consideration of the foregoing, I hereby forfeit to the said C. E. Farnum the said lease or contract, with all my rights under it." The appellant proceeded to enforce his judgment and execution lien by a sale of the property on such execution, and himself became the purchaser. He entered upon the lands under his purchase, and proceeded to harvest the wheat growing on the land. While so in possession he was notified by the respondent to give possession of the property, and forbidden to harvest the grain. After having harvested and threshed the grain, he tendered to the agent of the respondent the wheat, as provided in the lease. One Frank Hefner, a son of the appellant, testified as follows with reference to the delivery of and offer to deliver the wheat: "When I had cut and sacked the grain I visited Biggs, and notified Mr. Robinson (respondent's agent) that the grain was ready for delivery, and requested him to name the place where I should deliver it. He refused to name the place, and refused to make any division of the grain. I thereupon hauled all of the grain to Biggs and deposited it in the warehouse, had it weighed and divided, and deposited two-thirds of it under one receipt and one-third under another. I again called upon Mr. Robinson, and informed him that all of the grain was at the warehouse, and tendered him the receipt for one-third of it, which he at first refused to accept, but in a short time concluded to, and did, accept the one-third."

Mr. Robinson testified as follows: "After the grain was cut and sacked, Mr. Frank Hefner, the son of the defendant, called upon me at Biggs, and notified me that the grain had been cut and sacked, and was ready for delivery, and requested me to designate where it should be delivered, and also to make division. I refused to accept the grain unless it was delivered free from any claim by Mr. Hefner for any part of it. Afterwards Mr. Frank Hefner notified me that the grain had all been delivered at the warehouse at Biggs, and weighed, and tendered me the warehouse receipt for one-third of said wheat. I at first refused to receive it, but afterwards accepted and received it." At the trial the appellant offered in evidence the judgment roll in the action of himself against Butler, under which the leasehold interest of Butler was sold. Objection was made to the evidence by the respondent, and the court below excluded it, and this is assigned as error. The respondent contends that the ruling of the court was right, on three grounds: (1) The transfer of the leasehold interest by the execution sale to the appellant was an assignment within the terms of the lease, and worked a forfeiture thereof. (2) The lease has been forfeited by the written acknowledgment of the tenant. (3) The tenant, under the provisions of the lease, had no interest in the crops harvested, and therefore no interest could pass to the appellant by the sale.

1. The first of these contentions presents the question whether an involuntary transfer of the leasehold interest of the tenant was in violation of the terms of the lease, and worked a forfeiture of his estate. If so, the ruling of the court below was right; otherwise, so far as this point is concerned, it was error. The covenant in the lease is the ordinary kind, which applies, it seems to us, to a voluntary, and not an involuntary, assignment of the lease. It is firmly established by authority that under such a covenant an involuntary assignment by sale under execution, bankruptcy, and the like, is not a violation of the covenant and does not work a forfeiture. 2 Greenl. Ev. § 245; Wood, Landl. & Ten. (2d Ed.) 714; Riggs v. Pursell, 66 N. Y. 198; 1 Tayl. Landl. & Ten. § 408; Bemis v. Wilder, 100 Mass. 446; Jackson v. Silvernail, 15 Johns. 277. If the landlord desires to avoid such involuntary transfer of the leasehold interest of the tenant, he may provide expressly in his lease that such transfer of the property shall work a forfeiture, and the same will be effectual. Tayl. Landl. & Ten. § 409; Davis v. Eyton, 7 Bing. 154; Doe v. David, 5 Tyrw. 125; Roe v. Galliers, 2 Term. R. 133. So where it appears that the judgment and sale have been submitted to in bad faith on the part of the lessee, or where he voluntarily places himself in such a position that a transfer must result; as, for example, where he deposits the lease as security, or gives a warrant of attorney, whereby he may be dispossessed by the creditor. Doe v. Hawke, 2 East, 481. But this is placed upon the ground that the assignment in such cases must be regarded as voluntary. It is contended by counsel for respondent that where the whole tenor of the lease shows that it is the intention of the parties that the tenant shall himself occupy the premises, the case is within the rule above laid down, and that the assignment, under the circumstances of this case, must be held to work a forfeiture; and he cites a number of cases, only one of which, it seems to us, has any tendency to support the position taken, (Doe v. Clarke, 8 East, 185,) and in that case the court puts its decision upon the ground that the lease required, as a condition, that the tenant should actually occupy the dwelling-house on the premises, which, we think, presents an entirely different case from the one before us. We are quite clear, from the authorities cited above, that the transfer of this property by the judgment and sale of the appellant did not forfeit the lease, and that the ruling of the court cannot be sustained on that ground.

2. As to the contention that the lease was forfeited by the written acknowledgment thereof by the tenant, it appears that such acknowledgment was executed after the lien of the appellant's execution had attached. and in our judgment a voluntary acknowledgment of forfeiture at that time could not affect the rights of the appellant, and that upon a sale of the property his title would relate back to the time of the levy of his execution as against such forfeiture. Again, it appears to us from the record before us that there was no consideration or reason for this acknowledgment of forfeiture, unless it were to avoid the just obligations of the tenant to the respondent. There is no evidence in the case, nor does it appear from the instrument itself, that there was any cause of forfeiture, or that the respondent could in any way be injured by reason of the proceedings of the appellant. Under such circumstances it seems to us that the forfeiture executed by the tenant must be held to be invalid as against the rights of the appellant.

3. We think the contention of the respondent, that the tenant had no such interest in the wheat in controversy in this action as could pass by execution and sale, does not reach the question presented. The tenant certainly had a leasehold interest in the property, under which he might, by complying with the terms of the lease, become the owner of the identical wheat raised upon the land. It is undoubtedly true, as contended, that the landlord and tenant may by agreement provide that all of the crops raised upon the land may be delivered to and remain the property of the landlord, and be disposed of by him; and such agreement will protect the title of the landlord in the property as against an attaching creditor of the tenant. But it will be found upon an examination of the cases cited by counsel that in every instance where such an agreement is upheld, it is made for the protection of the landlord in case of ad-

vancements by him, or for some other reason; in other words, there is some consideration shown for the agreement by which the title remains in the landlord. And in none of the cases, so far as they have come to our notice, has it been held that such a rule can apply where the property, or a part of it, delivered to the landlord, is to be immediately redelivered to, and become the property of, the tenant, as in this case. Howell v. Foster, 65 Cal. 169, 3 Pac. Rep. 647; Smith v. Atkins, 18 Vt. 461; Paris v. Vail, Id. 277; Briggs v. Oaks, 26 Vt. 138; Esdon v. Colburn, 28 Vt. 631.

There is no evidence in this case that there was any reason, so far as the liability of the landlord was concerned, that there should be any withholding of the crops raised upon the land for his protection, and the lease expressly provides that one-third of the wheat shall be delivered to him at a certain place, and the other two-thirds be delivered to the landlord on the land, and immediately redelivered by him to the tenant. It is not denied that the appellant, after his purchase, fully complied with the terms of the lease, cut and harvested the grain, tendered the delivery thereof to the agent of the respondent, who refused to receive the same unless the delivery was made free from any claim of the appellant. Conceding, as contended, that the title to the property remained in the respondent, still the tenant would have had the right to enforce the delivery of the grain to him under the terms of the lease, and that right was one which would pass by the sale to the appellant, and, upon a compliance by him with the terms of the lease, he was entitled to have the identical wheat raised upon the land delivered to him; and upon the refusal of the respondent, through his agent, to accept the wheat on the terms provided for in the lease, the appellant had the undoubted right to retain the wheat without a delivery in the first instance to him. The wheat being in his possession, under these circumstances, it is quite clear to us that an action to recover the wheat, or for damages for its conversion by the appellant, cannot be maintained. For these reasons the court below erred in excluding the judgment roll, which was material to show that the appellant had become the owner of the interest of Butler. It is also contended by the appellant that the court erred in admitting in evidence, over his objection, the written acknowledgment of forfeiture above set out. We are of the opinion, for the reasons above stated, that the acknowledgment was immaterial as against the appellant, whose rights had attached in the property before such acknowledgment had been executed and delivered. Judgment and order appealed from reversed.

We concur: BEATTY, C. J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.

I dissent: MCFARLAND, J.

MORAN *et al.* v. ROSS. (No. 12,697.)

(*Supreme Court of California.* July 1, 1889.)

EMINENT DOMAIN—COMPENSATION.

Under Code Civil Proc. Cal. § 1248, which provides that in eminent domain proceedings to condemn land the damages to defendant's land not sought to be condemned shall be ascertained, as well as the amount of benefit to said land, if any, that will be derived from the proposed improvement, and which further provides that, if the benefit shall be equal to the damages assessed, no compensation shall be paid except the value of the portion taken, but, if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value, the defendant is entitled to the full value of the land taken, for the use of a private individual, and also to the damages sustained by the balance of the tract by the severance from the part taken, less the benefits accruing to such part; and it is immaterial that Const. Cal. art. 1, § 14, makes different provisions in case of the taking of land for the use of a private corporation.

In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

Charles Moran and others, partners as Moran Bros., commenced proceedings in eminent domain to condemn, for railroad purposes, land owned by defendant, A. E. Ross. Judgment condemning the land was rendered, the value of the land taken being fixed at $329.51, and the injury to the other land at $150. The plaintiffs were also required to pay for fencing the right of way. The court further found that the portion of defendant's land not taken would be benefited $150, but refused to offset it against the damages to that tract. Plaintiffs appeal.

Spencer & Raker, for appellants. *Goodwin & Davis* and *W. N. Goodwin*, for respondent.

WORKS, J. Proceeding to condemn lands for the right of way of a railroad, brought by the appellants as partners. There was judgment for the appellants condemning the land, as prayed for, but the court found that the lands of the respondent, not taken by the railroad, would be benefited by the location and construction of the road in the sum of $150, and refused to allow the appellants any deduction on account of said benefits from the amount of damages found as to the part of respondent's land not taken. The sole question presented is whether, in an action by a private individual to condemn lands, the amount of benefits accruing to the land of the defendant, not taken, can be deducted from the damages resulting from the taking of the right of way. The Codes of this state authorize private individuals to condemn lands for railroad purposes. Civil Code, § 1001; Code Civil Proc. § 1238; Moran v. Ross, ante, 547, (opinion filed May 6, 1889.) The Code requires that the court, jury, or referee trying the case shall ascertain, among other things, damages to the defendant's land not sought to be condemned, and "separately how much the portion not sought to be condemned, and each estate or interest therein, will be benefited, if at all, by the construction of the improvement proposed by the plaintiff."

Code Civil Proc. § 1248, subds. 2, 3. It is also provided in this same section, subd. 3: "And if the benefit shall be equal to the damages assessed under subdivision 2, the owner of the parcel shall be allowed no compensation except the value of the portion taken; but, if the benefit shall be less than the damages so assessed, the former shall be deducted from the latter, and the remainder shall be the only damages allowed in addition to the value." There can be no question as to the proper construction of these provisions. The defendant is entitled to the value of the lands taken, without any deduction; but if the balance of his tract of land will be damaged by the severance therefrom of the part taken, and at the same time be benefited by the making of the improvements by the plaintiff, such benefits shall be deducted from the damages that will result to the land not taken. The section is not only plain and explicit in this respect, but to us it seems to be eminently just and right. No one's private property should be taken for public improvements, no matter how important or necessary to the public good they may be, without just compensation. But it is equally true that no one engaged in a work for the benefit of the public should be compelled to pay more than a just compensation for such taking. Therefore, when the defendant receives compensation for his lands taken and the damages resulting to the part not taken, less the benefits accruing to such part, he receives what seems to us to be "just compensation." But in respect to corporations the constitution of this state provides otherwise. Section 14, art. 1, of the constitution, provides: "Private property shall not be taken or damaged for public use without just compensation having been first made to or paid into court for the owner, and no right of way shall be appropriated to the use of any corporation other than municipal, until full compensation therefor be first made in money, or ascertained and paid into court for the owner, irrespective of any benefit from any improvement proposed by such corporation; which compensation shall be ascertained by a jury, unless a jury be waived, as in other civil cases in a court of record, as shall be prescribed by law." So far as this section imposes upon the party seeking to condemn lands for public use a burden greater than those provided for in section 1248 of the Code of Civil Procedure, it is confined to private corporations. Moran v. Ross, supra. Its language is plain, and, so far as it requires the payment of compensation "irrespective of any benefit from any improvement proposed by such corporation," it is carefully limited to "corporations other than municipal." Counsel for respondent contends that such a construction of the constitution and statutes would render the provision in the constitution absurd, and make one rule of damages for a corporation and another for private individuals. Such may be the effect of these provisions, but if so it is a matter with which we have nothing to do. We have only to declare the law as it is, not to change it to avoid what may seem to be an absurd or unjust provision, where it is plain and unambiguous in its terms. Railway Co. v. Porter, 74 Cal. 261, 15 Pac. Rep. 774, relied upon by counsel for appellants, is not in point, as the party seeking to condemn there was a private corporation and strictly within the terms of the constitution. The court below should have allowed the deduction of the benefits found, as against the damages resulting to the lands of the defendant not taken. Judgment reversed, with instructions to the court below to modify the same in accordance with this opinion.

We concur: McFARLAND, J.; PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

BEATTY, C. J., (*concurring.*) I concurred in the opinion of the court in the case of Moran v. Ross, ante, 547, wherein it was held that under our statutes natural persons may condemn lands for railroad purposes; but subsequently, on consideration of the petition for rehearing, I became so doubtful of the soundness of that conclusion as to think the question at least deserving of reargument and further consideration. The result to which the doctrine of that case leads —as illustrated in this case, viz., that there is one rule of damages for private individuals and another rule for corporations, when they seek to condemn lands for the same purpose —deepens my conviction that the correctness of our former decision is open to serious question. If, however, we were right in that decision, and, whether right or wrong, so long as we adhere to it, the conclusion reached by Mr. Justice WORKS in the foregoing opinion seems to be inevitable.

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79 Cal. 565

TURNER *v.* TURNER *et al.* (No. 12,505.)

(*Supreme Court of California.* July 1, 1889.)

PRESUMPTION OF PAYMENT.

In a suit to foreclose a lien based on six promissory notes, both the maker and the payee were dead. The notes could not be found. When last seen, the maker had them. The payee was executor of the maker, and in reporting claims against the estate did not mention the notes. The evidence as to non-payment was vague. *Held*, that the presumption was the notes were paid.

Commissioners' decision. In bank. Appeal from superior court, Butte county; LEON D. FREER, Judge.

Hundley & Gale and *R. C. Long*, for appellant. *Gray & Sexton* and *F. C. Lusk*, for appellees.

HAYNE, C. This was a suit to foreclose a vendor's lien to secure the amount of six promissory notes. One of the defenses was that the notes had been paid, and the trial court found this to be the fact. The counsel for the appellant contend that this finding is not supported by the evidence, but we think that the evidence must be held to be sufficient to support it. The notes were made by one J. T. Turner to his brother Robert Turner, whose administrator is the plaintiff here. Both brothers were dead before the suit was commenced, and there was no direct evidence for or against the payment. The plaintiff did not produce the notes at the trial, or give any satisfactory explanation of their absence. It was shown that diligent search had been made among the papers of Robert Turner, and inquiry made of every person who would be likely to know about them, but nothing was heard of them. The last seen of some of them was that they were in possession of the maker. The possession of the notes is a material circumstance in relation to the question of payment. Possession by the maker raises a rebuttable presumption of payment. Code Civil Proc. § 1963, subd. 9; 2 Greenl. Ev. § 527; Zeigler v. Gray, 12 Serg. & R. 42; Lipscomb v. De Lemos, 68 Ala. 592; Carroll v. Bowie, 7 Gill, 41. And, on the other hand, possession by the payee is *prima facie* evidence of non-payment. Somervail v. Gillies, 31 Wis. 155; Ritter v. Schenk, 101 Ill. 389; Haywood v. Lewis, 65 Ga. 225. And, upon this principle, it has been held in this state that, if payment is denied, the *onus* is upon the plaintiff to prove the non-payment, at least by the production of the note. Bank v. Christensen, 51 Cal. 572. In other words, if the plaintiff does not produce the note or account for its absence, the presumption is against him.

There was evidence tending to strengthen this presumption. Robert Turner, the payee, was executor of his brother's will; and, in making out the appraisement, he gave to the appraiser a list of the debts and incumbrances of the estate, on which occasion, according to one of the appraisers, the following occurred: "After the debts was all in I asked if there was any further claims against the estate that he knew of, and he, Robert Turner, told me there was none. I was referring more particularly to that land." The inventory and appraisement were introduced in connection with this testimony, and contained no reference to the notes or lien. Although the ascertainment of the debts which the deceased owed was not the duty of the appraisers, yet the conversation was admissible as an admission of the payee, and the inventory was admissible in connection therewith. There were other admissions of the payee to the same effect. When the will was read, he declared to the attorney that he had no interest in the property of the estate, beyond what was given to him by the will. And upon his death-bed, when some of his family were around him, he called for his clothing, "took his purse out of his pocket, and poured out a few dollars and said, 'Here, Mary, take this; it is all I have in the world.'" The evidence against the payment was of the same character, consisting of evidence of the family and friendly relations between the parties, and of assertions by Robert Turner, on different occasions, of a claim against the property, on the ground that it had not been paid for. But the testimony in reference to the more specific assertions were contradicted. The foregoing is the substance of the material evidence which bears upon the question, and it certainly does not show that the notes were not paid. The counsel for the appellant rely a good deal upon "undertones" which they say are heard throughout the testimony. But this is not the kind of evidence upon which an appellate court can be asked to set aside a decision of fact. In this view it is not necessary to consider the question whether the defendant Thresher was a *bona fide* purchaser. There was no error in the admission of evidence. The inventory and appraisement and the conversation in connection therewith have already been referred to. The question at folio 133 was entirely irrelevant. The objections on pages 89, 90 were properly overruled. The evidence simply went to show what was the consideration of the conveyance from Robert Turner to his brother. The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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79 Cal. 537

OULLAHAN *v.* SWEENEY. (No. 12,654.)

(*Supreme Court of California.* July 1, 1889.)

TAX-DEEDS—NOTICE.

Pol. Code Cal. § 3785, (act March, 1885,) provided that a purchaser of property at tax-sale must, 30 days before he applies for a deed, serve the owner with a certain notice. S. purchased at a tax-sale, February, 1885, at which time the law permitted him to obtain a deed one year after sale without notice to the owner. *Held*, that section 3785 applied to all deeds obtained after its passage, and a deed procured after that time, without notice, was void.

Commissioners' decision. In bank. Appeal from superior court, Stanislaus county; WILLIAM O. MINOR, Judge.

Wright & Hazen, for appellant. *Stonesifer & Minor,* for respondent.

HAYNE, C. Ejectment. Judgment for defendant; plaintiff appeals. The case turns upon the validity of a tax-deed, under which the plaintiff claims. The deed was made without any notice to the owner, as required by section 3785, Pol. Code. The sale was made in February, 1885, at which time the law was that a redemption could be made in 12 months, and, if not made within that time, the purchaser could obtain his deed without giving notice to the owner. But by an amendment passed in March, 1885, it was provided that "the purchaser of property sold for delinquent taxes, or his assignee, must, 30 days previous to the expiration of the time for redemption, or 30 days before he applies for a deed, serve upon the owner of the property purchased, or upon the person occupying the property, if said property is occupied, a written notice, stating that said property, or a portion thereof, has been sold for delinquent taxes, giving the date of sale, the amount of property sold, the amount for which it was sold, the amount then due, and the time when the right of redemption will expire, or when the purchaser will apply for a deed; and the owner of the property shall have the right of redemption indefinitely until such notice shall have been given and said deed applied for, upon the payment of the fees, percentages, penalties, and costs, as provided by law." Pol. Code, § 3785. We think that this amendment was intended to apply to all applications for deeds after it took effect. The counsel argue, however, that it was not within the power of the legislature to extend the time for redemptions on sales previously made, because they say such an extension impairs the validity of a contract. It may be assumed, for the purposes of the case, that the legislature cannot make an absolute extension of the time for redemption of property previously sold. But this has not been attempted to be done by the provision in question. The purchaser may still obtain his deed at the expiration of 12 months provided he takes the proper proceedings. If he does not take them it is his own fault, and he alone is responsible for the consequences. The question, therefore, is whether the legislature had the power to require notice to be given of applications for deeds of sales made before the passage of the law. This precise point was decided in Curtis v. Whitney, 13 Wall. 68, in which the court upheld the validity of the law. We think that this decision is sound in principle. The change affected the remedy merely, which was within the control of the legislature. See, generally, Redemption Co. v. Sedgwick, 15 Cal. 516; Moore v. Martin, 38 Cal. 428. We therefore advise that the order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

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3 Cal. Unrep. 105

KNOCK *v.* BUNNELL. (No. 12,469.)

(*Supreme Court of California.* July 1, 1889.)

HOMESTEAD DECLARATION.

Where a homestead declaration contains no estimate of the cash value of the property, as required by Civil Code Cal. § 1263, it is void.

Commissioners' decision. In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

Spencer & Raker, for appellant. *Goodwin & Dodge*, for respondent.

HAYNE, C. The transcript in this case is improperly entitled. Simpson v. Applegate, 75 Cal. 345, 17 Pac. Rep. 237. The action was brought to foreclose a mortgage executed by one H. C. Stockton, since deceased. No claim was presented to the administrator, the plaintiff having waived in his complaint all recourse against any property of the estate other than the mortgaged property. Judgment passed for the plaintiff, and the defendant appeals. The main ground relied upon for the reversal is that a homestead existed upon the property, and that, therefore, a claim should have been presented under the rule of Camp v. Grider, 62 Cal. 20. It is sufficient answer to this contention to say that no homestead existed upon the property. The homestead declaration set out in the answer and introduced in evidence contains no estimate of the cash value of the property, as required by section 1263 of the Civil Code. It was therefore void. Ashley v. Olmstead, 54 Cal. 616; Ames v. Eldred, 55 Cal. 136. In this view the evidence introduced for the purpose of showing that the homestead had ceased to exist was irrelevant and immaterial, and, if it be assumed that there was error in its admission, such error was without injury. The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be affirmed.

We concur: GIBSON, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

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79 Cal. 504

KING *v.* GILDERSLEEVE *et al.* (No. 11,882.)

(*Supreme Court of California.* July 1, 1889.)

SPECIFIC PERFORMANCE—PLEADING—MUTUALITY OF CONTRACT.

1. C., in consideration of services to be rendered by plaintiff as attorney for him in litigation then pending concerning land, agreed to convey to plaintiff a certain lot "out of the premises which may be recovered by him." After C.'s death, and after plaintiff had performed services in the litigation, C.'s administrator compromised it against plaintiff's advice, and conveyed C.'s interest in the land to B., the other litigant. *Held*, that a complaint in a suit for specific performance need not allege against C.'s administrator and B., and purchasers from B., that C. had any title to the land, as plaintiff was entitled, as against all the defendants, to a conveyance of C.'s interest, whatever it may have been.

2. But such a contract cannot be specifically enforced, as there is no mutuality of remedy thereon, where the complaint does not show a substantial performance by plaintiff of his contract to render services, the refusal of C.'s administrator to continue the litigation not being such a waiver as to warrant specific performance.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Suit for specific performance by E. A. Lawrence against George W. Gildersleeve, administrator of Joseph R. Corwin, deceased, and others. From a judgment for defend ants, plaintiff's administrator, James L. King, appeals.

George E. Lawrence, for appellant. *Garber, Thornton & Bishop* and *Lloyd & Wood*, for respondents.

WORKS, J. The deceased, Corwin, and the defendant Baldwin being in litigation involving the title to a certain tract of land, the former entered into a written contract with the appellant's intestate, by which he agreed that, in consideration of his services, to be rendered as an attorney for said Corwin, in said litigation, he would convey to Lawrence "a lot of land out of the premises which may be recovered by him, fronting 30 feet on Hayes street, by a uniform depth southerly of 137½ feet, which is to be of equal quality and value as the remainder of said premises, free of incumbrances created by him." Lawrence entered upon the performance of the services, and a long litigation followed, the case coming once to this court. Before the litigation was concluded Corwin died, and the respondent Gildersleeve was appointed his administrator. Gildersleeve declined to prosecute the action further, although Lawrence requested it, and was ready and willing to carry out his part of the contract. Gildersleeve, against the advice and without the consent of Lawrence, compromised the litigation with Baldwin for $1,000; and, under an order of the probate court, procured in furtherance of the terms of compromise, conveyed to Baldwin all the right, title, and interest of Corwin in the property. This suit was brought to compel a specific performance of the contract of Corwin to convey to Lawrence the 30-feet front of the property, and the complaint shows substantially the above facts. Baldwin and the defendant Grayson, who took under him, as well as Corwin's administrator, are made parties defendant. A demurrer to the complaint was sustained, and judgment rendered against the plaintiff, from which this appeal is taken, and is being prosecuted by King, the administrator of Lawrence.

We are inclined to doubt the correctness of the ruling of the court below, on account of the extreme length of the brief of the learned counsel for respondent in its support. Knowing the abilities of counsel, and their accurate knowledge of the law, a brief of 85 pages, coming from them in support of a single ruling of the court below, casts great doubt upon such ruling. However, the learned counsel may not have had time to prepare a short brief, and for that reason have cast upon us the unnecessary labor of reading and extracting therefrom the points made. If we overlook any of them, counsel will readily understand the reason.

It is urged, as an objection to the complaint, that it does not allege that Corwin had any title to the land. This was unnecessary. The question whether he had title or not was the question in litigation between Corwin and Baldwin. Lawrence had agreed to recover the land for Corwin, and in consideration thereof was to have a part of the land. Neither Corwin nor his administrator could assert, as against him, that Corwin had no title, and thereby defeat his claim. He was entitled to proceed with the suit and obtain a title; and, as Corwin's administrator prevented his doing so, he was, as against Corwin's estate, entitled, so far as this point is concerned, to a conveyance of Corwin's interest in the land, whatever it might have been. He would also have been entitled to such a conveyance, as against Baldwin and purchasers under him, if the contract had been fully performed on his part. Under such a conveyance he would have stood in Corwin's shoes; and, if Baldwin had a better title, his deed would have availed him nothing. If Corwin's title was good as against Baldwin, Lawrence was entitled to it, if he performed his part of the contract; so that, in neither view that can be taken of it, was it necessary for Lawrence to show title in Corwin in order to entitle him to recover. The fact that the litigation, as between Corwin and Baldwin, was compromised, could not affect his right to such a deed. It would, of course, give him no better title than Corwin had, and to that Baldwin, and purchasers from him with notice, cannot be heard to complain. It is true, as contended by the appellant, that an attorney cannot prevent a compromise by his client, but it is equally true that the client cannot, nor can the opposite party, having knowledge of his rights, so compromise the action as to defeat the rights of the attorney in the subject-matter of the action.

But the complaint was fatally defective for the reason that the contract was not one that could be specifically enforced. To authorize the specific enforcement of a contract, the remedy under it must be mutual and susceptible of enforcement by both of the parties. There are certain exceptions to this rule not affecting this case. The performance of a contract for personal services, confidential in their nature, will not be compelled, and this being so, the party bound by the contract to perform such services cannot compel performance by the other party for that reason alone. Cooper v. Pena, 21 Cal. 409, is in point, and decisive of the question. In that case it was said: "So far as the agreement is unperformed, the plaintiff cannot be compelled to perform it on his part, for equity will not enforce a contract for personal services, but leave the party to his remedy at law. In respect to the remedy, therefore, there is no mutuality, and it is universally admitted that equity will not enforce a contract where the party asking its enforcement cannot himself be compelled to perform it. The contract must be just and equal in its provisions, and the subject-matter must be such that equity can take jurisdiction of it, and compel performance by both of the parties. The remedy must be mutual as well as the obligation, and, where the contract is of such a nature that it cannot be specifically enforced as to one of the parties, equity will not enforce it against the other. * * * We have already stated that the plaintiff cannot be compelled to complete the services which he agreed to perform, and the fact that he has offered to complete them is not equivalent to actual performance. The rejection of the offer by the defendant excuses the performance as a condition precedent, but does not release the plaintiff from his obligation to perform, so long as he insists upon the agreement. As this is an obligation which the court cannot enforce, there is no principle which would justify it in enforcing the obligation on the other side; and the only course is to decline to interfere, and leave the plaintiff to his remedy for damages." So in Vassault v. Edwards, 43 Cal. 465, it is said: "In Cooper v. Pena the consideration for the land to be conveyed was to be paid by the personal services of the plaintiff; and the court rightly, and in entire accord with the authorities, some of which we have above cited, held that, as the court could not specifically enforce the performance of the personal services, the remedy was not mutual. There is no exception to the rule—at least none now occurs to us—that the contract, though signed by both parties, will not be specifically executed at the instance of one party, unless performance on his part can also be compelled. The proposition, that specific performance of the contract would not be decreed when the party asking its enforcement could not be compelled to perform it, was decisive of the case, and upon it the case was, in fact, decided; and in our opinion the decision is sustained by the overwhelming weight of the authorities. The exceptions which are stated in some of the cases prove the rule. A suit cannot be maintained by an infant, because he cannot be compelled to perform the contract; but, if the infant commence the action after he arrives at the age of majority, specific performance will be decreed, because there is then a mutuality of remedy, and the plaintiff can be compelled to perform on his part. A sale to a married woman furnishes another illustration. She cannot maintain a suit for specific performance, because she cannot be compelled to perform the agreement on her part." The rule is not applicable where the personal services have been fully or substantially performed, or where full performance has been waived. Ballard v. Carr, 48 Cal. 79; Howard v. Throckmorton, Id. 489.

The complaint does not show even a substantial performance on the part of Lawrence, and the refusal of the administrator to go on with the litigation could not, under the circumstances of this case, be regarded as such a waiver of performance as would entitle the appellant to a specific performance, but might entitle him to damages.

This objection to the complaint being fatal, other points made by the respondent against it need not be considered. Judgment affirmed.

We concur: BEATTY, C. J.; PATERSON, J.

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79 Cal. 603

CROSSMAN *v.* DAVIS. (No. 12,920.)

(*Supreme Court of California.* July 2, 1889.)

RES ADJUDICATA.

A stipulation, by which all parties to a suit involving the title to certain land compromised and dismissed the action, is a bar to a suit involving the title to the same property by a grantee of one of the parties who purchased with knowledge of the agreement.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

E. A. Crossman sued C. G. Davis in partition. The case turned upon the stipulation of Raynor, present plaintiff's grantor, and proceedings thereunder, in the case of P. A. Raynor v. W. H. and Sarah J. Mintzer, in which case the then plaintiff, P. A. Raynor, sought partition of the same lands described in the present case, and in which former suit defendants therein filed a cross-complaint, in which case, under the said stipulation, the cross-complaint was withdrawn and dismissed, and thereupon by consent of defendants plaintiff dismissed said action. Defendant claims that by reason of such dismissal in former case, and the stipulation, plaintiff is barred from again proceeding in a new action to obtain partition; the defendant here being the grantee of defendants in that suit, and present plaintiff here, Crossman being grantee of former plaintiff Raynor, and also having purchased with full knowledge of all the facts. The dismissal in the former suit was by agreement.

Crossman & Woodside, for appellant. *Rowell & Rowell* and *A. B. Hotchkiss*, for respondent.

WORKS, J. Action for the partition of real estate. Findings and judgment for the defendant that he was the owner of all the property in controversy. The appeal is from the judgment, and comes to us on the judgment roll. The only real question presented by the record is whether or not a certain agreement between the grantors of the parties to this action, by which said parties compromised and dismissed an action pending between them, involving the title to this same property, was a bar to the plaintiff's claim to an interest therein. The court below found that the dismissal of the action under a special agreement involving other disputed matters was sufficient to bar the plaintiff's claim, and in this we think the court was right. Merritt v. Campbell, 47 Cal. 542. The plaintiff had full knowledge of the agreement and dismissal, and must be held to have been bound thereby. Judgment affirmed.

We concur: Beatty, C. J.; McFarland, J.; Paterson, J.; Thornton, J.; Sharpstein, J.

79 Cal. 605

Franklin *et al.* *v.* Dutton. (No. 12,946.)

(*Supreme Court of California.* July 2, 1889.)

Venue in Civil Cases.

Under Code Civil Proc. § 392, providing that actions for the recovery of real property, or an estate or interest therein, or for the determination of such interest, must be tried in the county in which the subject of such interest is situated, a suit for the reformation of a contract for the sale of land must be tried in the county where the land is situated.

In bank. Appeal from superior court, Santa Barbara county; R. M. Dillard, Judge.

B. F. Thomas, for appellants. *Hall & Rodgers*, for appellee.

Sharpstein, J. This action was commenced in the superior court of the county of Santa Barbara for the reformation of a contract for the sale by plaintiffs to defendant of a certain tract of land lying in said county. Defendant demurred to the complaint, and at the same time demanded a change of the place of trial to San Francisco, the place of his residence. The court made an order changing the place of trial as demanded. From that order plaintiffs appealed, and contend here that under section 392[1] of the Code of Civil Procedure they are entitled to have the action tried in the county of Santa Barbara, where it was commenced. If it be an action for the determination, in any form, of a right or interest in real estate, situated in Santa Barbara county, it must be tried in that county. This action, as we construe it, is for the determination of a right or interest in real estate. Order reversed.

We concur: Beatty, C. J.; Works, J.; Paterson, J.; Thornton, J.

79 Cal. 561

Green *v.* McMann *et al.* (No. 13,092.)

(*Supreme Court of California.* July 2, 1889.)

Record on Appeal.

1. A certificate to a transcript which merely states that the "transcript is correct," and does not state that numerous erasures, interlineations, etc., were in the transcript when the certificate was given, is insufficient.

2. Where the copy of a transcript served on appellees does not contain all the interlineations and corrections in the original transcript, the service is insufficient.

In bank. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

A. D. Splivalo, for appellants. *Mitchell & McPike*, for respondent.

McFarland, J. Respondent moves to dismiss the appeal herein on seven different grounds, each of which is entitled to consideration. We will notice a few of them:

1. The first is that the transcript is not a printed transcript, within the meaning of rule 2 of this court. The facts with reference to this point are that, although the original transcript is mainly in print, it contains a large number of erasures and 23 corrections and alterations in writing,—some between the printed lines, and others on the margin; and, in addition, there are certain capital letters scattered along the margin, which, on their face, are of uncertain meaning. Of course, it would be allowable to thus correct one or two typographical errors in a printed transcript, but the condition in this respect of the transcript in the case at bar is beyond the reach of clemency.

2. The second ground is that the transcript—not considering the erasures and written matter—is not printed on paper of the size required by the rule, and has no blank fly-sheet cover, etc., as the rules require. The facts on this point are as stated by respondent.

3. The third ground is that the transcript is not certified as required by law. The facts on this point are: *First*, that the certificate merely states that the "transcript is correct," and does not state, in terms, that the papers are correct copies of the originals on file; and, *second*, that it does not state that the erasures, interlineations, and alterations were made before the certificate was given.

4. The fourth ground is that "the transcript contains so many errors and corrections as to have become unintelligible." It is difficult to say whether an inspection of the transcript establishes this allegation or not; it certainly tends strongly in that direction.

5. The fifth ground is that "no copy of the transcript has been served upon this respondent or his attorneys." The facts on this point are that the copy served contained only four of the corrections on the original transcript, one of them being a paster.

The other grounds go rather to the merits of the appeal, and we do not care to discuss them here.

We have noticed the grounds of the motion in detail, not because each of them, in itself, would furnish sufficient reason for dismissing the appeal, but to show the general situation of the case, as bearing on the discretion (if there be room for discretion) which this court should exercise in the premises. We think that the motion to dismiss should be granted, upon, at least, the third and fifth grounds stated. Waiving the question whether or not a general statement that the "transcript is correct" is sufficient in a clerk's certificate, it is clear that, in this instance, the certificate should have shown that the numerous erasures, interlineations, marginal writings, etc., were in the transcript when the certificate was given. Any other rule would subject a record to most dangerous alterations and mutilations. And, again, no matter under what circumstances the changes were made, it is apparent that no substantially correct copy of the transcript was served on appellant. For these reasons the motion is granted. Appeal dismissed.

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[1] Section 392 provides that actions "for the recovery of real property or of an estate or interest therein, or for the determination in any form, of such right or interest and for injuries to real property" must be tried in the county where the subject of the action is situated.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; WORKS, J.; PATERSON, J.

THORNTON, J. I concur in the judgment on the ground that no copy of the transcript was served.

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79 Cal. 564

HUBBOCK *v.* ROSS *et al.* (No. 13,148.)

(*Supreme Court of California.* July 2, 1889.)

APPEAL—RECORD.

A motion to dismiss an appeal because a transcript was not filed in time will not be granted where the reason of the delay was that appellant, a poor man, was unable to procure the money in time to get the transcript printed.

In bank. Appeal from superior court, Marin county; E. B. MAHON, Judge.

Moses G. Cobb and *Hepburn Wilkins*, for appellant. *Wm. Barber*, for appellees.

PER CURIAM. There is a motion to dismiss this appeal. The appellant, not being able to get his transcript on file in time, applied for an extension of time, and this was renewed until three extensions were granted. The respondents move to dismiss, on the ground that no sufficient reason existed for the failure to file the transcript in time, and that the court was misled and induced to make the several orders extending time by the affidavits of counsel for the appellant, which it is claimed, did not set out the true reason for the delay. It is quite apparent to us that counsel for appellant did not deal frankly with the court, and his course in the matter is subject to criticism. Therefore, if his interests alone were to be considered, we would dismiss the appeal without hesitation. But the true reason of the delay, as now developed, was that the appellant is a poor man, and was unable in time to procure the means with which to get his transcript printed, or arrange to have the same printed in any other way, although he endeavored to do so. The expenses of taking appeals, under our practice, are extremely burdensome to litigants of small means, and no doubt frequently result in injustice. For that reason we do not feel that we should deprive the appellant of the benefit of his appeal under the circumstances of this case. The courts should be open to all litigants alike, whether rich or poor, and every facility should be afforded them to be heard. But we take this occasion to express our unqualified disapproval of the growing habit on the part of some attorneys practicing in this court of neglecting to prepare their transcripts and briefs in time to be printed, and then burdening this court with applications for extensions. These applications are of almost daily occurrence, and in perhaps 99 out of every 100 of these cases, if the real reason for the failure to file in time were stated, it would be the neglect of the attorney. Usually it is that the printer has failed to print in time; but whether the manuscript was furnished him in time or not is left to be conjectured. If counsel will do their duty in this respect this court will have more time to devote to other more urgent and important matters. Motion denied.

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79 Cal. 606

WILLIAMS *et al. v.* HALL *et al.* (No. 13,028.)

(*Supreme Court of California.* July 2, 1889.)

ACTION ON CONTRACT.

1. Under Civil Code Cal. §§ 1614, 1615, providing that every written contract imports a consideration, as if it were a promissory note, in a suit on a contract for the payment of money it is not necessary to allege a consideration.

2. A general finding that all the allegations of the complaint are true, and all the averments of the answer untrue, is sufficient.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; A. W HUTTON, Judge.

Hall and others sued Williams and others on a contract for the payment of money. Judgment for plaintiffs, and defendant appeals.

Wells, Guthrie & Lee, for appellants. *W. S. & I. Hall, pro sese*, and Reymert & Messmore.

HAYNE, C. The transcript in this case is improperly entitled. The plaintiffs in the court below are put as the defendants on appeal, and the defendants in the court below are put as the plaintiffs on appeal. Under our system this is improper and confusing. Simpson v. Applegate, 75 Cal. 345, 17 Pac. Rep. 237. The action was upon a contract for the payment of money. Judgment was given for the plaintiffs, and the defendants appeal. The first point is that the complaint does not allege that there was a consideration for the contract; but, in the first place, we think that a consideration is alleged. By their contract the defendants acknowledged themselves to be indebted to plaintiffs in a certain sum, and promised to pay the same. And it is alleged that "the said obligation and indebtedness was made and executed by the said defendants, Williams and Adams, as final settlement of accounts for transactions in real estate between them and the plaintiffs and defendant Frank Berton, and for good, valid, and substantial consideration." And in the second place the contract was in writing and was set forth *in hæc verba*, and in such case it is not necessary to aver a consideration. Under the Code every written contract imports a consideration, as much as if it were a promissory note, (Civil Code, §§ 1614, and 1615,) and therefore it is not necessary that a consideration should be specifically averred. Winters v. Rush, 34 Cal. 136. The next point is that the general finding, that all the allegations of the complaint are true and all the averments of the answer are untrue, is not sufficient. But it is well settled that it is sufficient. Gwinn v. Hamilton, 75 Cal. 266, 17 Pac. Rep. 212; Johnson v. Klein, 70 Cal. 186, 11 Pac. Rep. 606. In addition to this, the findings dispose of all the material issues specifically. The only other point is that the judgment was for one dollar less than authorized by the findings. The appeal is entirely destitute of merit, and was evidently taken for delay. We therefore advise that the judgment be affirmed, with 20 per cent. damages.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed, and it appearing to the court that the appeal herein was taken for delay, it is ordered that there be added to the costs 20 per cent. of the amount of the judgment as damages, by virtue of the provisions of section 957, Code Civil Proc.

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79 Cal. 568

PEREGOY *et al. v.* SELLICK. (No. 12,441.)

(*Supreme Court of California.* July 2, 1889.)

WATER-COURSE—QUIETING TITLE—PLEADING.

1. One who has appropriated all the water in a stream for purposes of irrigation may sue persons who afterwards acquire vacant land above plaintiff's tract, and divert part of the stream to irrigate their crops, to quiet his title to the full flow of the stream.

2. Where the complaint alleges that defendants were preparing to divert the whole stream under a claim of right, and the answer asserts a right to use 40 inches of the stream for irrigating defendants' crops, and the court finds that plaintiff was entitled to the full flow of the stream, it is sufficiently shown that defendants claimed water at a time when plaintiff was entitled to it.

3. There need not be an actual interference with plaintiff's right before an action can be brought. The assertion of an adverse claim is sufficient.

In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

A. L. Shinn and *Spencer & Raker*, for appellants. *Goodwin & Davis*, for respondent.

BEATTY, C. J. The record and the brief of the appellants in this case bear the above title, which, in view of the long-settled practice of the court not to transpose the names of the parties when defendant appeals, is confusing, if not positively misleading. We take the occasion to express the hope that we may receive no more records or briefs entitled in this way. The case is this: Sellick, the plaintiff, owned lands bordering on a natural stream. He went above his land, on land of the government, put a dam in the stream, and by means of a ditch of sufficient capacity, heading above the dam, diverted all the water of the stream, which he conducted to the higher parts of his own land, and has since continuously used thereon to irrigate his crops of grass, etc., and for domestic purposes. Subsequent to this appropriation by plaintiff, the defendants acquired from the government lands bordering on the stream above plaintiff's dam, and commenced diverting water from the stream by means of ditches, for the irrigation of their crops. The plaintiff thereupon commenced this action to quiet his title to the full flow of the stream down to the head of the ditch. In his complaint he alleged his ownership of the land, and appropriation of the water for beneficial uses, substantially as above stated, and charged that the defendants had "entered upon said stream above said land and above the head of the ditch of plaintiff, and made some claim to the whole of the water flowing in said stream, and are making preparations to divert and use said water so as to deprive plaintiff of the use thereof."

It will be seen that the entry and diversion, or claim of right to divert, by the defendants, is not expressly charged to have been subsequent to plaintiff's appropriation. But it is charged "that whatever claim the defendants, or either of them, have or may make to said water, or the use thereof, the said claim or right is entirely subject to plaintiff's claim and title to said water, and is wholly invalid and without right as against the appropriation of said water by plaintiff." The prayer of the complaint is that defendants be required to set forth their claim, etc., and that plaintiff have judgment "quieting him in the use, right to use, and title, to all of said water as aforesaid, against the defendants, and either of them, and that said defendants have no right or title to the same, or any portion thereof," etc. To this complaint the defendants interposed a general demurrer, which was overruled, whereupon they answered, denying plaintiff's appropriation, and setting up their riparian rights and use of the water diverted by them for irrigation of their crops. The case was tried by the court upon these issues. Findings, conclusions, and judgment were made and given in favor of the plaintiff. The defendants appeal from the judgment upon the judgment roll.

1. It is contended that the superior court erred in overruling the demurrer to the complaint. We do not think so. The complaint is, perhaps, justly amenable to some of the criticisms directed against it, but it states facts sufficient to constitute a cause of action. It presents a case substantially like the case of Standart v. Water Co., 19 Pac. Rep. 689, in which we held that this action would lie to quiet title to rights of the character here involved.

2. It is contended that the superior court has failed to find upon all the material issues raised by the pleadings, and that the findings made do not support the judgment. We think every material fact has been found, and that the findings do support the judgment. The two points under this head, upon which counsel for appellant most strongly insist, are (*a*) that it is not shown by allegation or finding that the defendants claim any water which belongs to plaintiff at a time when plaintiff shows himself entitled to it; and (*b*) that defendants are not shown

to have interfered with the use of the water at the season when plaintiff was entitled to it. As to the first point the complaint shows that defendants were making preparations to divert the whole of the water, so as to deprive plaintiff of the use of it, and that they did this under claim of a right to do so. The answer asserts a right to use 40 inches of the stream on the lands of defendants for irrigating crops, (necessarily during the irrigating season,) and this assertion of right renders a finding upon the point unnecessary. As to the second point it is only necessary to say that the right to maintain this action does not depend on an actual interference with plaintiff's right. The assertion of an adverse claim is all that is required. No error appears in the record. Judgment affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.

79 Cal. 572

PEREGOY v. MCKISSICK. (No. 12,442.)

(*Supreme Court of California.* July 2, 1889.)

WATER-COURSES—INJUNCTION.

Plaintiff constructed a dam in a stream on vacant land, and diverted the entire stream to his land for purposes of irrigation. Afterwards defendant acquired title to the land on which the dam was built, and he removed a portion of the dam so as to allow the water to flow in its natural course, using it to irrigate his crops. It did not appear that plaintiff used the water for irrigation, though he diverted it for that purpose, or that he was in any way damaged by defendant's acts. *Held*, that defendant would not be enjoined from interfering with the dam.

In bank. Appeal from superior court, Lassen county; M. MARSTELLER, Judge.

A. L. Shinn and *Spencer & Raker*, for appellants. *Goodwin & Davis*, for respondent.

BEATTY, C. J. There is the same fault in the entitling of this appeal as that noticed in Peregoy v. Sellick, ante, 966, (No. 12,441,) just decided. It should be entitled McKissick v. Peregoy. This is an appeal from a judgment enjoining the defendant from interfering with a head-dam by means of which the plaintiff diverts water from a stream which flows in its natural course through the defendant's lands. This head-dam and connecting ditch were constructed by plaintiff on the land now owned by defendant, while the title thereto remained in the government, and they have been used to divert the water of the stream to lands belonging to the plaintiff. The defendant, owning land bordering on the stream below plaintiff's dam, and needing the water for irrigation, has several times removed portions of the dam so as to cause the water to flow down to his own ditches, and claims the right to do so, and is insolvent. But it is not found that plaintiff will be damaged by the acts done and threatened by the defendant except nominally. It is found that the water is useful and necessary for the irrigation of plaintiff's land, and that he diverted it for that purpose; but it is not found that he has ever used it for that purpose, or that he has ever raised, or attempted to raise, any sort of crops on his land. For aught that appears he has simply turned the water out of the stream and allowed it to run to waste, and when defendant turned it back into its natural channel through his land (where he did use it for beneficial purposes) it does not appear that plaintiff was at all damaged. The finding shows he was not damaged. Under such circumstances a party claiming as an appropriator has no right to an injunction against a riparian proprietor, and the judgment is therefore erroneous. Another point is also presented by the record in this case, viz., the validity of an appropriation not initiated by compliance with the provisions of the Civil Code as to posting and recording of notice. This question was decided in the case of De Necochea v. Curtis, 20 Pac. Rep. 563, and a rehearing afterwards granted. As counsel in this case have not argued that question, and its decision is not necessary to a disposition of his appeal, we shall leave it untouched until we come to reconsider the case of De Necochea v. Curtis. For the reason above specified the judgment is reversed and cause remanded.

We concur: WORKS, J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.

THORNTON, J. I concur, and will add that if the plaintiff has never used the water for any useful or beneficial purpose, he was never an appropriator, and if he has ever used it for the purposes above mentioned, and then ceased to use it, his right has ceased. This is so by both statute (Civil Code, § 1411) and the law fixed by the decisions in this state, made before the statute was enacted. If he ever appropriated the water, or his right has ceased by non-user, we cannot see what right he has against the defendant, a riparian proprietor, to continue his diversion and waste of the water.

79 Cal. 625, 631

PEOPLE v. LENON. (No. 20,516.)

(*Supreme Court of California.* July 2, 1889.)

RAPE—EVIDENCE—INSTRUCTIONS—JUDGMENT—ENTRY.

1. On a trial for rape, where the prosecutrix, a girl between 10 and 11 years old, testifies that defendant, her step-father, with whom she lived, was in the habit of beating her, and thus keeping her in constant fear, and that she submitted to him under the influence of such fear, the testimony of a witness to the effect that, living in a house close to defendant's, she could hear him beating prosecutrix, is admissible as corroborative.

2. Prosecutrix, during her testimony, made a remark, not brought out by any question, indicating that defendant had, or attempted to have, intercourse with her on former occasions. The district attorney then asked, without objection, "Do you mean to say that he has done these things before?" to which she replied that he had twice before. *Held*, that the district attorney was then properly allowed to ask, "How came he to do it on these two

former occasions?" and "Why didn't you tell your mother?"

3. A charge on the subject of reasonable doubt, that "it would not be sufficient to justify a conviction if the jury should be satisfied of the guilt of the defendant to such a moral certainty as would influence their minds in the important affairs of life," was properly refused, as calculated to confuse the jury.

4. An instruction that before the jury can convict they must be satisfied beyond reasonable doubt that defendant is guilty of the crime as alleged; that a charge of this nature is one peculiarly hard for a defendant to clear himself of; that from the nature of the case the prosecutrix and defendant are usually the only witnesses; that the jury should be perfectly satisfied from the case made out by the witnesses, and corroborating evidence, if any, before finding defendant guilty; that, if not satisfied, they should acquit; and that the "reasonable doubt" mentioned is as follows: "A defendant in a criminal action is presumed to be innocent until the contrary is proved, by not the mere preponderance of evidence, but by evidence entirely convincing to the jury; and, in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal,"—is sufficient.

5. Where the clerk omits to enter the judgment in a criminal case when it is pronounced, defendant being then present, an order to enter the judgment *nunc pro tunc* may afterwards be made, though defendant is not in court.

In bank. Appeal from superior court, Los Angeles county; W. P. WADE, Judge.

Hugh J. & Wm. Crawford, for appellant. *George A. Johnson*, Atty. Gen., for the People.

MCFARLAND, J. 1. The defendant was charged with and convicted of the crime of rape, and he appeals from the judgment. Appellant contends that the court below erred in allowing the testimony of Mrs. Amanda Stevens to the effect that, living in a house next and close to that of defendant, she heard him whipping and beating the prosecuting witness. The prosecuting witness, upon whom the alleged crime is charged to have been committed, was a young girl between 10 and 11 years old, and lived with the defendant who was her step-father. She testified that defendant was in the habit of cruelly beating her, and thus keeping her in constant fear and terror, and that she submitted to him under circumstances which, without such fear and terror, might have indicated consent, (if, indeed, consent of such a child could have been found by the jury at all.) The testimony of Mrs. Stevens was admitted by the court expressly upon the ground—and upon no other ground—of corroborating the statement of the prosecuting witness as to cruel treatment and fear, and we think that for this purpose it was properly admitted. 2 Bish. Crim. Law, §§ 1124, 1125; Reg. v. Jones, 4 Law T. (N. S.) 154. What is said in People v. Tyler, 36 Cal. 522, does not apply to the case at bar, where the party injured was a mere child under the defendant's control, and where the main question was whether or not she was influenced by fear to make less resistance than should have appeared under other circumstances. The fact that the beating to which Mrs. Stevens testified the most positively happened about a year before the alleged rape, goes only to the weight, and not to the admissibility, of the testimony.

2. During the examination in chief of the prosecuting witness, she voluntarily, and not in response to a question asked by the prosecution, made a remark indicating that the defendant had, or attempted to have, intercourse with her on occasions prior to the time alleged in the information. The district attorney then asked: "Do you mean to say that he has done these things before?" To which question she answered that he had twice before. The district attorney then asked her if on these occasions she had consented to his doing it, and she answered that she had not. Up to this point no objection was made to the testimony by the defendant. The district attorney then asked the witness, "How came he to do it on these two former occasions?" and "Why didn't you tell your mother?" Defendant objected to these questions as irrelevant, incompetent, and immaterial. The court overruled the objections, and defendant excepted, and he contends that this ruling was an error for which the judgment should be reversed. The witness answered, substantially, that on the two former occasions she was overcome by fear and terror, and that she did not tell her mother because she was "so scared," and because she was afraid that defendant would kill her mother.

There is no doubt that it is the general rule that the prosecution cannot prove the commission by a defendant of another offense, for the purpose of raising the inference that he is guilty of the particular crime charged. If, therefore, the prosecution had directly offered to prove the two former assaults made by the defendant on the girl, and defendant had objected to the testimony, it would, perhaps, have been the duty of the court (even under the particular circumstances of this case) to have sustained the objection. But the testimony of the main fact, that former assaults had been made, came from the witness incidentally, and evidently to the surprise of the prosecution, and defendant made no objection to it. If he had made such objection, and had moved to strike out what had thus been suddenly injected into the testimony, a different question would have arisen. Defendant, however, had apparently no objection to the witness testifying to the fact of the former occurrences; for that testimony was evidently favorable to defendant, as tending to rebut the want of consent on the part of the witness. His position was that her testimony, given voluntarily, that the former intercourse, or attempted intercourse, did occur, should remain before the jury as an isolated fact, without any explanation of the circumstances under which it occurred. This position, in our opinion, is not tenable. As the testimony to the fact of prior intercourse, coming, as it thus did, incidentally, was, with the consent of defendant, allowed to remain before the jury, we think that the prosecution was properly allowed to explain the circumstances under which that fact occurred. Moreover, there could have been no material damage done to defendant by the ruling, because—*First*, before any objection was made the witness had already testified that the former acts were without her consent, which was, substantially, all that she afterwards testified to; and, *second*, because the whole testimony as to the former acts was favorable to defendant.

3. Appellant contends for a reversal because the court refused a certain long instruction on the subject of reasonable doubt. It is difficult to tell from the transcript by whom this instruction was asked; but, assuming that appellant requested it, there was no error in refusing it, because it contained this proposition: "It would not be sufficient to justify a conviction if the jury should be satisfied of the guilt of the defendant to such a moral certainty as would influence their minds in the important affairs of life." This language lacks precision, and is so unguarded as to produce a bewildering impression. It seems to be founded upon People v. Brannan, 47 Cal. 97. In that case the court had given to the jury the affirmative proposition that it "was their duty to convict" if they should "be satisfied of the guilt of the defendant to such a moral certainty as would influence the minds of the jury in the most important affairs of life." This was held to be error, as most of the instructions of courts on the old subject of reasonable doubt turn out to be erroneous, when they ambitiously step outside of well-established bounds. But the proposition in the Brannon Case is very different from the negative proposition that the evidence is not sufficient to convict if it would influence men in the important affairs of life,—a meaning that can fairly be ascribed to the instruction asked for.

Moreover, the court of its own motion had instructed the jury as follows: "The jury are instructed that before you are justified in finding the defendant guilty of the crime charged in the information you must be satisfied beyond a reasonable doubt that on about the 6th day of February, 1888, and at the place alleged in the information, the defendant forcibly, violently, and against her will, had sexual intercourse with the female Eliza Daniels. The jury are instructed that a charge of this nature is peculiarly difficult for a defendant to clear himself of. No charge can be more easily made, and none is more difficult to disprove. From the nature of the case, the complaining witness and the defendant are generally the only witnesses. You should be perfectly satisfied that the case is made out by witnesses, and corroborating evidence, if any, before you find the defendant guilty, if you find him guilty. If you are not satisfied, you should acquit." And at the request of appellant had also instructed them as follows: "The jury are instructed that the reasonable doubt mentioned in the foregoing instructions is as follows: A defendant in a criminal action is presumed to be innocent until the contrary is proved, by not the mere preponderance of evidence, but by evidence entirely convincing to the jury, and in case of a reasonable doubt whether his guilt is satisfactorily shown, he is entitled to an acquittal." And we are satisfied that these instructions include about all that is necessary to say to a jury on the subject of reasonable doubt. It is proper for a court, and (if asked, at least) its duty, to call the attention of the jury to the difference between the character of evidence which would warrant a verdict in a civil case and that which would warrant a verdict in a criminal case, and to tell them that, while a preponderance of evidence would be sufficient in the former, it would not be in the latter, which requires proof beyond a reasonable doubt. In the case at bar the jury were cautioned that the charge of rape is "easily made," and "difficult to disprove." They were told that before they could convict they must be "satisfied beyond a reasonable doubt" that the defendant committed the crime charged; that they must be "perfectly satisfied," or else they should acquit; that mere "preponderance of evidence" will not do, but that there must be "evidence entirely convincing to the jury;" and that in any other event the defendant is "entitled to an acquittal." Where such instructions are given we would be slow in any case to reverse a judgment because other instructions on the same subject were refused. How much further, indeed, can a court safely go? Whenever a judge undertakes, in elaborate language, to tell a juror when his mind would be in a legal state of reasonable doubt, he enters upon a wide waste of mental philosophy, where landmarks are soon lost in fog; and he is very apt to have a collision with the metaphysics of some other court, which results in a wreck of the judgment. We think there was no error in the case at bar with respect to the subject of reasonable doubt. There are no other assigned errors which we deem it necessary to notice. Judgment affirmed.

We concur: WORKS, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J

Appeal from order to enter judgment *nunc pro tunc*, (No. 20,525.)

MCFARLAND, J. Appellant was convicted of rape, and on the day duly appointed for pronouncing judgment he was brought into court, and while he was present there judgment was duly pronounced and rendered that he be imprisoned in the state-prison for a certain term of years. The clerk, however, neglected at that time to enter the judgment; and afterwards the court made an order that the judgment be entered as of the date at which it was pronounced, which was accordingly done. This order was made when appellant was not present, and he appeals from the order on the ground that it was void because made in his absence. The position of appellant is not tenable. Appellant was present when the judgment was pronounced and rendered, and that is all that is required by the Penal Code on the subject. Sections 1191, 1193. It has been held in some cases that a different judgment cannot be rendered, or the original judgment changed, without the presence of the defendant, or after the lapse of a certain period of time. But in the case at bar there was no change of the judgment or new judgment entered. The entry of the judgment which had been already rendered was a mere ministerial act, which the clerk, probably, had the power to perform without any order of the court. Franklin v. Merida, 50 Cal. 289; In re Cook's Estate, 19 Pac. Rep. 431. We are astonished, however, that in so grave a case as this there was such unpardonable neglect to enter the judgment immediately after it was rendered. The order appealed from is affirmed.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

79 Cal. 501

GORDON *v.* DONAHUE. (No. 11,760.)

(*Supreme Court of California.* July 1, 1889.)

APPEAL—RECORD—WAIVER.

Where the record on appeal in a case tried by the court shows no findings by the judge except a paper bearing a date 28 days after judgment rendered, in the absence of showing to the contrary it will be presumed the clerk did his duty, and as provided by Code Civil Proc. Cal. § 1963, subd. 15, included immediately after entering judgment all the papers on file in the judgment roll, and the paper with a date later than the judgment need not be regarded, and no findings appearing it will be presumed they are waived.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

E. S. Lipitt, for appellant. *Theodore Bradley*, for respondent.

GIBSON, C. Action to recover compensation for services as nurses, rendered to defendant by plaintiff and two other persons, which other persons respectively assigned their demands therefor to the plaintiff. The case was tried before the court without a jury, and on the 12th day of October, 1885, judgment in favor of plaintiff, as prayed for in her complaint, was announced by the court, and was entered on the 14th day of the same month, from which judgment the defendant appeals.

Defendant urges as the sole reason for the reversal of the judgment that the instrument set forth in the transcript and denominated "Findings," and bearing date of November 11, 1885, and which date is appended under the signature of the judge, and no indorsement of filing appearing anywhere thereon, contains the only findings of fact and conclusions of law that were filed in the case, and the judgment having been entered prior to the filing of findings of fact and conclusions of law, the same not having been waived, is unsupported by findings, and consequently erroneous, and the filing of the findings bearing date of November 11, 1885, as aforesaid, did not and could not correct the error. To sustain this position, defendant assumes that the date on the face of the so-called findings under the signature of the judge, and the situation of the paper in the transcript immediately after the judgment, no other findings appearing in the judgment roll, conclusively show that such paper must have been filed after the judgment. This assumption, as will appear from what follows, is based on an unstable foundation. There is no bill of exceptions in the record; nothing by which it can be determined whether findings were not waived, or whether the so-called findings in the record were filed before or after the judgment was entered, unless the mere date on the so-called findings can be taken as *prima facie* evidence of the time the findings were signed, on the theory that the signing or authentication of findings should precede the filing, and could not have been filed prior to such date, which is 28 days after the entry of the judgment. The only thing in the record showing that the paper referred to as findings was ever filed is the certificate of the clerk to the transcript, reciting that all the papers in the transcript are correct copies of the originals on file in his office.

In Mulcahy v. Glazier, 51 Cal. 626, the court said: "It is a well-settled rule that upon appeal taken error is not to be presumed, but must be affirmatively shown. Where, therefore, as here, a cause is tried by the court without a jury, and the appeal is taken upon the judgment roll, the mere nonappearance of findings of fact in the roll does not necessarily establish that error was committed. The statute, when its several provisions are considered together, does not absolutely or unconditionally require that findings of fact shall be filed, but only that they must be filed unless waived in some one or more of the three methods therein mentioned. Under the rule of presumption referred to, we cannot presume that no such waiver occurred; the necessary intendment, in support of the judgment, is the other way. A party, therefore, who comes here to say that the court below committed an error in failing to find the facts, must, by bill of exceptions or some other similar and appropriate method, make it affirmatively appear by the record that no waiver of findings had in fact occurred in the court below; otherwise the intendment here must go to support, and not to overthrow, the judgment rendered there." Smith v. Lawrence, 53 Cal. 34; Carr v. Cronan, 54 Cal. 600; Reynolds v. Brumagim, Id. 254.

Measured by the foregoing rule, the judgment should be affirmed, because, if the paper referred to as the findings was not filed until after the entry of the judgment, then it must be presumed, in the absence of a showing to the contrary, that as the clerk of the trial court was required by section 670 of the Code of Civil Procedure, immediately after entering the judgment, to make up the judgment roll, that he regularly performed his official duty, (Code Civil Proc. § 1963, subd. 15,) and made it up within the proper time, including therein all papers then on file which should have gone into it, and the paper referred to as the findings showing merely, under the signature of the judge thereto, a date subsequent to the time when the judgment roll is presumed to have been completed, need not be regarded as a portion thereof. It then follows that, as no findings appear in the judgment roll, we must presume that they were waived. On the other hand, if the mere date on the paper referred to as the findings and its situation in the transcript immediately following the judgment can be disregarded, as we think they can be on the record before us, then the intendment still is in favor of the regularity of the proceedings of the court below, and the findings must be held to have been filed before the judgment was entered. It is therefore evident that upon either aspect of the case the judgment should be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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3 Cal. Unrep. 106

PURDY *v.* RAHL. (No. 11,921.)

(*Supreme Court of California.* July 1, 1889.)

APPEAL—AFFIRMANCE.

Where appellant, long after the time granted by the court to file briefs, fails to file either briefs, points, or authorities, the judgment appealed from will be affirmed.

Commissioners' decision. Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER, Judge.

T. H. Laine, for appellant. *J. E. Richards*, for respondent.

VANCLIEF, C. On the 24th day of January, 1889, it was ordered by the court that in this cause appellant be allowed 30 days to file brief, respondent 10 days to answer, and appellant 5 days to reply; and on the 25th day of March following the court ordered the submission of the cause. But no brief or points and authorities have been filed by either party. We therefore advise that the judgment and order appealed from be affirmed.

We concur FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

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3 Cal. Unrep. 117

HANSON *et al. v.* VOLL *et al.* (No. 11,951.)

(*Supreme Court of California.* July 2, 1889.)

APPEAL—AFFIRMANCE.

When a case is submitted, without oral arguments, on briefs to be filed, and none are filed, the judgment will be affirmed without looking into the record.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

David McClure, for appellants. *Wm. H. Fifield*, for respondents.

BELCHER, C. C. This case was submitted, without oral argument, on briefs to be filed. The time allowed for filing briefs has elapsed, and none have been filed. In such case the rule is well settled that judgment will be affirmed without looking into the record. We therefore advise that the judgment here appealed from be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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79 Cal. 556

HAMMOND *v.* STARR *et al.* (No. 11,623.)

(*Supreme Court of California.* July 2, 1889.)

ATTACHMENT—BONDS—DISSOLUTION—DAMAGES.

1. The misnomer of a defendant corporation, consisting in the omission of part of its name, will not invalidate a levy of an attachment on its property if it waives the irregularity by appearing without objection.

2. Nor will the filing of an amended complaint, correcting the misnomer, and stating the causes of action separately instead of as one, as in the original complaint, render void such a levy, if the defendant makes no objection on that ground, and the attachment cannot be questioned for the first time in an action on the bond given by defendant to obtain a release of the levy.

3. Under Pol. Code Cal. § 4178, providing that the return of a sheriff upon process is *prima facie* evidence of the facts therein stated, such a return showing that he demanded payment of an execution of defendant, and was informed by the officers of the latter that they had no property of defendant in their possession, sufficiently shows that defendant's property previously seized under attachment and released on bond was not delivered to the sheriff pursuant to the provisions of the bond.

4. Under Code Civil Proc. Cal. § 555, requiring such an undertaking to provide that defendant shall restore the released property or pay its value on demand, in case the attachment plaintiff recovers judgment, the damages recoverable in an action on the undertaking cannot exceed the amount of the judgment in the attachment action.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by John Hammond against A. M. Starr and G. H. Walter, upon an undertaking given by them to obtain the release of property of the Ætna Iron-Works Company, a corporation, levied on under attachment at the suit of said Hammond. Code Civil Proc. Cal. § 555, provides that such an undertaking shall provide that the defendant shall restore the released property in case plaintiff recovers judgment, or pay its value. Pol. Code, § 4178, makes the sheriff's return on process *prima facie* evidence of the truth of the facts therein stated. Judgment for plaintiff, and defendants appeal.

E. W. McGraw and *R. Percy Wright*, for appellants. *John C. Hall*, for respondent.

GIBSON, C. This was an action against defendants as sureties upon an undertaking to obtain the release of an attachment levied in another suit, and was tried before the court without a jury, and resulted in a judgment for plaintiff, from which judgment defendants appeal, and, instead of moving for a new trial, bring up the evidence, rulings, and exceptions in a bill of exceptions. In the action wherein the attachment proceedings occurred it appears the original complaint therein was entitled "John Hammond vs. Ætna Iron-Works, a corporation," and the affidavit and undertaking for an attachment were entitled the same. The defendant thus designated appeared in and by its true name, viz., Ætna Iron-Works Company, and demurred to the complaint. This demurrer was sustained, and, pursuant to leave obtained, plaintiff filed an amended complaint, entitled the same as the original complaint, to which defendant again demurred by its true corporate name, which demurrer was overruled. Two answers were then put in,—one by the "Ætna Iron-Works," averring that said "Ætna Iron-Works" was a private copartnership, and denying the corporate existence of defendant; the other by the "Ætna Iron-Works Company," averring its corporate capacity, and denying that the "Ætna Iron-Works" ever was a corporation, or anything other than a private copartnership. Thereafter the plaintiff served on the attorney who had appeared as the attorney for the Ætna Iron-Works Company, and filed a second amended complaint, in the title of which the defendant was designated as the "Ætna Iron-Works Company, a corporation." For failing to answer this last amended complaint, judgment was rendered in favor of plaintiff against the Ætna Iron-Works Company, a corporation. The day after, the Ætna Iron-Works Company appeared, and demurred to the original complaint. It made its motion in its true corporate name for a release of the attachment levy, under the provisions of sections 554 and 555 of the Code of Civil Procedure, which motion was granted, and the undertaking sued on in this action given pursuant to said sections.

When a person, natural or artificial, is sued by a wrong name, and appears by and in his or its true name in the action without objection, the error is waived. McCreery v. Everding, 54 Cal. 168. The irregularity in omitting the word "Company" from the name of defendant in the original complaint did not affect the attachment lien. In Porter v. Pico, 55 Cal. 173, the court, speaking of an attachment lien that had merged in the judgment therein considered, said: "This lien was not affected by any irregularities in the attachment itself, nor was it destroyed by the judgment rendered in the attachment suit. Any irregularities in obtaining it were waived by the defendant to the suit when he appeared and answered, without taking advantage of them by motion or otherwise in the course of the proceedings. The process is merely auxiliary, and the judgment in the action cures all irregularities."

It is urged that the amended complaints rendered the attachment levy void, because they stated a different cause or causes of action from that or those declared upon in one common count in the original, which was a demand for goods sold and services rendered to defendant, for which it agreed to pay. No objection was made on this ground to either of the amended complaints in the action in which they were filed, and cannot be made for the first time in a collateral proceeding. The original complaint at most was but defective, and could be amended without affecting the attachment lien. Hathaway v. Davis, 33 Cal. 168.

The two returns of the sheriff on the execution issued in the attachment suit show demands upon the officers of the defendant corporation for the payment of the amount named in the execution instead of for property released from the attachment, and that such demands were answered by such officers saying that they had no money or property in their possession belonging to the "Ætna Iron-Works." We think that it appears from the returns that a sufficient demand for the redelivery of the property that was released from the attachment levy was made. It was the sheriff's duty to levy the execution on such property, and his returns are *prima facie* evidence that the property was not delivered to him pursuant to the undertaking given for the release thereof. Pol. Code, § 4178. The said returns also show that the execution was unsatisfied. The judgment creditor then elected, under Code Civil Proc. § 552, to proceed upon the undertaking on the release of the attachment levy, and gave notice to each of the sureties thereon of the non-delivery of the attached property, and demanded payment of the amount fixed in the undertaking. As appellants' principal contention is that the findings in this case are not supported by the evidence based upon the invalidity of the proceedings in the attachment suit, and that the court erred in admitting the same in evidence, it follows that their contention cannot be sustained.

The judgment in the attachment suit was entered January 23, 1884, for $708.25, and $55.41 costs, which, together with interest thereon at the rate of 7 per cent. per annum to October 28, 1885, the date of the entry of the judgment appealed from, amounts to $857.25. The judgment appealed from is for $1,200 and costs, being $342.75 greater than that which the plaintiff could have recovered on his judgment in the attachment suit. The measure of damages is the value of the property attached. Metrovich v. Jovovich, 58 Cal. 342; Code Civil Proc. § 555. It is admitted in the pleadings that the value of the property attached was $76,000, but by stipulation the amount of the undertaking in suit was fixed at $1,200, instead of at the value of the property attached, as might have been done under section 555, Code Civil Proc. As the sheriff, in satisfaction of the execution in the attachment suit, could not have sold more of the attached property, had it been redelivered to him according to the undertaking for the release thereof, than sufficient to satisfy such execution, we think the plaintiff's recovery in this case should be limited to the amount recovered by him in the attachment suit, with the statutory interest thereon from the date thereof until the date of the entry of the judgment in this case. This we understand to be in accordance with the rule deduced from the authorities in Drake on Attachment, § 342, expressed as follows: "The measure of recovery on a delivery bond is the value of the property secured by it, not exceeding the amount of plaintiff's recovery in the attachment suit." We advise that the court below be directed to modify the judgment appealed from by deducting therefrom the sum of $342.75, and that it be affirmed for the remaining sum of $857.25 and the costs therein contained.

We concur FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the court below is directed to modify the judgment by deducting therefrom the sum of $342.75, and the judgment as to the remaining sum of $857.25, and costs, therein contained, is affirmed.

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79 Cal. 608

BROWN *v.* STARR *et al.* (No. 13,100.)

(*Supreme Court of California.* July 2, 1889.)

HOMESTEADS—CONSTRUCTION OF STATUTES.

Under Civil Code Cal. § 1237 et seq., exempting from forced sale a homestead, consisting of "the dwelling house in which the claimant resides, and the land on which the same is situated," and further providing for the appraisement of the premises, and a division thereof in case the "land claimed" is of greater value than $5,000, and is susceptible of division without injury, and that when so divided the "remainder of the land" above the value of $5,000 may be sold, etc., the duration of the debtor's estate in the land is immaterial, and not merely the value of his life-interest, but the value of the land in fee, should be appraised.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Wicks & Ward, for appellants. *C. N. Wilson*, for respondent.

MCFARLAND, J. Execution was issued upon a judgment in favor of plaintiff herein against L. C. Alexander et al., and levied on land upon which Alexander had declared a homestead. Under section 1245 et seq. of the Civil Code, persons were appointed by the court to appraise the value of the homestead. They reported that the property covered by the homestead was of the value of $15,000; that it could be easily divided, and that they had set off as a homestead a certain part of the land, including the dwelling-house of Alexander, and most of his improvements, which was of the value of $5,000. Alexander claimed that he owned only a life-estate in the land, or a "mere right of personal occupancy during his life-time;" and he moved that the appraisement be remanded for another report, in which his said life-interest only should be appraised, and that he be allowed to prove that he had only such interest. He also moved that the premises be sold as an entirety, and $5,000 of the proceeds paid to him. The court overruled said motions; and Alexander appeals from the orders denying said motions, and also from an order approving the report of the commissioners.

Assuming that said orders are appealable, we are satisfied that no error was committed by the court below. A homestead consists of "the dwelling-house in which the claimant resides, and the land on which the same is situated," (Civil Code, § 1237,) irrespective of the tenure, tenancy, or title by which he holds it. When an execution is sought to be enforced against it the appraisers must "view the premises" and "appraise the value thereof,"—that is, the value of the premises; and if the value of the premises exceeds $5,000 they must determine whether the land claimed can be divided without material injury. Section 1251. If from the report it appears to the judge that the land claimed can be divided, etc., he must "direct the appraisers to set off to the claimant so much of the land, including the residence, as will amount in value to the homestead exemption, and the execution may be enforced against the remainder of the land." Section 1253. It is the land, including the residence, that "must amount in value," etc. There is no provision of the Code on the subject of homesteads which makes any allusion to the title or kind of tenure by which the claimant holds the property, or requires any appraisement of the interest which he has therein. If he resides on the land, he may have a homestead on so much of it as does not exceed in value $5,000, against any person except one who has a better title, no matter what his own title is; and when an execution creditor claims that he is holding as a homestead more than he is entitled to, that question must be determined by the value of the land. Any other rule would lead to infinite confusion. Can it be contended that a man can have and keep and enjoy as a homestead a large and valuable tract of land, worth ten times the amount of exemption, and can prevent a creditor from having set off to him a part of the land, including his dwelling-house, of the value of $5,000, because he claims only a life-estate in the whole, and, owing to the uncertainty of life, such estate might not bring a large sum at sheriff's sale? The question here is not what title would a purchaser get if the property were sold? A purchaser at sheriff's sale never gets higher title than that held by the judgment creditor. Whenever it appears that a homestead claimant holds land of greater value than $5,000, and a creditor seeks to subject the excess to his execution, the court must first find out, through appraisers, whether it can be "divided without material injury;" and, if it can be so divided, and a part worth $5,000 set off to the claimant, that course must be pursued. That was the fact, and such was the course pursued, in the case at bar; and there the proceedings properly ended. If large and valuable properties could be held as homesteads under the pretense that the claimants had less than titles in fee-simple thereon, schemes could easily be contrived with relatives and friends, by which the machinery of the homestead law, designed for beneficent purposes, could be used as a means of dishonesty and fraud. These views are in entire accord with the cases of Spencer v. Geissman, 37 Cal. 99, and Brooks v. Hyde, Id. 366.

The orders appealed from are affirmed.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.; WORKS, J.

79 Cal. 584

In re FIL KI *et al.* (No. 20,547.)

(*Supreme Court of California.* July 2, 1889.)

CONTEMPT.

The petitioners were convicted of contempt in violating an injunction in a case in which the complaint was entitled as in "The Supreme Court of" Y. county, while the other papers were entitled as of "The Superior Court" of Y. county, where the suit was brought. *Held*, that though Code Civil Proc. Cal. § 405, provides that a complaint must contain, *inter alia*, "the name of the court and county in which the action is brought," yet, as section 475 provides that the court "must disregard" every defect in the pleadings which does not affect the rights of the parties, the court had jurisdiction, and an application for discharge on *habeas corpus* should be denied.

In bank. Application for a writ of *habeas corpus*.

Frank M. Stone and *Joseph A. Joyce*, for petitioners. *George A. Johnson*, Atty. Gen., for respondent.

SHARPSTEIN, J. The persons in whose behalf this writ was sued out were convicted, in the superior court of Yuba county, of a contempt of said court in disobeying and violating a temporary injunction issued out of said court in an action in which the county of Yuba was plaintiff and said Fil Ki *et al.* were defendants. The complaint in that action was entitled, "In the Supreme Court of the County of Yuba, State of California." The wrapper or outside cover had upon it the title, "In the Superior Court of the State of California, in and for the County of Yuba." The summons and temporary injunction were entitled, "In the Superior Court of the State of California, in and for the County of Yuba." The complaint was filed in the office of the clerk of the superior court of said county of Yuba. The contention of the petitioners is that no such action as that in which said injunction purports to have been issued was pending in the superior court of said county at the time said injunction issued; that a complaint must contain, among other things, the name of the court, and the county in which the action is brought; and that the complaint in this case does not contain the name of any court. That the complaint is defective in that respect is apparent. Is it a fatal defect?

Civil actions in the courts of this state are commenced by filing a complaint. Code Civil Proc. § 405. The complaint must contain: "(1) The title of the action, the name of the court and county in which the action was brought, and the names of the parties to the action. (2) A statement of the facts constituting the cause of action, in ordinary and concise language. (3) A demand of the relief which the plaintiff claims. If the recovery of money or damages be demanded, the amount thereof must be stated." Id. § 426.

If, in order to constitute a complaint, it is necessary to strictly comply with each and every of these requirements, then the paper filed in this case was not a complaint, and the injunction issued upon it was void, and, if void, might be disobeyed without committing any contempt of court. But no mere irregularity or omission, not going to the jurisdiction of the court, can be taken advantage of in this proceeding. Here we can only inquire whether the court had jurisdiction to issue the injunction. The Code prescribes what a complaint must contain, and it provides that "the court must, in every stage of an action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the parties, and no judgment must be reversed or affected by reason of such error or defect." Id. § 475. The two provisions are equally mandatory and imperative. The defect relied on in this case could not in any conceivable way "affect the substantial rights of the parties." The summons contained the name of the court, and the cover of the complaint contained it. So did the writ of injunction, which was disobeyed. And there was no "Supreme Court of the County of Yuba, State of California." The requirement that the complaint must contain the names of the parties is just as mandatory and imperative as it is that it must contain the name of the court. But in Campbell v. Adams, 50 Cal. 205, the court said: "The only ground on which it is claimed the judgment is void is that he [Lewis] was not named as a defendant in the original or any amended complaint * * *. But we are not prepared to hold that the judgment was a nullity for want of jurisdiction to render it. When Lewis was served as a defendant sued by a fictitious name, the court acquired jurisdiction over his person, and it then became the duty of the plaintiff to amend the complaint by inserting the true name. The omission to do this rendered the judgment irregular, but it was not void." In this case, we think, there was a complaint filed in the proper court, and that the defect relied on did not affect the substantial rights of the parties, and therefore must be disregarded in every stage of the action. The writ is discharged, and the prisoners remanded to the custody of the sheriff of Yuba county.

We concur: BEATTY, C. J.; THORNTON, J.; MCFARLAND, J.

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79 Cal. 495

NORDDEUTSCHEN FEUER-VERSICHERUNGS GESELLSCHAFT *v.* BERTHEAU. (No. 11,770.)

(*Supreme Court of California.* July 1, 1889.)

CONTRACTS—DAMAGES.

1. Defendant's firm made a written contract of agency with plaintiff, by which plaintiff reserved the right to terminate the agency at any time. In an action to recover money received by the agents, defendant testified that after the written contract was made it was discovered that a former agent was in default to the amount of $12,000, and that defendant's firm then verbally agreed to pay that amount, on plaintiff's assurance that "if this account is squared up, and you keep up the accounts with [plaintiff,] and do your duty, you will be able to soon refund yourself for your outlays, and we will stay with you and support you as long as you do your duty for us." *Held*, that the court properly left it to the jury to say whether there had been a modification of the written contract in respect of the duration of the agency.

2. Defendant's agency continued for two years after the alleged modification of the contract, when plaintiff terminated it. The court charged that if the jury found that there was such modification, and if the agency was revoked without consent, defendant would be entitled to counter-claim against plaintiff's demand the sum paid in settlement of the former agent's debt. *Held* error. If such payment was the consideration for the modification, the continuance of the agency for two years must have been of some value to defendant.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Naphtaly, Freidenrich & Ackerman, for appellant. *A. H. Loughborough*, for respondent.

WORKS, J. This is an action to recover the sum of $8,983.56, money alleged to have been had and received by the defendant, as agent of the plaintiff in the business of insurance. One Henry Balzer had been the agent of the plaintiff, and on the 25th day of September, 1878, the defendant entered into a copartnership with said Balzer, and upon that day the plaintiff and said firm entered into a written contract by which they became the agents of the company, in which it was provided, among other things, that the plaintiff should have the right of giving notice of the removal of the agency at any time, the agents to terminate the agency upon six months' notice. Immediately after the formation of the copartnership and the making of this contract of agency, it was discovered, upon closing up the accounts of said Balzer, that he was indebted to the plaintiff for premiums theretofore collected by him in the sum of $12,018.37. The defendant pleads by way of answer that upon the discovery of the indebtedness of Balzer there was a separate verbal agreement entered into between himself and the plaintiff, through its then president, by which it was agreed that the defendant should pay the said sum of $12,018.37 found to be due from Balzer, and that in consideration thereof the said firm, or the defendant, might continue the agency mentioned in the said written contract so long as the defendant might desire, provided that said firm, or the defendant, would perform all the duties of the trust. Shortly after this transaction Balzer died, and the defendant continued the business of the agency for about two years after the making of the contract, when he was removed by the plaintiff. The principal question in the case arises upon the allegation of the verbal contract, claimed to have been made by the president, by which it is claimed that the written contract was so modified as to continue the agency during the good behavior of the defendant. The only evidence tending to establish this allegation of the answer is that of the defendant himself, and is as follows: "At that time Henry Balzer owed the company $26,309.32, against which were outstanding premiums to the amount of $16,952.75, which had not been collected. Balzer owed the company for moneys actually collected by him $12,018.37. His financial condition, as I found it later, was hopelessly bankrupt. That balance of $12,018.37 was paid by me to Mr. Perger, as manager of the company, on the 28th of September, 1878. Mr. Balzer had told Mr. Perger that the money was ready for him, and when the latter found that it was not forthcoming he called on me, and asked me to pay the indebtedness of Henry Balzer, and he said to me at the time: 'If this account is squared up, and you keep up the accounts with my company, and do your duty, you will be able to soon refund yourself for your outlays, and we will stay with you and support you as long as you do your duty against [for] us.' I then paid the money. It has only been partly paid back to me." The agency was withdrawn from the defendant on the 19th day of August, 1880, and it is claimed that this was a breach of the contract, and entitled the defendant to recover back the $12,018.37. The plaintiff asked the court to charge the jury as follows: "*First.* I charge you that defendant has not presented here any proof sufficient in law to alter or modify in any particular the written contract of September 25, 1878. *Second.* Under the terms of said contract plaintiff had the privilege of changing said agency and removing said agent at any time, and defendant has not shown by legal proof that this provision of said written contract was in any manner changed at any time." The court refused to give these instructions, and this is assigned as error. It must be conceded that the evidence upon the point is extremely meager, but it tends to show that the money due from Balzer to the plaintiff was paid upon a consideration moving from the plaintiff to the defendant, and we think it was for the jury to determine whether this was such a modification of the original contract as would entitle the defendant to the remedy claimed. It may be conceded that, where the evidence is clear and undisputed, the court may determine as a matter of law whether it shows a contract or not. Lassing v. Paige, 51 Cal. 575. But we think there was evidence sufficient here to go to the jury, and be determined by them. For this reason the instructions asked by the plaintiff were properly refused. The court gave to the jury the following instruction: "If from the evidence you find that after the execution of the contract mentioned in the complaint Perger, on behalf of the plaintiff, agreed with the defendant that the plaintiff would continue the agency with the firm of Henry Balzer & Co., or with the defendant, so long as they would faithfully discharge the duties of the trust, if said firm would pay to the plaintiff a certain amount, alleged to be due to the plaintiff by Henry Balzer, as its former agent, and if you find that said firm thereupon, on the faith of such promises, paid to the plaintiff the said amount, and that the said firm thereafter, until the death of said Balzer, and that the said defendant until the revocation of the agency faithfully performed all the duties of the trust, and if you further find that the agency was revoked without the consent of the defendant, then the court instructs you that the defendant is entitled to offset the amount that you may find was so paid against the claim of the plaintiff for moneys received by the defendant, or the said firm under the contract set forth in the complaint." This instruction was clearly erroneous. It informed the jury that the measure of damages must be the exact amount paid by the defendant of the indebtedness of Balzer. The question as to the amount of damages was a question of fact that should have been left to the jury. Parke v. Frank, 17 Pac. Rep. 428.

Taking the defendant's view of the transaction and giving it the most favorable construction for him, he was not entitled to recover the full amount paid by him to satisfy Balzer's debt. If the right to do business for the plaintiff, as its agent, during good behavior, was worth $12,018.37, the amount agreed to be paid by him, the right to the agency for the term of two years, it may fairly be assumed, was worth something, and it is alleged in his answer and conceded by him that he did hold the agency for that length of time. If the agency had been terminated immediately upon the payment of the money, it might be said with some degree of force that he would then be entitled to recover back the whole amount of the money paid, but this cannot be the case where the agency was the consideration for the payment of the money, as claimed by him; and he has enjoyed the fruits of the agency for at least a part of the time contracted for. There is in fact no foundation laid in the answer of the defendant for proof of damages, and no facts are alleged tending to show that he was in fact damaged by his removal from the agency. We are quite clear, for this reason, that the instruction ought not to have been given, and for this error the case must be reversed. It may be well to notice that, so far as the allegations of the answer go, and the evidence in support of it, the money paid by the defendant seems not to have been paid on his own account, but for the firm, and, as one member of the firm was the person owing the indebtedness, it may be questionable whether the defendant would be entitled to recover in any event more than the one-half of the amount found to be due him as damages or otherwise. Judgment and order appealed from reversed.

We concur: PATERSON, J.; FOX, J.

(81 Cal. 408)

In re JESSUP'S ESTATE. (No. 12,941.)

(*Supreme Court of California.* July 1, 1889.)

ADOPTION—EVIDENCE.

1. Code Civil Proc. Cal. § 1659, provides that notice of an application by an heir, legatee, etc., for partial distribution of the estate, must be given to the executor, etc., personally, and to all others interested, in the same manner as is required on settlement of the account of an executor, etc. Section 1633 provides that notice of the settlement of such accounts shall be given by posting notices in three public places, stating the time, place, etc., and that "the court or judge may order such further notice to be given as may be proper." *Held*, that where all the non-resident legatees were represented in the proceeding by attorneys and by the executor, who was their brother, there was no abuse of discretion in not requiring additional notice to be given to them.

2. The right to ask for partial distribution under Code Civil Proc. § 1658, by an "heir" who is not named in the will, is not confined to children born in lawful wedlock; and it is not necessary for the petitioner to first establish his heirship (as by adoption) in the manner provided in section 1664. The proceeding provided for in that section is not exclusive of the right to have the question determined at the hearing of the application for partial distribution.

3. The statutes relating to the adoption of illegitimate children are to be liberally construed, except as to the proof of paternity required.

4. No greater degree of certainty in the evidence to prove the fact of adoption of an illegitimate child by acts *in pais* is required than in other ordinary issues of fact.

5. Acts *in pais*, tending to show adoption of an illegitimate child, at a time when the statute required a written acknowledgment, are admissible, not only to show the purpose and object of the father's subsequent treatment at a time when the statute no longer required the acknowledgment to be formal or in writing, but also because the whole treatment of the child, being continuous in its nature, must be considered in determining whether or not there was an adoption under the later statutes.

6. Civil Code, § 1387, providing that "every illegitimate child is an heir of the person who in writing acknowledges himself to be the father of such child," is not a limitation upon section 230, so as to exclude from the inheritance an illegitimate child adopted by its father under that section without writing. Section 230 expressly provides that a child adopted as therein provided "shall be deemed to be legitimate for all purposes."

7. Under the statutes relating to adoption, (St. 1869-70, p. 530; Civil Code, §§ 221-230,) the consent of the mother is not necessary to an adoption of an illegitimate child by its father by acts of recognition, etc., without any formal proceeding.

8. Petitioner was shown to be the illegitimate son of the testator, J. Many witnesses testified that J. had taken charge of him from his birth, named him after a favorite uncle, provided him with the best nurses, sent him to school and college, dressed him expensively, often spoke of him and introduced him to friends as his son, often declared his intention to leave him all his property, and always manifested much affection for him. On the other hand, petitioner was kept in the family of a colored woman, whose mother had nursed him, and went by her name. J. was never married, nor had what could be called a home, he living much of the time with a mistress; and it appeared that he did not have petitioner assume his (J.'s) name, because he feared interference from the mother's family. A number of his business and social acquaintances testified that they never heard him speak of having a son, but it appeared that he was a reticent man. *Held*, that the evidence justified a finding that J. adopted him, under Civil Code, § 230, "by publicly acknowledging it [the child] as his own, receiving it as such into his family, and otherwise treating it as if it were a legitimate child."

9. The *status* of the petitioner being thus fixed, it could not be affected by subsequent acts of the father, by failing to name him in his will or otherwise.

10. The fact that the statutes under which petitioner claims to have been adopted were enacted after the execution of J.'s will in favor of third persons is immaterial, as the will gave no vested rights at the time of its execution.

11. The fact being undisputed that petitioner was the illegitimate son of J., and clearly established by competent evidence, the erroneous exclusion or admission of other evidence on that point was harmless.

McFarland and Thornton, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

Thomas J. Bowers, *John H. Dickinson*, and *McAllister & Bergin*, for appellants. *Henry I. Kowalsky*, (*W. H. L. Barnes* and *Morris C. Baum*, of counsel,) for respondent.

Works, J. Gershom P. Jessup, an unmarried man, died testate, leaving an estate valued at about $100,000. By his will he devised and bequeathed his estate to his brother and sisters. The will was admitted to probate, and letters issued to the executors named therein. The respondent, Richard Page Jessup, filed his petition in the court below, alleging that he was the illegitimate son of the deceased, and had been adopted by him, whereby he became his legitimate son and heir, and praying for a partial distribution of the estate to him. Upon a full hearing the petition was granted, and an order made distributing the whole of the estate to the petitioner, upon his giving bond to secure the payment of the debts of the estate, and costs and expenses of administration. From this order the executors of the estate and the legatees under the will have appealed.

The really controverted question in the court below was whether or not the deceased had adopted the respondent as his son in such manner as to constitute him his heir. Some objections are urged in the brief for appellants to certain rulings upon the admission and exclusion of evidence. Most of the rulings complained of relate to evidence tending to show that the respondent was the son of the deceased. Counsel for respondent contend that these rulings, if erroneous, were harmless, for the reason that the paternity was expressly admitted by counsel in the court below. No such admission appears in the record, but the fact of such paternity is not disputed in this court, and the evidence of the fact, independent of any testimony claimed to have been erroneously admitted or excluded, is so clear and conclusive that the appellants could not have been injured by any of the rulings complained of. So far as the rulings apply to other material matters, we find no error for which the cause should be reversed.

It is contended that the court below had no jurisdiction to make the order appealed from, for the reason that the non-resident legatees were not notified of the pendency of the proceeding. The court below proceeded under sections 1658 and 1659 of the Code of Civil Procedure. Section 1659 provides that notice of the application must be given to the executor or administrator personally, and to all persons interested in the estate, in the same manner that notice is required to be given of the settlement of the account of an executor or administrator. Notice of the settlement of an account of an executor or administrator is provided for as follows: "The clerk must thereupon give notice thereof by causing notices to be posted in at least three public places in the county, setting forth the name of the estate, the executor or administrator, and the day appointed for the settlement of the account. The court, or a judge thereof, may order such further notice to be given as may be proper." Code Civil Proc. § 1633. It is not claimed that the notice expressly required by the statute was not given, but it is contended that this was a case in which the court should have ordered further notice to be given. Whether such additional notice shall be given or not is a matter within the discretion of the court below, and, in the absence of anything to show that such discretion has been abused, this court will not interfere. There was no such abuse of discretion here. One of the executors, who was a resident of this state, was a brother of the deceased and of the other legatees under the will, and his interest in the proceeding was identical with that of the other legatees. As to the non-resident parties in interest, an attorney was appointed to look after their interests, and did so throughout the proceeding. Their rights, if they had any, were thoroughly represented and carefully guarded by competent and able attorneys, who acted for them as well as the executors.

Again, it is contended that the court had no jurisdiction to determine the question of the heirship of the petitioner in this proceeding; that the right to ask for partial distribution by an heir, where there is a will in which he is not named, must be confined to children born in lawful wedlock; and that he must assert his right to the estate, or any part of it, by a contest of the will, or must first establish the fact that he is an heir by proceeding under section 1664 of the Code of Civil Procedure. A distinction is thus attempted to be made between an heir born in lawful wedlock and one that has become such by adoption. Counsel contend that section 1386 of the Civil Code, which provides for the succession to and distribution of estates, does not apply to illegitimates, and in support of the position cite Estate of Magee, 63 Cal. 414; McCool v. Smith, 1 Black, 459; Hughes v. Decker, 38 Me. 153. These cases relate, generally, to the right of an illegitimate child to inherit, and have no application to a case of adoption by the father. Whether the petitioner was an heir, and entitled to distribution as such, was a question of fact to be determined by the probate court before an order for such distribution could be made. We see no reason for holding that the court could not consider and decide this question of fact because his right of inheritance must be established by proof that he was an "illegitimate child of the deceased, and adopted by him, instead of proof that he was a child born in lawful wedlock." It is no more a contest of the will in one case than in the other. The fact of heirship, when established, must have the same effect upon the will, and the rights of the legatees thereunder, in both cases. The fact of heirship is one that must be found by the court in either case, and the jurisdiction cannot be denied because the fact to be adjudicated must be established by evidence of a different kind, where the claim rests upon adoption. It cannot be treated as a contest or revocation of the will of the deceased, because the property distributed goes to one not named therein. The position that this was a taking of property without due process of law cannot be maintained, for the plain reason that notice was given as required by law in such cases. The position that the heirship of the petitioner must be established in the manner provided in section 1664 of the Code of Civil Procedure, before he can maintain a proceeding for partial distribution, is not well taken. The proceeding provided for in the section referred to is not exclusive of the right to have the question determined at the hearing of the application for distribution. Estate of Oxarart, 20 Pac. Rep. 367.

We come now to a consideration of the main issue in the case, viz., whether or not the finding by the court below that the petitioner was adopted by the deceased, as his son and heir, is sustained by the evidence. At the outset, counsel for the appellant insist that the question is not one of conflict of evidence, but purely a question whether or not the facts proved constitute such acts and conduct on the part of the deceased towards the respondent as amounted to an adoption of him as his heir, and that the claim of heirship must be sustained by evidence, clear, indisputable, and conclusive. The question whether the acts and conduct of the deceased, as testified to, admitting them to have been proved, amount to an adoption or not, is a matter of law to be determined by the court; but whether such facts are established by sufficient evidence, there being testimony directly on the point, is a question of the weight of the evidence and the credibility of the witnesses, to which the well-established rule as to conflicting evidence must apply. The cases cited by the appellant to the effect that, where clear and conclusive evidence of a fact is required, the appellate court may inquire whether the evidence proves such fact to such a degree of certainty, no doubt state the law correctly; but, in order to make them applicable here, it must be assumed that such a degree of certainty is required in this class of cases; which we think is a mere assumption, without authority to support it. So far as the mere question of adoption is concerned, no greater degree of certainty in the evidence should be required in this than in other ordinary cases. The cases cited by counsel are such as call for exceptionally clear proof, for the reason that they seek to defeat a written instrument or the like. Ford v. Osborne, 12 N. E. Rep. 526. Cummings v. Baars, 31 N. W. Rep. 449; Anthony v. Chapman, 65 Cal. 73, 2 Pac. Rep. 889.

In order that we may intelligently consider the evidence, and the effect to be given it, we must first call attention to certain dates, and construe the several statutes bearing upon the question in dispute. The respondent was born March 20, 1866. The will of the deceased was executed August 28, 1867. The deceased died November 2, 1886. His will was probated November 22, 1886, and the respondent's petition for distribution was filed April 11, 1887. The law in force at the time of the birth of the respondent was the statute of April 13, 1850, which provided: "Every illegitimate child shall be considered as an heir of the person who shall, in writing signed in the presence of a competent witness, have acknowledged himself to be the father of such child." St. 1850, p. 220, § 2. By an act approved March 31, 1870, general provision was made for the adoption of minors, and the statute of 1850 was expressly repealed. St. 1869–70, p. 530. Section 9 of this statute related to the adoption of illegitimate children by either or both of the parents, and provided as follows: "Sec. 9. Either or both parents of an illegitimate child, or the father, with the consent of his wife, or the mother, with the consent of her husband, may acknowledge such child as his or their own by a document in writing, executed by either, if single, or both, if married, or by treating, receiving, or acknowledging him publicly as his or their own legitimate child; and such child, and the one mentioned in the foregoing section, shall, to all intents and purposes, be deemed legitimate from the time of its birth, and entitled to all the rights aad privileges of legitimate offsprings." Section 3 of this act provided that an illegitimate child could not be adopted without the consent of its mother, and that the consent of a minor, if over 12 years of age, should always be necessary. This statute continued in force until January 1, 1873, when the Civil Code took effect. Chapter 2 of the Civil Code provides generally for the adoption of minor children in much the same terms as in the statute of 1869–70. Civil Code, §§ 221–230. Civil Code, § 230, provides: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth. The foregoing provisions of this chapter do not apply to such an adoption." Section 1387 of the Civil Code, which is a part of the chapter on succession, provides: "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child; and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock."

The appellants contend: (1) That the statutes authorizing the adoption of an illegitimate child by the father should be strictly construed. (2) That there could have been no adoption of the respondent under the statute of 1850 by any acts or conduct of the deceased towards him, for the reason that, under that statute, the only way in which such adoption could have taken place was by a writing to that effect, signed in the presence of a competent witness. (3) That such acts as are shown to have been done prior to the enactment of subsequent statutes, enabling the father to adopt his illegitimate child without any written acknowledgment, cannot be considered in determining whether there was an adoption or not, because the statute cannot be construed to be retroactive, and the question of adoption is one of intent on the part of the father, and his acts and conduct, tending to indicate what his intention was, must be construed in the light of the statute in force at the time. (4) That there could be no adoption, under either of the statutes or the Code, without the consent of the mother, and that no such consent has been shown. (5) That section 1387 of the Civil Code is a limitation upon section 230, as to the right of inheritance, and that under section 1387 there can be no inheritance, except where there has been a written acknowledgment of the child. (6) That the evidence is insufficient to prove an adoption of the respondent by the deceased. The points stated are given in our own language, as the substance of the very elaborate briefs of counsel. We shall endeavor to dispose of each of them in its order.

1. As to the strictness with which the statutory provisions referred to should be construed, we are not without authority. Estate of Sandford, 4 Cal. 12; Pina v. Peck, 31 Cal. 361. The cases cited are clearly to the effect that the statute, being in derogation of the common law, must be strictly construed. So far as the cases relate to the degree of proof required to prove the parentage of the alleged father, or that the claimant is his illegitimate child, we fully concur in the views expressed, but no further. If the proof of parentage is clear, then the rule to be applied should be the reverse of that contended for by the appellants. It should be the policy of the law to require the father of a child, whether legitimate or illegitimate, to assume towards it the duties and responsibilities of a father. Hargroves v. Freeman. 12 Ga. 342. This state has made no provision by which the paternity of an illegitimate child may be judicially determined and the father compelled to contribute to its support. These unfortunates are left to be supported by the mothers, who are usually unable to maintain or educate them properly, or by public charity, and, as a result, many of them, whose fathers are amply able to support and educate them, become paupers and criminals. The legislature has, in a very slight measure, made amends for this anomalous state of affairs by providing that the illegitimate child may, so far as its legal rights are concerned, by acts of the father, be made legitimate. The object is laudable, and should receive the aid and encouragement of the courts, and to that end the statute, so far as it provides how this being born again may be brought about, should be liberally construed. If the paternity of the child be the matter in dispute, strict proof of the fact should be required, but once the paternity is established the statute should be liberally construed, so far as it affects the question of legitimizing the child. We may fairly assume that such was the legislative intent. The earlier statutes requiring a written acknowledgment were, as we have seen, strictly construed. This was followed by more liberal statutes, authorizing the legitimizing of this class of children, which clearly indicates that such construction was not consistent with the object and purposes of such legislation. In this case, as we have said, the fact of paternity was so clearly established by the proof that it is not controverted here. The only question, therefore, that this court is called upon to consider is whether or not, being an illegitimate child of the deceased, the respondent was by the acts and conduct of his father adopted as legitimate. As to this branch of the inquiry we hold that the statutes relating to the subject should be liberally construed. Dickinson's Appeal, 42 Conn. 491. See commissioners' comments in note to section 230, Civil Code; Deering's Civil Code, § 230.

2. The point made that there could have been no adoption under the statute of 1850 is well taken, for the reason that under that statute a written acknowledgment was nec-

essary, and none such was shown by the evidence. But it does not follow that the conduct and acts of the deceased, prior to the enactment of subsequent statutes, cannot be taken into account in determining whether or not there was an adoption, where, as in this case, as we shall show presently, such acts. conduct, and treatment were continuous from the birth of the respondent until the death of the deceased. If the acts relied upon had all taken place before the statute authorizing an adoption in that manner took effect, the position of counsel for appellant, that the subsequent statute could not be construed to be retroactive, so far as to render proof of such acts sufficient to establish the fact of adoption, would be correct. Estate of Pico, 52 Cal. 84; Brown v. Belmarde, 3 Kan. 41.

3. It follows that, conceding that the question of adoption is one of intention on the part of the alleged father, it was not only competent to prove such prior conduct on his part as tending to show the purpose and object of his subsequent treatment of the respondent, but the whole of his treatment of him, being continuous in its nature, must be taken into account in determining whether or not there was an adoption under the later statutes. If, taking his whole conduct towards and treatment of the child, it appears that it is sufficient to show an adoption, we think the case is made out, notwithstanding some of the acts proved appear to have taken place before the later statutes took effect. In support of the opposite view, counsel cite Morgan v. Perry, 51 N. H. 559; Brown v. Belmarde, 3 Kan. 41; Estate of Pico, 52 Cal. 84; Hartinger v. Ferring, 24 Fed. Rep. 15. These cases do not meet the question presented. In Estate of Pico it was held that section 230 of the Civil Code could not be construed to be retroactive; that all of the acts shown, since the enactment of that section, were after the claimant had arrived at full age; and that, as the statute only authorized the adoption of minors, the claimant was not within its terms, and no adoption was shown. This was precisely the same, in legal effect, as if no acts tending to show an adoption, after the statute took effect, were shown, which presents an entirely different question. In the case of Brown v. Belmarde, the statute under which the adoption was claimed to have taken place was enacted after the death of the alleged father, and it was claimed that the statute related back. It seems unnecessary to say that this case is not in point. In the case of Morgan v. Perry the statute required marriage of and recognition by the parents. The parents of the claimant had married and taken him into the family 40 years before the statute was enacted, and it was held that the statute did not apply. Hartinger v. Ferring is to the same effect. We do not regard any of these cases as of any weight, except upon the simple question whether the statute can be treated as retroactive, in the sense in which we have held it to be so, as above stated.

4. As to the point raised, that there could be no adoption without the consent of the mother, we cannot agree to the proposition that such consent is necessary where the adoption is by the father, and especially where such adoption is the result of his conduct towards the child, and does not depend upon any formal proceeding. The provision of the statute must be held to apply to adoptions by persons other than the father. This is apparent from a reading of the statute of 1870, and of the provisions of the Civil Code. St. 1869-70, p. 530; Civil Code, §§ 221-230. Sections 1 to 8 of the statute of 1870 relate exclusively to adoptions by other persons than the father, and include the provision requiring the mother's consent. Sections 8 and 9, although parts of the same act, are, as to the procedure, essentially an act to themselves, providing for an adoption in an entirely different manner, not including such consent. This is made manifest by section 230 of the Civil Code, which provides in express terms that "the foregoing provisions of this chapter do not apply to such an adoption." One of the foregoing provisions is the one requiring the consent of the mother of the illegitimate child. In Estate of Pico, 52 Cal. 84, relied upon by the appellants, the sole question was whether a person not a minor could be adopted under section 230. This court said in that case: "Except for the concluding words of the section, 'the foregoing provisions of this chapter do not apply to such an adoption,' it would be clear beyond controversy that this section, like all those which precede it in that chapter, had reference to minor children. But, taking the whole chapter together, we are satisfied that when section 230 declares that 'the foregoing provisions of this chapter do not apply to such an adoption' it refers only to the procedure by which the adoption may be effected." This is in entire accord with the view we have taken. The provision for procuring the consent of the mother relates to the procedure necessary to effect the adoption, and is clearly within the language of the case cited.

5. We cannot agree to the proposition that the provision contained in section 1387 of the Civil Code, that "every illegitimate child is an heir of the person who, in writing signed in the presence of a competent witness, acknowledges himself to be the father of such child," is a limitation upon section 230 and excludes an illegitimate child, adopted as provided in the latter section, from the inheritance. If so, section 230 would be deprived of much of its force. One of the legal consequences of an adoption is the right to inherit from the adopted father. Section 1387 of the Code is, no doubt, based upon the former provision of the statute, requiring the adoption to be in the manner therein indicated, and has never been made

to conform to the later and more liberal provision. But, however this may be, the provision in section 1387, that certain illegitimates may inherit, cannot be held to exclude others, who have been adopted as provided by law, from the right of inheritance. Section 230 expressly provides that upon the adoption of a child, as therein provided, it shall "be deemed to be legitimate for all purposes." See Estate of Wardell, 57 Cal. 484.

6. In order to a proper understanding of the comments we make upon the evidence, it is necessary to state its substance. The testimony on the part of the respondent tended to show that the mother of the respondent resided in Marysville, in this state, and was, while residing there, on terms of intimacy with the deceased; that she came to San Francisco, and was by him placed in charge of a nurse, an old colored lady, who it appears, was a respectable, Christian woman. Soon after being placed with the nurse, she was confined, and gave birth to the respondent. The deceased visited her frequently during her stay at the house, paid all of the expenses consequent upon her sickness, and after the birth of the child the mother left the city, and the deceased took the entire charge of the child from that time on, leaving it with the nurse. He provided for its maintenance, appeared to be very fond of it, took it out with him frequently when it was young, to places of amusement, took great pride in seeing that it was well dressed, paid the nurse, and an extra nurse employed by her, liberally, for taking care of the child, and paid all of the doctor's bills and other necessary expenses. After the child became old enough he sent it to a private school, paying considerable sums of money for that purpose, and paid all of its necessary expenses. He caused a picture of it to be painted at an expense of $100, and kept the same in his room. As to his declarations with reference to the child, we set out the evidence of various witnesses as to the same, without giving names, lettering the testimony of each witness separately:

(*a*) "He said: 'This is my son, Doctor, that I had by Miss ———. Isn't he a nice-looking boy. I think a great deal of that boy, and I am going to raise him as my boy, and look after him, and educate him, and make a man of him, and he shall be my heir.' After that we had some talk, and I asked him on one occasion whether the boy was his son. He said he had him, educating him, and also told me that Miss ——— had married, and done well, and he was very glad of that, as it got her out of the scrape, and him too. Jessup said also that he did not want the mother to see the boy, because her parents would find it out, and he did not want them to find it out; but he wanted to keep the boy as secret as he could from the parents, and it would save the reputation of the young lady. He told me that the boy had grown up, and was most a young man, and he was going to make him his son and heir. He so told me more than once, and within the last five years, but I am unable to state when or where."

(*b*) "We had some further conversation after that; some conversation about the boy. He had grown to be four or five years old. Jessup knew that I knew all about the affair. We used to talk about it frequently. I recollect he brought the boy up to my place to have his teeth taken out, which I did."

(*c*) "My mother spoke to him about Miss ———, and wanted him to marry her; told him that Miss ——— was feeling very bad, and that he had confessed to my mother that he was the father of the child. He said: 'Yes; I know I am. She was a good girl when I met her, and I caused her fall. I am the father of the child, and I intend to marry her.' Mr. Jessup called quite often. I cannot tell the number of times,—two or three times a week; I should think oftener after the child was born. He was not there more than twice before. He paid forty dollars a month for the care of Richard. That was for the board exclusively. As for his clothing, he wanted him dressed in the best. He said that he was able to pay for it, and he wanted him dressed nicely, and always to look nicely. He did not want him to wear calico dresses. He wanted him dressed in white always. He wanted him kept in white, and whatever the expense was he would pay it. He had plenty to take care of Richard with, and he intended to take care of him, and wanted him always to look nice. He visited the child after the mother went away quite often. I cannot tell just how often, but very often. He visited him quite often at my mother's house, before the child went to Petaluma. I cannot tell how often. If the child was awake when he came he would take him up, and play and talk with him. If he was not awake, he would wait until he awoke. He would call him his boy, and many other affectionate names. He would take him up in his arms and say: 'Come to your papa; come to your daddy,'—and hold him up, and ask if he was not a fine boy. He always seemed very pleased if mother said that he looked like his father. He was very fond of him. He used to take him out,—would come very often, and used to take us down to North Beach; for Richard, as a baby, was very fond of the birds and monkeys and wild animals that were kept down at North Beach at the time, and his father, learning of his fondness for them, would take us down there to visit those animals, and he would buy nuts and candy for Richard to give them. The baby was rather sickly from the time it was born, and needed a good deal of care, and Mr. Jessup told my mother whenever she thought it was necessary to get a physician, and take good care of him. He was called Richard by his father's request. He said he wanted him called Richard after an uncle of his, a brother of Mr. Jessup's, who Mr. Jessup said was very wealthy. He said he was dead, and he would receive his estate, and that whatever he got would belong to Richard. He was leaving it to Richard, and he intended to leave him all that he had, and he would like to have him named after his uncle. He said: 'If Richard behaves himself, and does what I want him, he will not be sorry for it.' Said he wanted to make a man of him. He wanted him well educated. Fretted, I think, that Richard did not want to remain at school. He said that Richard was all that he had, and there was only the two of them, and that he ought to try and make him happy, and do just as he wanted him to do. He thought he ought to try and make him happy, and he would do anything for him and make a man of him, and after his death he would have 'all that I have.' He further said he wanted Richard to work and be self-sustaining. He wanted him to be independent, but at the same time he did not want him to want for anything. He told me his object in having Richard work was that he wanted him to learn the value of a dollar, because he wanted him to know how to take care of it; for he said: 'When I die, what belongs to me will fall into Richard's hands, and I want him to know how to take care of it.'"

(*d*) "I knew Gershom P. Jessup in his lifetime about ten or twelve years, probably. We were friends. Never had any conversation with him directly about his family. With regard to the boy, I had a conversation once. One of my sons was with me, and I introduced him to Mr. Jessup, and he said to me: 'I have a son that I am educating and bringing up.'"

(*e*) "I painted the portrait for Mr. Jessup. During the process of painting the picture Mr. Jessup called at my studio, and seemed quite interested in the portrait. I cannot exactly state how, except that he came up in the room, and expressed himself pleased with it."

(*f*) "I said: 'You have not anything to detain you here,—have not got any family, have you?' He said: 'I have got a son here.' He spoke of having two sisters in the east and his brother here. He said he did not expect— Well, he said: 'The way I feel, and the way this thing [referring to some litigation] worries me. I do not think I will last long.' He said he had made a will providing for his sisters, his brother, and for his son."

(*g*) "The boy always accompanied him to the store. I do not remember any statement he ever made with reference to the boy, as to who he was. He would say: 'I want a suit for the boy.' The way he spoke, I thought it was his boy, though I do not remember his saying whose boy it was. He selected the best goods, and made no objection to the price. I think I last made an overcoat. I cannot remember. It must have been ten or twelve years ago."

(*h*) "I knew Mr. Jessup in his life-time. At one time he came and asked me the fare to San Diego. I told him, and asked him whether he was going. He said: 'No; he was going to send some one.' He said he was going to send a boy. I said: 'What boy?' He said: 'I have got a boy as big and as old as yours.' He did not tell me where the boy was. He said he had been to college, and was going to send him to a ranch on a vacation. He asked for the ticket to be made out to Richard Miller, and it was so made. He told me that the ticket was for his boy,—his son. I asked him: 'Why do you make it out for Richard Miller?' Well, he said that he wanted to avoid trouble with a woman, or the mother, as some people at the back of her, by talking with her, were making trouble."

(*i*) "*Question.* Did you hear the boy call his father by any names? *Answer.* Papa. Mr. Jessup's manner was very affectionate. He would take the boy, and caress him, and kiss him, bring him fruits, cakes, lady-fingers, and be very fond of him."

(*j*) "He said that she had been married, and that he did not think that he ought to look out for her any more; that he had this heir,—this boy, rather,—and he had looked out for him from his infancy, and intended to look out for him, but he did not think he should be bothered with the mother. He said that he was giving the boy a schooling. He had looked out for him from infancy. I don't think he told me who the child was with. He said he had him off at school. I think he told me that the mother had nothing to do with the boy; that he had taken care of him. That is my recollection. I said: 'Mr. Jessup, that is my boy.' He said: 'My boy is as old as your boy.' I said: 'Your boy ought to be three or four years older than mine, I don't know but more, and my boy is fully sixteen years;' and he said: 'He is.' I asked him: 'Where is your boy? What have you done with him?' 'Well,' he said, 'he is at work; it is well enough for parents to learn their boys to go to work.' I said: 'I agree with you; that is a good idea.'"

(*k*) "He said: 'That is my boy.' He had a little boy with him. I judged in my own mind that it was his son at the time. He said: 'What do you think of him?' I took him to be his son, for he looked upon him with such pride and affection, as if he must be his child."

(*l*) "He spoke to me several times about his family,—about having a son. I told him to bring him up one time; I should like to see him. That was about five years ago; may be a little longer. He brought him in afterwards a couple of times, and they had dinner together. I says to Mr. Jessup: 'You cannot deny that boy; he is the very picture of you.' Jessup said: 'The boy puts me to a good deal of trouble sometimes now. It don't matter; I will never forget him.' He said he had property on Stevenson street and on Clay street,—some property that he said he would make over to him. He was sick then a great deal. He could hardly walk sometimes.

He often used to come over. He would say: 'I am not able to walk.' He told me the boy was in the country with friends, and that he loved the boy dearly. We were then talking about children. I had children myself. He said if the boy would do right, and all this, that he would give him everything he had got. He said that he did not want him with him; that he would keep him in the country. He would be better off with his friends than he would be with him."

(*m*) "I saw the child with him. The child was dressed in a very handsome black suit, with a black cap, and had long hair. I was going down Market, and he was going up with the child by the hand. I asked: 'Is that the first production, and are there any more of them?' He said: 'No; it was the first one. Don't you think he looks like me?' I always understood him to say that he had the child in good hands, or was taking the best care of him. I do not know that I ever spoke to him about the boy more than five or ten or twenty times during our couple or three years' acquaintance. He would speak to me about how the boy was, and about how he was taking care of him. He used to speak about the boy as 'little Dick,' or 'my little Dicky,' or 'my little boy.'"

(*n*) "One day he asked me if I knew his boy. I asked him who his boy might be. He said: 'Dicky Jessup.' I said I did not know him by that name. He then said: 'He may go over here by the name of Miller; he is hiding over here.' 'Yes,' I said, 'I know him.' He said: 'If you see him, tell him to come over to see me, corner of Fifth and Market streets. I am residing there, and you will confer a favor upon me.'"

(*o*) "I knew the boy, who gave me his name as Richard Jessup Miller. He was sent to me from San Francisco by A. A. Denning about six years ago, when I was living on my ranch. He told me his name was Richard Jessup, but his aunt made him call himself Richard Jessup Miller. That was when he first came to my place. He was with me about six months, and then went back to San Francisco. I received several letters from Mr. Jessup. He sent me money for the boy. He told me to be kind to him, and make a man of him. He returned to San Francisco at the request of Mr. Jessup, who sent him money to buy him clothing and buy him a ticket."

(*p*) "He said: 'Oh, no; there is no mystery about the child. I have always taken care of the child—the boy—from his birth. I have always done for him, and always will.' I think he told me that he had him at Washington College, over at Alameda, and said: 'I have done for him. I have had him down in Lower California. I have spent large sums of money on him. I have always taken care of him, and always shall.' He seemed to want to impress on my mind the fact that he wanted to make the boy self-sustaining,—self-supporting; to show him how to save money; how to make money."

(*q*) "I saw Mr. Jessup once with a little boy. I do not know how old. I should think about five. He was dressed in a kind of fancy suit. I think he said: 'This is my boy.' I don't know about the word 'son.' He said the 'little boy,' or his 'boy;' meaning his son, I presume. He did not say his 'son,' I do not think. I said he looked very much like him."

(*r*) "He told me that he had a young boy, going on two years. Those were the words he used. I will not be positive now whether he said 'boy' or 'son.'"

(*s*) "I got to speaking to him,—was very well acquainted with him,—and I told him I thought he was very well fixed for wealth. He said: 'Yes, I am well fixed.' I said: 'I suppose you have got fully one hundred thousand dollars.' He said: Yes; he had fully that much. I heard him speak about his son at different times; I forget the date. I said: 'When you die you must remember me,'—in a kind of joking way. Well,' he says, 'I have got a son that will come in for a good part of that.' Then I commenced to laugh at him. I says: 'How is that? You have a son and have no wife.' He said: 'Can't a man have kids and not have a wife?' On one occasion he asked me if I had any family beside my little girl. I said none, with the exception of two brothers and a sister, aged fifteen, seventeen, and nineteen. 'That,' said he, 'is the age of my boy.' This was in 1885. On my expressing my surprise, he said: 'Oh, yes; I have a son. He is across the bay.'"

(*t*) "He said that he had a fine boy by her, and that he was going to make a Dick Jessup of him. He told me the boy was in school. I cannot tell which one. He spoke about his boy that he had put at school. Said that he was a fine boy, but he believed he was going to make him a great deal of trouble."

In opposition to this array of evidence, tending strongly to show an adoption, it appears that the respondent did not go by his father's name; that he lived with a colored woman, daughter of the old nurse, and was brought up with her children, and went by her name. But it appears from some of the evidence above that this might have been, not for the purpose of concealing his parentage, but through the fear that the mother of the boy, or some of the family, might assert some claim to him. Again, it is shown that the deceased never took the boy into his family. But the evidence shows clearly that he never had any family, or any place that could be called a home. He roomed in various places in the city, and a great part of the time lived with a mistress, the wife of another man. It was to his credit, and bears strong evidence of his regard and affection for the boy, that he was not willing to subject him to the influences that had contaminated his own life. It was also shown by a number of reputable witnesses that they had known the deceased with more or less intimacy, had met him in business, at the clubs and at lunch, and never heard him speak of having a son. But this is testimony of a negative kind, and entitled to but little weight. Besides the fact that it appears that the deceased was a reticent man, not given to talking about his affairs, he would not be likely to discuss such a matter under such circumstances, and, if he had, the witnesses would not be likely to remember it. There is evidence tending to show that the respondent was christened under the name of Richard Page Jessup, and that this was done at the request of the deceased, but as to the latter the evidence is conflicting.

Was this evidence sufficient to show an adoption? This depends, in part, upon the construction to be given to the two statutes in force during the time covered by the testimony. The appellants contend that under section 9 of the statutes of 1870, which provides for the adoption of a child "by treating, receiving, or acknowledging him publicly as his or their own," should be construed to mean receiving and acknowledging, and that both must be proved to show an adoption. As we view the evidence, it is unnecessary to determine this question. If the testimony is sufficient to establish one of these requisites, it is equally sufficient to prove the other. But it is further contended that the requirement that he should publicly acknowledge him as his own legitimate child is not established by proof that he acknowledged him openly to various persons as his son; that a public acknowledgment, as here used, means some formal acknowledgment of him as his legitimate son, in an open and public way; and that it is not enough to show that he made such acknowledgment to friends and acquaintances, no matter how many. We do not so understand the statutes. To establish his right to inherit, a claimant must prove two things: (1) That he is the illegitimate child of the alleged father; (2) that he has been openly and publicly acknowledged and received and treated as such. But, in order to avoid imposition and fraud, the statute requires that these things shall be established by certain proof. Under the statute of 1870, it must be proof of his "treating, receiving, or [and] acknowledging him publicly as his own legitimate child." That is to say, he must treat, receive, or (and) acknowledge him as if he were his own legitimate child; and in order that the proof may be made by disinterested parties, and fraud and imposition avoided, all of these things must be done openly and publicly, and not secretly. But this does not mean, as counsel for appellants seem to think, that the alleged father must cry out from the housetops: "This is my illegitimate son, that I now and here publicly acknowledge as my own legitimate son,"—or go about with a lie upon his lips, saying: "This is my legitimate son." Section 230 of the Civil Code, although differently worded, is in effect the same. The language is: "By publicly acknowledging it as his own, receiving it as such into his family, and otherwise treating it as if it were a legitimate child."

Undoubtedly the most satisfactory way of establishing the necessary facts is by proof that the claimant has been received into the family, and given the family name. But this is not necessary where there is sufficient proof of a reason for not having done either, as we think is shown in this case. The deceased could not take the respondent into his family, because he had none. He did not openly give him his name, for the reason that he feared the mother, or some of her family, would attempt to take him from him. But he did give him the Christian name of a favorite brother, and expressed the hope that he might be able to raise him to be like his uncle. In other respects he treated him as such a man might be expected to treat his legitimate son; and that he openly and publicly acknowledged him to be his son there can be no doubt, if the witnesses who testified to the facts were to be believed. Whether they were worthy of belief or not was for the court below to determine. He performed towards the respondent the duties which would have devolved upon him as the father of a legitimate child, viz., those of protection, maintenance, and education. Therefore he treated him as his legitimate child. When the *status* of the respondent was thus fixed it could not be affected by subsequent acts of the deceased, by failing to name him in his will or otherwise. The statute, together with other acts done under it as will constitute an adoption, fixes the *status* of the illegitimate child irrevocably. McGunnigle v. McKee, 77 Pa. St. 81; Hosser's Succession, 37 La. Ann. 839.

It is said that the statutes under which the respondent claims to have been adopted were enacted after the will of the deceased was executed, and therefore the adoption, if proved, cannot affect the rights of parties named as legatees in the will; but the will gave no vested right at the time of its execution, and for that reason, if for no other, the point is not well taken. Sewall v. Roberts, 115 Mass. 262. The evidence is sufficient to sustain the order of distribution. Order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; PATERSON, J.

I dissent: THORNTON, J.

MCFARLAND, J. I dissent, and, if other duties permit, may express my views at length hereafter.

(79 Cal. 525)

FEENEY *v.* HOWARD *et al.* (No. 11,567.)

(*Supreme Court of California.* July 1, 1889.)

TRUSTS—EXPRESS AND IMPLIED—STATUTE OF FRAUDS.

1. A grantor conveying land by a deed reciting a valuable consideration, in the absence of actual or constructive fraud, accident or mistake, cannot show by parol that no consideration passed, and

that the conveyance was made in trust, the grantee agreeing to reconvey upon request.

2. Mere failure to comply with the promise to reconvey is not such evidence of fraudulent intent in procuring the conveyance as will take the case out of the operation of the statute of frauds.

3. Though, when no consideration for a conveyance is either recited therein or proved, a trust will result in favor of the grantor, parol evidence will not be admitted as between the parties to contradict the recital of such a consideration for the purpose of raising such a trust.

4. Nor would the fact that the grantee acted under the deed, doing nothing but what the terms of the deed authorized, constitute such a part performance as will take the case out of the statute.

5. The statute of frauds need not be specially pleaded to an action to enforce such a parol trust, if the agreement is itself denied by defendant's pleadings.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Action by Michael Feeney against James Howard, the San Francisco Savings Union and others, to declare a trust in the proceeds of land conveyed by plaintiff to defendant Howard. Judgment for plaintiff, and defendant Howard appeals.

R. Percy Wright, for appellant. *Clara S. Foltz* and *J. C. Bates*, for respondent.

HAYNE, C. Suit to declare a trust. The material facts are as follows: One Catherine Feeney and the plaintiff, Michael Feeney, were tenants in common of a certain tract of land. She died, and Michael Feeney was appointed her administrator. He made two deeds to the defendant Howard, which were dated on the same day, and purported to convey the same property, and recited a valuable consideration. One of these deeds was made by Michael Feeney as administrator of Catherine Feeney, and the other by him in his individual capacity. Howard subsequently conveyed the property to trustees to secure a debt to the San Francisco Savings Union, and, this debt not having been paid, the trustees sold the property, and, after satisfying said debt, have a certain balance in their hands, which they are ready to pay to the person entitled thereto. The controversy relates to this balance. Michael Feeney, in his life-time, commenced the present suit in his own name, (not as administrator,) to have it declared that he was entitled to said balance. On the trial he introduced in evidence the deeds above mentioned, and then offered parol evidence to prove that they were without consideration, and that the property was conveyed to Howard upon certain trusts, and was to be reconveyed on request. Howard objected on the ground of the statute of frauds. The parol evidence was admitted against such objection, to which Howard excepted; and judgment was given for the plaintiff, from which, and from an order denying a motion for a new trial, the appeal is taken. Subsequent to the appeal Michael Feeney died, and his administrator was substituted. It is to be observed that, since Michael Feeney did not sue as administrator, no question as to the rights of the estate is involved. His deed as administrator may therefore be dismissed from consideration. The question to be determined is whether, as between Michael Feeney and his grantee, a trust can be established in the manner attempted.

1. Unless the case can be brought within some one of the exceptions hereinafter noticed, we think that it is clear that the statute of frauds is a defense to the action, and that the parol evidence was improperly admitted. If a trust could be raised in such a way, what operation could the statute of frauds ever have? The authorities are overwhelming to this effect. In the case of Rasdall's Adm'rs v. Rasdall, 9 Wis. 379, the ancestor of the plaintiff conveyed certain real property to the defendant, and it was sought to be shown that the transfer was without consideration, and upon a parol agreement to reconvey upon request. But the court held that this could not be done, and PAINE, J., delivering the opinion, said: "We do not feel called upon to cite authorities to show that in the absence of fraud, accident, or mistake, parol evidence cannot be received to prove that a deed absolute on its face was given in trust for the benefit of the grantor; and we have not been able to find anything in the case to make it an exception. We cannot see why, if this evidence is to be received to establish this trust, every other deed in the state may not be shown by parol to have been given upon trust, and the statute of frauds be entirely annulled." And there are numerous authorities to the same effect. See Barr v. O'Donnell, 76 Cal. 469, 18 Pac. Rep. 429; Sturtevant v. Sturtevant, 20 N. Y. 39; Wheeler v. Reynolds, 66 N. Y. 227; Titcomb v. Morrill, 10 Allen, 15; Ratliff v. Ellis, 2 Clarke, (Iowa,) 59; Fouty v. Fouty, 34 Ind. 433; Perry v. McHenry, 13 Ill. 227; Burden v. Sheridan, 36 Iowa, 125; Morrall v. Waterson, 7 Kan. 199; Lawson v. Lawson, 117 Ill. 98, 7 N. E. Rep. 84; Dean v. Dean, 6 Conn. 284; Walker v. Locke, 5 Cush. 90; Boyd v. Stone, 11 Mass. 342; Metcalf v. Brandon, 58 Miss. 842; Bonham v. Craig, 80 N. C. 224; Donohoe v. Mariposa Co., 66 Cal. 327, 5 Pac. Rep. 495. In some of these instances the case might possibly have been taken out of the statute on the ground of a fiduciary relation, but that feature did not receive attention. Then, can the case be brought within any of the recognized exceptions to the above general rule? We do not think it can.

(*a*) The counsel for the respondent is in error when he contends that the case presents features of actual or constructive fraud. No actual fraud was alleged. A material ingredient of actual fraud is the fraudulent intent, and this must be alleged as one of the facts constituting the fraud. Moss v. Riddle, 5 Cranch, 351. And if it be assumed, for the purposes of the opinion, that there may be cases where a fraudulent intent would necessarily be inferred from the allegation of certain facts, and that a sale by an administrator without consideration would be such a case, yet this would not help the respondent in this regard; for, as above stated, neither the right of the estate nor the administrator's deed is involved here. No actual fraud is alleged, found, or shown by the evidence. For all that appears to the contrary, Michael Feeney's deed may have been given and received in entire good faith. The mere failure to perform a parol agreement, which was made in good faith, is not fraud. Perry v. McHenry, 13 Ill. 236; Wheeler v. Reynolds, 66 N. Y. 234; Burden v. Sheridan, 36 Iowa, 125; Boyd v. Stone, 11 Mass. 348; Rasdall's Adm'rs v. Rasdall, 9 Wis. 386, 387. Nor does any constructive fraud appear. It is true that it was held in Brison v. Brison, 75 Cal. 525, 17 Pac. Rep. 689, that if by means of a parol promise to reconvey a party obtains an absolute deed, without consideration, from one to whom he stands in a confidential relation, the violation of the promise is constructive fraud, although at the time of the promise there was no intention not to perform. And this case was approved in Broder v. Conklin, 19 Pac. Rep. 516. But it is essential to the operation of this principle that there be a confidential relation. It is one of the facts constituting the fraud. The facts constituting fraud must be averred in cases of constructive as well as of actual fraud. Golson v. Dunlap, 73 Cal. 164, 14 Pac. Rep. 576. And in this case no confidential relation is averred. The counsel for the respondent suggests in his brief that the plaintiff was the son-in-law of the defendant, and reposed personal confidence in him. But, if it be assumed that this would make a difference, it is sufficient to say that it nowhere appears in the record that plaintiff was the son-in-law of the defendant, and that nothing in relation to actual trust or confidence is averred in the complaint. We are not saying that a trust might arise out of the violation of actual trust and confidence, independent of any fiduciary relation. We simply say that no such question can arise under the pleadings in this case.

(*b*) There was no resulting trust. It is not necessary to consider whether the old rule that a trust results where a deed is made without consideration, either expressed in the deed or proved *aliunde*, prevails at present. Compare Civil Code, § 1040; for the deed recited a consideration. And although there are certain collateral purposes for which such a recital can be contradicted, it cannot, in the absence of fraud or mistake, be contradicted between the parties for the purpose of defeating the operation of the instrument or raising a trust. Russ v. Mebius, 16 Cal. 356; Graves v. Graves, 29 N. H. 129; Philbrook v. Delano, 29 Me. 412, 413.

(*c*) The position that there was part performance sufficient to take the case out of the statute cannot be sustained. Whatever was done by Howard the deed gave him a right to do. And to say that the deed itself, or what was done under it, is part performance, is merely to reassert in another form that the parol agreement was sufficient to raise the trust.

It is not pretended that the transaction was a mortgage, nor is any other ground suggested which would constitute an exception to the general rule. We have carefully examined the numerous cases in our reports bearing upon the subject, and find that all proceed upon some recognized exception, and that none conflict with the rule above laid down.

2. The statute of frauds, however, was not pleaded. The defendant simply denied the alleged agreement and trust, but made no reference to the statute. And it is contended for the respondent that the statute was therefore waived, and that the appellant is not in a position to avail himself of it. As there has been some confusion on this subject, we have examined it with some care. The notion that the statute must be specially pleaded is derived from the old chancery practice. In the English court of chancery the usual course was to plead the statute specially. The function of pleadings in chancery, however, was somewhat different from that of pleadings at law. In the language of Story, "a bill in chancery is not only a pleading for the purpose of bringing before the court, and putting in issue, the material allegations and charges upon which the plaintiff's right to relief rests, * * * but it is also in most cases an examination of the defendant upon oath for the purpose of obtaining evidence to establish the plaintiff's case, or to counterprove or destroy the defense which may be set up by such defendant in his answer." Story, Eq. Pl. § 268. If in response to such a bill the defendant confessed the making of a parol agreement, but pleaded the statute as a bar to relief, the defense was good. 2 Story, Eq. Jur. § 757. But if he confessed the parol agreement, and did not insist upon the statute, he was regarded as having waived it. Id. § 755. But it was not necessary for the defendant to confess the agreement. It became settled, after some conflict of opinion, that he could plead the statute as a bar to the discovery of the parol agreement as well as to its performance. Story, Eq. Pl. § 763. And, inasmuch as a denial of the agreement would subject him to a conviction of perjury, (see 1 Sugd. Vend., 7th Amer. Ed., p. 158, c. 4, § 6, par. 12,) it was natural that the usual course was to plead the statute as a bar to both discovery and relief. But it is not entirely clear whether a denial of the contract without pleading the statute was sufficient to enable the party to take the objection at the hearing. That it was, is distinctly stated by Lord Cranworth in Ridgway v. Wharton, 3 De Gex, M. & G. 689; and compare Fell v. Chamberlain, 2 Dick. 484, and Sugd. Vend., supra. But the contrary was held in Heys v. Astley, 4 De Gex, J. & S. 34. At law it is clear that the denial of the contract was sufficient to let in

the defense. Buttemere v. Hayes, 5 Mees. & W. 461; Eastwood v. Kenyon, 11 Adol. & E. 445. And this was not put upon any distinction between cases where the plaintiff declared specially and cases where he resorted to the common counts. The defendant, however, was at liberty to plead the statute specially, if he saw fit to do so. 1 Chit. Pl. *528. The rule that it was sufficient at law to deny the contract seems to have continued in force until the new judicature acts, by which it was expressly provided that "when a contract is alleged in any pleading a bare denial of the contract by the opposite party shall be construed only as a denial of the making of the contract in fact, and not of its legality, or its sufficiency in law, whether with reference to the statute of frauds or otherwise." See And. & S. Jud. Acts, (4th Ed.) 197.

The common-law rule that it was sufficient to deny the contract has been sanctioned in America by high authority. Thus, in Dunphy v. Ryan, 116 U. S. 495, 6 Sup. Ct. Rep. 486, which went up from Montana, the defendant in an action at law set up a counterclaim or cross-action based upon an agreement which was not alleged to be in writing, and the plaintiff filed a replication denying such contract, and it was held that this was sufficient to raise the question, the court saying: "The denial in the replication of the plaintiff of the making of the contract, on which the defendant based his cross-action, is as effective for letting in the defense of the statute of frauds as if the statute had been specifically pleaded." See, also, Birchell v. Neaster, 36 Ohio St. 331. And even in states where the chancery rule that the statute must be specially pleaded seems to prevail, it has been held that, so far as the common counts are concerned, it is sufficient to plead the general issue. Durant v. Rogers, 71 Ill. 124; and see also Hunter v. Randall, 62 Me. 426; Duck Co. v. Dewey, 6 Gray, 446.

In New York, where the phraseology of the statute of frauds is similar to ours, the common-law rule of pleading is applied even in equity. This view was announced in Cozine v. Graham, 2 Paige, 181. That case arose on a demurrer to a complaint, which did not show whether the contract was in writing or not. The demurrer was overruled upon the ground that the contract must be presumed on demurrer to have been in writing. But Chancellor WALWORTH, in the course of his opinion, said: "The rule of pleading on this subject is well settled in the courts of law, and I do not see why the principle of that rule is not applicable to this court. It is there held that the statute did not alter the form of pleading; that if an agreement or contract is stated in the declaration to have been made, it is not necessary to allege that it was in writing, as that will be presumed until the contrary appears. If the agreement is denied the plaintiff must produce legal evidence of its existence." This case is a leading one in that state, and upon its authority it has always been held there that it is sufficient as a matter of pleading to deny the contract. See Bank v. Root, 3 Paige, *481; Coles v. Bowne, 10 Paige, 535; Champlin v. Parish, 11 Paige, 408; Harris v. Knickerbacker, 5 Wend. 643, 644; Botts v. Cozine, 1 Hoff. Ch. 89; Duffy v. O'Donovan, 46 N. Y. 226. The case of Bommer v. Manufacturing Co., 81 N. Y. 471, is not at all in conflict with the foregoing. In that case RAPALLO, J., said, in reply to an argument upon the statute of frauds: "There is no exception in the case raising any question under the statute of frauds. The statute is not pleaded, nor was there any objection to the proof of the agreement sued upon, by oral testimony, nor is there any exception to any finding or conclusion, which presents any question under the statute. No such question can, therefore, be considered on this appeal." This is merely the statement of the very obvious proposition that the record on appeal must show in some way that a question as to the statute of frauds is involved in the case. And the implication is that this might be shown in any of the ways mentioned. Nor have we seen any New York case which is in conflict with the rule that a denial of the contract is sufficient to raise the question of the statute of frauds. This rule is applied by the supreme court of the United States, not only at law, as appears from the cases above cited, but even in equity. See May v. Sloan, 101 U. S. 237. And it is so applied in many of the state courts. See Wiswell v. Tefft, 5 Kan. 266; Whiting v. Gould, 2 Wis. 593, 594; Patton v. Rucker, 29 Tex. 411; Walker v. Hill, 21 N. J. Eq. 203; Billingslea v. Ward, 33 Md. 51; Semmes v. Worthington, 38 Md. 317; Hocker v. Gentry, 3 Metc. (Ky.) *474; Brown v. East, 5 T. B. Mon. *408; Wynn v. Garland, 19 Ark. 34; Poag v. Sandifer, 5 Rich. Eq. 180; Hook v. Turner, 22 Mo. 333; Rowton v. Rowton, 1 Hen. & M. 91; Bonham v. Craig, 80 N. C. 228. And in some of the states which maintain the contrary doctrine it is admitted that the prevailing rule in this country is that a denial is sufficient. See Battell v. Matot, 58 Vt. 285, 5 Atl. Rep. 479.

In California two cases on the subject have been called to our attention. In Osborne v. Endicott, 6 Cal. 153, one of the objections to establishing a parol trust as to the real property was that there was no writing. The court held that the trust was a resulting trust, and therefore not within the statute, but said, in addition, that the point as to the statute was not good "because the statute of frauds is not pleaded." That was all that was said on the subject. No reason was given for the remark of the court, and no authorities were referred to. This case was referred to in Broder v. Conklin, 19 Pac. Rep. 513, but in such a manner as to show that no reliance was placed upon it. In Burt v. Wilson, 28 Cal. 638, an amended complaint to establish a trust alleged, as a reason why the trust should be established, that in the answer first filed (which had been withdrawn) the trust was admitted. The court replied, as well it might, that the position was not tenable "for a number of reasons;" and the reason which it selected from among the number was that there was no admission because it was not alleged that said answer did not contain a plea of the statute of frauds, which it might have done. It is hardly necessary to say that this does not conflict with the proposition that if the defendant denies the contract he need not plead the statute specially. In the subsequent case of Wakefield v. Greenhood, 29 Cal. 599, 600, the court stated the common-law rule to be as follows: "If the contract stated in the declaration or bill in equity was denied, it was incumbent on the plaintiff or complainant to prove by legal evidence its existence, and this could be done only by the production of proof of the execution and contents of the written agreement, or some note or memorandum thereof executed according to the provisions of the statute of frauds."

We think it clear upon principle that under our statute of frauds and system of pleading it is sufficient to deny the contract without referring to the statute. The old chancery idea that the statute must be specially pleaded grew out of and is based upon, the assumption that a parol contract within the statute had some kind of validity. And one of the objects of the pleadings in chancery being for the discovery of evidence, we can readily see how the doctrine arose. But our statute declares, not merely that no action shall be maintained upon contracts within its operation, but that they are "invalid." A parol contract within such a statute is void. Dung v. Parker, 52 N. Y. 496, 497; Dunphy v. Ryan, 116 U. S. 495, 6 Sup. Ct. Rep. 486; Welch v. Whelpley, 62 Mich. 15, 28 N. W. Rep. 744; Raub v. Smith, 61 Mich. 543, 28 N. W. Rep. 676. And to require the defendant to show affirmatively the invalidity of the plaintiff's contract would be out of harmony with the general rules of pleading and practice. It may be that it would simplify matters if the plaintiff were required to state in his complaint whether he relies upon a writing or not; for then the question could always be raised at a preliminary stage of the case. But it has been decided that this is not required. Wakefield v. Greenhood, 29 Cal. 599. And, since this is so, and the question may be adjourned to a subsequent stage of the proceedings, we do not see why the burden of allegation should be thrown upon the defendant when the thing is an essential element of the plaintiff's case. Furthermore, under our system the pleader is to allege facts only, avoiding matters of evidence on the one hand and matters of law on the other; and when he states a fact once, either affirmatively or negatively, it is sufficient for that pleading. Therefore when the plaintiff alleges a contract, which is either stated or presumed to be in writing, it is sufficient for the defendant to deny such contract. Having denied it, he is not required to state affirmatively that it was not in writing, or to refer in his answer to the law which makes it invalid. If the statute of limitations constitutes an exception to the rule that matters of law must not be pleaded, it is but an exception to a general rule; and it is quite a different matter. It is not an element of the plaintiff's case. Nor does it render the contract void. McCormick v. Brown, 36 Cal. 184; Grant v. Burr, 54 Cal. 300. And the statutory mode of pleading it is simply a short way of averring the time of the transaction. If the rule that the statute must be specially pleaded is to prevail in this state because it prevailed in the English court of chancery, then, to be consistent, we should say that for the same reason pleadings here should be of matters of evidence to the extent that was proper there. To our minds the rule of the common law which prevails in the majority of American courts, even in equity, is the true one. The bill of exceptions was in time. The other matters do not require special notice. We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: Vancliff, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

79 Cal. 517

SANTA MARINA *v.* CONNOLLY *et al.* (No. 11,889.)

(*Supreme Court of California.* July 1, 1889.)

FRAUD—FORECLOSURE OF MORTGAGES.

1. The land in controversy was covered by a mortgage to H. for $96,725, held by S. as collateral security. It was agreed that T., the owner, should convey the land to plaintiff for $37,500, the money to be paid to S., which was accordingly done. An agreement was then made between plaintiff and H. and S., by which the latter agreed to foreclose the mortgage, and to bid at the sale the sum of $45,000, and to transfer the certificate of sale to plaintiff; also that, if any third persons should bid more than $45,000, and become the purchasers, H. and S. should pay plaintiff that sum, and he would quitclaim to T. The actual value of the property was not more than $37,500, and there was no intent to defraud other creditors by the arrangement. *Held*, that the holders of liens junior to the H. mortgage had no cause to complain.

2. It being apparent that the conveyance from T. to plaintiff was a part of the transaction by which S. was to realize the amount of the purchase price on giving plaintiff the benefit of a title under foreclosure, the fact that the deed from T. recited that plaintiff took the land subject to incumbrances did not prevent him from availing himself of the foreclosure as against other liens.

3. The fact that T. was not a party to the written agreement between plaintiff and H. and S. cannot affect plaintiff's rights.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Action to enjoin a sale of land under execution, brought by J. D. Santa Marina against Patrick Connolly and others. Plaintiff appeals from an order granting a new trial.

Edward J. Pringle, (*John H. Boalt*, of counsel,) for appellant. *J. M. Lesser*, *D. H. Whittemore*, and *W. H. Sears*, for respondents.

WORKS, J. One Madison H. Turrill, being the owner of the real estate in controversy in this action, together with several other tracts of land, executed a mortgage thereon to one Edward F. Hall for the sum of $96,725. Subsequently the defendants in this action brought their suit against Turrill, and sued out an attachment upon all of said property, and recovered a judgment for the sum of $10,145.82. An appeal was taken from said judgment to this court, and while the same was pending on appeal the said Hall assigned said mortgage to one Robert Sherwood, as collateral security for a debt due from Hall to Sherwood. The said mortgagor, Turrill, and his mortgagee, Hall, and the assignee of said mortgage, Sherwood, procured the plaintiff in this action to become the purchaser of the property in controversy here for the sum of $37,500, which, by agreement between the parties, was to be paid to Sherwood, the then holder of the mortgage. In consideration of his agreement to purchase the property, Turrill agreed to and did convey to him the real estate, and Hall and Sherwood entered into a written agreement with the plaintiff, in which the fact of incumbrances and the purchase by the plaintiff were recited, and in which it was agreed as follows: "And whereas the said party of the third part [the plaintiff] has, by direction of the said Madison H. Turrill, paid the whole of said purchase money to the said party of the second part, [Sherwood,] to be applied upon the indebtedness of the said party of the first part [Hall] to him, and to the expenses of said foreclosure proceedings: Now, the said parties of the first and second parts, for and in consideration of the premises, and of the sum of one dollar, lawful money, to each of them in hand paid by the said party of the third part, the receipt whereof is hereby acknowledged, have covenanted, promised, and agreed, and by these presents do promise, covenant, and agree for themselves, their heirs, executors, and administrators, to and with the said party of the third part, his heirs, executors, and administrators and assigns, as follows, to-wit: (1) That they will commence immediately to cause the said mortgage of the said party of the first part to be foreclosed, and the said mortgaged premises to be sold by the sheriff without unnecessary delay, and that they or one of them will bid at such sale, upon the said lot of land and premises so conveyed to the party of the third part, the just and full sum of forty-five thousand dollars. (2) That immediately upon receiving the sheriff's certificate of sale for said premises they or he will assign and transfer and deliver the same to the said party of the third part for his use, without further consideration, cost, or charge. (3) That if the parties of the first and second parts should fail to bid for said property at said sale the aforesaid sum of $45,000, the party of the third part shall be at liberty, and he is hereby authorized, to bid said amount therefor in the name of the plaintiff in the suit to foreclose said mortgage, and be entitled to an assignment of the certificate as aforesaid. (4) That, if at the sheriff's sale any other person shall bid for and take the premises so conveyed to the party of the third part any greater sum than $45,000, the said parties of the first and second parts shall and will pay, or cause to be paid, to the said party of the third part on demand, on the first day of the month succeeding the payment by said purchaser of such purchase money, and upon his executing to the said Madison H. Turrill a quitclaim deed for said premises, and delivering to the party of the second part the possession thereof, the just and full sum of $45,000. (5) And the said party of the third part, in consideration of the premises, doth undertake, promise, and agree, to and with the said parties of the first and second parts, that if at said sheriff's sale any person other than said parties of the first and second parts shall become the purchaser of said property so conveyed to him, he will, on demand, on the first day of the month succeeding such purchase, and on his payment to him of the sum of $45,000, convey the said property by quitclaim deed to said Madison H. Turrill, and deliver the possession thereof to the said party of the second part."

In pursuance of this agreement, and while the action of the defendants in attachment was pending in this court, Sherwood brought his action to foreclose the mortgage, making the respondents herein parties to that action, procured a judgment for the amount of the note and the foreclosure of the mortgage, and caused execution to issue, and the property to be sold. At the sale neither Sherwood nor Hall became the purchaser of said property, and the appellant, acting in pursuance of said agreement, himself bid the same in in Sherwood's name for the sum of $45,000; and a certificate of purchase was issued to Sherwood by the sheriff, and by him assigned to the plaintiff without the payment of any money, in addition to the $37,500 already paid to Sherwood. The respondents' judgment was reversed in this court, and sent back for a new trial, and upon a second trial thereof judgment in their favor was again rendered by the court below. Upon their second judgment they caused execution to issue, and placed the same in the hands of the sheriff, who was about to enforce the same by a sale of the property in controversy, and this action was brought to enjoin further proceedings under said judgment. The court below has found the facts as stated above, and found affirmatively that there was no actual fraud on the part of Turrill, Hall, Sherwood, and the appellant, or either of them, in the transaction with reference to the purchase of the property, and the foreclosure and sale thereof, and judgment was rendered in favor of the plaintiff that he was the owner of the property in controversy, and enjoining further proceedings under the judgment of the respondents. A motion for a new trial was made by the respondents, and granted, and this appeal is from the order granting a new trial.

There is no controversy between the parties as to the material facts. The sole question presented is whether the transaction between the appellant, Turrill, Hall, and Sherwood was a fraud upon the respondents or not. Conceding, for the purposes of respondents' case, that it was the actual intention of these parties to cut off the subsequent lien of respondents by a foreclosure of the mortgage, we confess our inability to see how any injury could have resulted to them by reason of the agreement and the foreclosure and sale. It is conceded that the mortgage lien was a valid one, and prior to the attachment lien of the respondents. The mortgage must therefore have been satisfied before the property could have been made available in satisfaction of their debt. The court found that the property was not worth more than the sum of $37,500, the amount actually paid by the appellant. By the agreement the holders of subsequent liens, covering this and other property of Turrill, were actually benefited to the extent of $7,500 by the stipulation that upon foreclosure a credit should be given on the mortgage of $45,000 when the value of this piece of land and the amount actually paid for it was $37,500. Nor did this agreement in any way prevent competition at the sale, as it was expressly provided that, in case any one else should bid more than $45,000 for the property, said last-named sum should be paid to the appellant, and he should reconvey the property to Turrill. Thus it was to the interest of Hall and Sherwood, as well as to all of the lienholders, to make this piece of property bring as much as possible, that other pieces of property owned by Turrill, and covered by the liens, might be relieved of the burdens resting upon them to that extent. We are unable to see any wrong in this transaction on the part of the appellant. He could not have been expected to pay the full value of the property, and take it subject to the whole of Sherwood's mortgage as well as subsequent liens, which were far in excess of its value. He had a perfect right to secure himself against such a result by the agreement that the money advanced by him should be applied upon a foreclosure of the mortgage, which would give him a title free from incumbrance; and so long as he paid full value for the property he was guilty of no wrong, and his acts could injure no one.

The only part of the transaction which, apparently, needs explanation is the provision that, while only $37,500 was paid, a credit of $45,000 was to be given upon a foreclosure and sale, but this is easily explainable. It is evident that Sherwood and Hall were anxious to realize $37,500 on the property. It appears in evidence that they had been offering it for $35,000. The appellant could not well afford to pay his money and run the risk of some one else becoming the purchaser at the foreclosure sale without some consideration. Therefore it was agreed that in consideration of his advancement of the money he was to receive, in case some one else became the purchaser, the amount paid by him, and $7,500 in addition, and, in order to prevent some one else becoming the purchaser, Sherwood and Hall agreed to bid the sum of $45,000 on the property. In either event the agreement was a positive benefit, instead of an injury to subsequent lienholders.

We have carefully examined the opinion of the learned judge of the court below upon the ruling granting the new trial. He concludes that the findings of facts were not sustained by the evidence in some particulars which seem to us to be wholly immaterial. Conceding that such findings were not sustained by the evidence, the conclusion of law should have been the same.

It is contended that the deed from Turrill to appellant recited that the appellant took the property subject to the incumbrances, and therefore he could not avail himself of the contract of Sherwood and Hall to relieve himself of any of the liens. But, conceding the fact, the conclusion does not follow. It clearly appears that the sale of the property was made in order to realize as much as possible on this one tract of the incumbered property. The appellant agreed to pay, and did pay, on the express agreement that the property was to be sold on foreclosure, and that he was to have the benefit of the title to be obtained by such foreclosure and sale. In other words, the effect of the agreement was that he should advance the money, but it was to be a payment on the foreclosure sale of the property. Again, it is urged that Turrill was not a party to the agreement for the foreclosure of the mortgage and application of the money, as therein provided. But Turrill is not complaining, and the fact that he was not a party to the contract cannot affect the rights of the appellant. Besides it clearly appears from the evidence that Turrill practically surrendered the property to the mortgagee for the purpose of having it disposed of for the satisfaction of the debt, or as much of it as could be realized from the sale of the property. The sale was negotiated by Hall. Turrill conveyed to the appellant for the sole purpose of carrying out the plan by which the sum of $37,500 was to be realized and applied to the indebtedness upon the terms agreed upon. As the property sold for its full value, this was all subsequent lienholders had a right to ask. Taking this view of the transaction, we are clear that the court below was right in its first conclusion, and that it was error to grant a new trial.

We do not overlook the rule that, on an appeal from an order granting a new trial, every intendment is in favor of the order of the court, but, where the question presented is purely one of law, and this court is satisfied that an error has been committed, the rule is not applicable. The order appealed from is reversed.

We concur: BEATTY, C. J.; PATERSON, J.

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79 Cal. 511

ROBINSON *v.* ROBINSON. (No. 11,903.)

(*Supreme Court of California.* July 1, 1889.)

JUDGMENT—DIVORCE—ALIMONY.

1. A judgment of divorce directed defendant to pay plaintiff $100 as counsel fees, and all her costs, and also the sum of $1,500 alimony. It further provided "that defendant pay to plaintiff's attorney" said $100 "as counsel fees of plaintiff in this action," and to the clerk of court "for the use of plaintiff, as plaintiff's costs in this action, the sum of $28.05." *Held*, that this was not a judgment in favor of the counsel or the clerk of court, (persons not parties to the action,) but was in favor of plaintiff, in whose name alone execution could issue.

2. Under Civil Code Cal. § 139, providing that, when a divorce is granted for an offense of the husband, "the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support during life, or for a shorter period, as the court may deem just," etc., alimony may be decreed in gross.

3. Where defendant's property is worth $5,000 there is no abuse of discretion in decreeing plaintiff alimony in the sum of $1,500, for the support of herself and two small children.

Commissioners' decision. Department 1. Appeal from superior court, Del Norte county; JAMES E. MURPHY, Judge.

R. W. Miller, (*George A. Knight*, of counsel,) for appellant. *L. F. Cooper* and *Sawyer & Barnett*, for respondent.

BELCHER, C. C. This is an action for divorce on the ground of extreme cruelty. It is alleged in the complaint that there are two female children, the issue of the marriage, one under four and the other under two years of age; that plaintiff has no property or means of support; and that defendant has separate property of the value of $5,000, which yields him an income. The court found that plaintiff was entitled to a divorce and the custody of the children; that defendant's property was of the value of $5,000, and that the rents, issues, and profits thereof were $350 per annum; that the property was not "susceptible of being divided between the plaintiff and defendant alone, and that on a dissolution of the marriage between the parties it would be more just to decree the plaintiff a sum in gross or continuous alimony for the support of herself and children than to award her an individual share of said property;" that "the sum of $1,500 would be a reasonable lump sum for defendant to pay plaintiff as alimony for the support of herself and two minor children;" that "defendant should pay her the sum of $100 as her counsel fees in this action, and all her costs in this action, and that he should also pay her the sum of $1,500, in full, for all future alimony for the support of herself and her two minor children." The judgment dissolved the marriage between the parties, and awarded the custody of the children to the plaintiff, and proceeded as follows: "And it is further ordered, adjudged, and decreed that defendant pay to plaintiff's attorney the sum of one hundred dollars as counsel fees of plaintiff in this action, and that the said defendant pay to the clerk of this court for the use of the plaintiff, as plaintiff's costs in this action taken, the sum of $28.05, and that the said defendant pay to said plaintiff the sum of one thousand five hundred dollars in full for all future alimony for the support of herself and her two minor children, and that said sum to be paid, amounting in the aggregate to the sum of $1,628.05, be and the same is hereby declared a lien on the following described real property which is hereby declared to belong to the defendant. * * * That all of said sums may be paid to the party entitled thereto, or to the clerk of this court for their use, and if the same be not paid, and receipts therefor filed with the said clerk within twenty days from the date of this decree, execution or order of sale of the said property may issue thereon, on demand of the plaintiff, under which execution or order of sale, the said real property, or so much thereof as will satisfy plaintiff's demand, to-wit, $1,628.05, may be sold in the manner prescribed by law for the sale of real property under execution." From this judgment defendant appeals, and the case is brought here on the judgment roll.

The judgment is objected to on two grounds: *First.* It is claimed that it is void in so far as it awards counsel fees and costs, because it directs the money to be paid to the attorney and clerk; and, *second*, it is claimed that the court had no power to award, and abused its discretion in awarding alimony in a gross sum. In support of the first point the case of Sharon v. Sharon, 75 Cal. 37, 16 Pac. Rep. 345, is cited. In that case an order was made that defendant pay as counsel fees, on or before a day named, "the sum of fifty-five thousand dollars,—that is to say, twenty-five thousand dollars to Messrs. Tyler & Tyler, or order; ten thousand dollars to George Flournoy, or order; ten thousand dollars to Walter Levy, or order; ten thousand dollars to David S. Terry, or order; and five thousand dollars to R. P. Clement, or order; and, in case any of such payments are not made on or before the time herein fixed, then the party or the parties entitled thereto shall have execution therefor, pursuant to section 1007 of the Code of Civil Procedure of the state of California," and it was held that this order "was a direct judgment for money in favor of persons not parties to the suit, and to that extent was irregular and void."

In this case there was no direct judgment for money in favor of any one but the plaintiff. The finding was that "defendant should pay her [the plaintiff] the sum of $100 as her counsel fees," and "all her costs," and the judgment simply directs him to pay the $100 to plaintiff's attorney "as counsel fees of plaintiff," and the costs to the clerk of the court "for the use of the plaintiff." It then provides that all the money, including the allowance to the plaintiff, may be paid to the clerk, and that, if the same be not paid within a time fixed, execution may issue, on demand of the plaintiff, and so much of defendant's property may be sold thereunder "as will satisfy plaintiff's demand, to-wit, $1,628.05." Now, while the judgment is in some respects not very happily worded, still we think it should be treated as a judgment in favor of the plaintiff for all the money required to be paid, on which execution can only issue in her name and on her demand. The judgment is thus distinguishable from the order made in the case of Sharon v. Sharon, and in our opinion it was neither irregular nor void. As to the second point, the Civil Code (section 139) provides as follows: "Where a divorce is granted for an offense of the husband, the court may compel him to provide for the maintenance of the children of the marriage, and to make such suitable allowance to the wife for her support, during her life, or for a shorter period, as the court may deem just, having regard to the circumstances of the parties respectively. And the court may, from time to time, modify its orders in these respects."

The question is: Had the court the power, under this section, to require a gross sum to be paid to the plaintiff for her support? We think the language broad enough to confer this power. It will be observed that the allowance may be for the wife's support during her life, and there is nothing limiting it to periodical payments. If it were so limited, it would be possible, where no security had been required, for the husband to dispose of all his property and then go away or die and thus defeat the allowance altogether. And this has been the practical construction of similar statutes in many other states. In Burrows v. Purple, 107 Mass. 432, Justice GRAY, speaking for the court, said: "This court has long been vested, by successive statutes, with authority, upon granting to a wife a decree of divorce either from bed and board or from the bond of matrimony, to allow her reasonable alimony out of her husband's estate. And the practical construction of these statutes has always been that such alimony might, at the discretion of the court, be ordered to be paid in one gross sum, instead of being made payable at stated periods. In many other states, also, the word 'alimony' is commonly used as equally applicable to all allowances, whether annual or in gross, made to a wife upon a decree of divorce, under similar statutes;" citing Parsons v Parsons, 9 N. H. 309; Whittier v. Whittier, 11 Fost. 452; Buckminster v. Buckminster, 38 Vt. 248; Sanford v. Sanford, 5 Day, 353; Lyon v. Lyon, 21 Conn. 185; Piatt v. Piatt, 9 Ohio, 37; Hedrick v. Hedrick, 28 Ind. 291; Wheeler v. Wheeler, 18 Ill. 39; and Jeter v. Jeter, 36 Ala. 391. In Jeter v. Jeter, supra, a sum of money in gross was decreed to the wife under a statute which reads as follows: "If the wife has no separate estate, or if it be insufficient for her maintenance, the chancellor, upon granting a divorce, must decree the wife an allowance out of the husband's estate, taking into consideration the value thereof and the condition of his family." And it was held that the word "allowance" as used in the statute, authorized a decree for a sum in gross. So in Piatt v. Piatt, supra, the same term was used in the statute, and it was held that under it the court was authorized to render a decree for a gross sum, or for installments payable at stated intervals. There are other cases to the same effect which might be cited, but we think the above sufficient. Assuming then that the court had power to make an allowance of a gross sum, is there anything here showing an abuse of its discretion? We think not. The sum allowed was less than a third of the value of the husband's estate, and this was for the support of an abused and injured wife, who was in feeble health, and had two small children to care for. "Having regard to the circumstances of the parties respectively," the sum seems to us quite as small as it ought to be. We therefore advise that the judgment be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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3 Cal. Unrep. 107

CASTAGNINO *v.* BALLETTA *et al.* (No. 11,713.)

(*Supreme Court of California.* July 1, 1889.)

ASSUMPSIT—INSTRUCTIONS—APPEAL.

1. *Assumpsit* will lie to recover a balance due on a special contract to erect a building, and it is not necessary to allege the performance of all the conditions to be performed before payment was due.

2. The verdict of the jury will not be disturbed because the evidence is conflicting.

3. Instructions are properly refused when the charge of the court covers all the points in the case, including those found in the instructions requested.

4. Where, after the reversal of a judgment in a mechanic's lien suit, the case is remanded for a new trial, and the plaintiff amends his complaint and sues in *assumpsit*, the law of the decision on the appeal is no longer the law applicable to the pleadings.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Tilden & Tilden, for appellants. *Hassett & Tevlin* and *Theodore Bradley*, for respondent.

BELCHER, C. C. This action was originally brought to foreclose a mechanic's lien for $1,395.50 on a block of buildings in the city of San Francisco. The buildings were erected by plaintiff for defendants under a written contract, which provided that plaintiff should furnish all the materials, and do the work according to plans and specifications made by George Bordwell, architect, and receive therefor the sum of $9,800, payable in installments as the work progressed, the last payment to be made "when the houses shall be completed, each in all its parts, and accepted by the architect." The $1,395.50 consisted of an unpaid balance of the contract price and $375 alleged to be due for extra work and materials. The case was tried, and judgment rendered for plaintiff. An appeal was taken by defendants from the judgment and an order denying them a new trial, and the judgment and order were reversed on the authority of Loup v. Railroad Co., 63 Cal. 97 The case came on again for trial, and the plaintiff was allowed, over the objections of defendants, to file an amended complaint in *indebitatus assumpsit.* It contained three counts. The first alleged an indebtedness from defendants to plaintiff of $1,020.50 for work and labor done and materials furnished in the erection of a block of buildings in the city of San Francisco. The second alleged an indebtedness of $270 for extra work done and materials furnished in the erection of the said block of buildings. And the third alleged an indebtedness of $105, for putting a door in defendants' building, and constructing a sidewalk in front thereof, at their special instance and request. The prayer was for judgment for $1,395.50, the aggregate of these amounts, with interest and costs.

The defendants, by their answer, denied that they were indebted to plaintiff in the sums of money named in the complaint, or in any sums or sum whatever, and to the first two counts they pleaded the statute of limitations. They then alleged that the labor and materials sued for, except the last item of $105, were executed under a written contract, which was furnished by the parties on the 26th of April, 1876, and a copy of which was set forth and made a part of the answer. They further alleged that they complied with all the conditions of the contract on their part, and paid plaintiff during the progress of the work the sum of $9,104, but that plaintiff failed to comply with the conditions of the contract on his part; that he omitted to put in the buildings many things required by the contract and specifications, and that the value of the articles and work omitted was $450; that the buildings were not completed within the time named in the contract, and defendants were damaged thereby in the sum of $900; that the foundation was not put down to solid ground, and by reason thereof the buildings settled, to the damage of the same in the sum of over $1,000. The prayer was for judgment against the plaintiff for $1,500 and costs of suit. The case was tried before a jury, and the verdict and judgment were for plaintiff. Defendants moved for a new trial, which was denied, and have appealed from the judgment and order.

When the trial commenced, the plaintiff first introduced in evidence the building contract, a copy of which is set out in the answer, and the specifications referred to therein. He then introduced evidence showing that the terms of the contract were subsequently changed in certain respects by agreement of the parties; that he proceeded to construct and complete the buildings according to the plans and specifications; that he performed certain extra work, which was provided for by an indorsement on the contract, and for which he was to receive $270; that he also placed an extra door in one of the houses by direction of the architect at a cost of $15, and by an agreement with defendants laid a new sidewalk in front of the building, for which they were to pay him $90; that he was prevented by defendants from completing the whole work at the time named in the contract; that after it was in fact completed the architect suggested certain items of work which he wished to have done, saying that when they were done to his satisfaction he would accept the buildings as complete, and that he (plaintiff) did the suggested work, so far as it was called for by the contract; that a few days afterwards, at a meeting of the plaintiff, defendant Balletta, and the architect, the architect said he was satisfied with the building, and would accept it; that at this meeting the architect also said to plaintiff's attorney, who was present, that "he [plaintiff] had a hard contract anyhow, and that he was glad that he had finished it up, and that he had advised him not to take the contract in the first place; that he knew he lost a great deal of money on it; he said he knew he lost not less than $2,000 on the contract; he was glad it was finished;" that it was then arranged that another meeting of the parties should be held at the architect's office to figure up the amount due plaintiff, and settle the whole matter; and that in pursuance of this arrangement the parties met, the amount due plaintiff was figured up and agreed to be, including the extra work, $1,395.50; and that after that the architect called plaintiff's attorney aside, "and spoke in a low tone, and said that he wanted plaintiff to pay him $100; that he had been to a great deal of trouble in superintending the buildings, and that the amount paid him by defendant for his services was not sufficient;" that plaintiff, on being informed of this demand, refused to pay it, and the architect then said that he would charge plaintiff for lost time, and would not receive the buildings; that defendant was present, with a bag of money on the table, ready to pay plaintiff, if the architect had not stopped him from doing so. The defendants objected to the admission in evidence of the contract and specifications, on the ground that they showed an entirely different contract from the one set up in the complaint, and were therefore irrelevant and immateral; and to all the evidence showing that the terms of the contract were varied and changed, and to all evidence offered to excuse or explain the delay in the completion of the contract according to its terms, on the ground that it was incompetent, and inadmissible under the pleadings. They also moved for a nonsuit on similar grounds. The objections and motion were all overruled, and exceptions reserved.

1. The first and most important question presented relates to the amended complaint, and the plaintiff's right to obtain relief thereunder. It is contended for appellants that an action in general *assumpsit* will only lie where nothing remains to be done except to ascertain and determine the amount of money due the plaintiff, and that where, as in this case, the action is based on a special contract, the plaintiff must allege and prove the performance of all conditions precedent before he can recover. And it is said that all the conditions precedent were not performed here, because, under the contract, the last payment was not to be due until the buildings should be completed and accepted by the architect. It has been frequently held in this state that, notwithstanding the requirement that the facts constituting the cause of action should be stated in ordinary and concise language, the common counts may be used. Freeborn v. Glazer, 10 Cal. 337; Wilkins v. Stidger, 22 Cal. 235; Abadie v. Carrillo, 32 Cal. 172; Friermuth v. Friermuth, 46 Cal. 42; Magee v. Kast, 49 Cal. 141. In De Boom v. Priestly, 1 Cal. 206, there was a special contract for the erection of a building, which was deviated from by instructions from the defendants. The action was brought on a *quantum meruit*, and testimony was admitted of the value of plaintiff's services. The court refused to instruct the jury, at the request of defendants, that, "if the jury believes that there was a special contract between the parties to erect the buildings at a specified price, and according to an agreed plan, which was afterwards changed by consent, the plaintiffs are compelled to sue upon that special contract, so far as it can be traced, and cannot recover upon an implied contract for work and labor, or for materials." And it was held that the evidence was properly admitted, and the instruction refused. In Reynolds v. Jourdan, 6 Cal. 108, the plaintiffs brought an action of *assumpsit* for work and labor done and materials furnished in the erection of a building for defendant. In his answer the defendant set up a written contract for the erection of the building, and on the trial the plaintiffs offered the contract in evidence, and it was admitted over the objection of defendant. The court said: "When the entire performance of a special contract has been prevented by one of the parties, or where its terms have been afterwards varied by the agreement of both parties, the action for the amount due for work and labor should be in the form of *indebitatus assumpsit*, and not upon the contract. In such case the contract may be introduced in evidence by either party as an admission of the standard of value, or as proof of any other fact necessary to the recovery, and should be allowed to go to the jury whenever it can aid them in attaining a

sound conclusion." In Farron v. Sherwood, 17 N. Y. 227, it was held that the Code had not changed the former rules of pleading, and that a party who had wholly performed a special contract on his part may still count on the implied *assumpsit* to pay the stipulated price, and is not bound to declare specially on the agreement. And the doctrine of that case has been affirmed in other cases. See Hosley v. Black, 28 N. Y. 438; Hurst v. Litchfield, 39 N. Y. 377. In Kerstetter v. Raymond, 10 Ind. 199, it was held that the rules of common-law pleading, which permitted evidence of special contracts to be given under the common counts, had not been changed by the Code, and that they applied—*First*, where the whole of the contract has been performed on the part of the plaintiff; *second*, where the special contract has been altered or deviated from by common consent; *third*, where the special contract has been performed in part, and its full performance is prevented or dispensed with by the defendant; and, *fourth*, where the plaintiff has not fulfilled on his part, but has, under it, done or delivered something of value to the defendant. The case of O'Connor v. Dingley, 26 Cal. 11, cited by appellants, is not in conflict with the foregoing cases. The action was *assumpsit*, and the evidence showed a special contract whereby the defendant was to pay plaintiff, not in money, but by note. In the opinion there are some lines of protest against the acceptance of the common counts under our reformed modes of procedure, but the decision was only that the proper action would be one for damages for failure to give the note. In view of the foregoing authorities we think the common counts may be used in a case like this, and that there was no error in the admission of evidence or in the denial of the motion for nonsuit. It is true, it does not appear that there was any formal acceptance of the buildings by the architect. But the plaintiff's evidence shows that they were in fact completed according to the terms of the contract, except as to time, and that the failure to have them done in time was the defendant's fault. It further shows that after they were completed the architect said he was satisfied with them, and would accept them. If, after this, he in bad faith, and for a selfish purpose, changed his mind, and refused to accept them, that fact cannot affect the plaintiff's right to recover.

2. There was evidence introduced by the defendants conflicting on some points with that introduced by the plaintiff. The record, however, shows only a conflict; and, in view of the well-settled rule in such cases, we cannot disturb the verdict on the ground that it was not justified by the evidence.

3. The court refused to give to the jury certain instructions asked by defendants, and then read to them its own charge. The charge covered the whole case, and stated the law applicable thereto very fully, clearly, and, as we think, correctly. It also included all the points found in the instructions refused, which were correct statements of the law, and were applicable to the case. We therefore see no error in the refusal, or in the charge given.

4. It is contended that the decision in Loup v. Railroad Co., supra, on the authority of which the former judgment was reversed, has become the law of this case, and that, under it, averment and proof that the buildings had been accepted were necessary. It was held in Sharp v. Miller, 66 Cal. 98, 4 Pac. Rep. 1065, that the reversal of a judgment and order denying a new trial places the parties in the lower court in the same position as if the case had never been tried, with the exception that the former opinion of the appellate court must be followed, so far as applicable, in the new trial. After the judgment in this case was reversed, the plaintiff amended his complaint, as he had a right to amend it. Cox v. McLaughlin, 76 Cal. 60, 18 Pac. Rep. 100. The law of the case cited was, therefore, no longer applicable to the pleadings. On the new trial the court seems to have followed and was governed by the "law of the case" in the admission of evidence as to performance, waiver, refusal, etc., and in its instructions to the jury respecting them.

5. No point is made by counsel on the statute of limitations, and we therefore find it unnecessary to consider the question as to whether the action was barred or not. Looking at the whole record, we find nothing calling for a reversal, and therefore advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(79 Cal. 587)

COONRADT *v.* HILL. (No. 12,504.)

(*Supreme Court of California.* July 1, 1889.)

ADVERSE POSSESSION—EASEMENTS.

1. Under Code Civil Proc. Cal. § 325, as amended in 1878, relating to title by adverse possession, and requiring, in addition to such possession, the payment by the claimant of "all taxes which have been levied and assessed upon such land," a claimant is not excluded from the benefit of his plea unless the property was actually assessed, even though it may have been his fault that it was not assessed.

2. Defendant is entitled to plead adverse possession of a ditch appurtenant to his land, and running through plaintiff's land, though defendant has never paid any taxes assessed against plaintiff's land, (which did not appear to have been taxed any higher on account of such ditch,) but has always paid the taxes on his own land, whose value was enhanced by the water from the ditch.

3. So far as the defense of adverse possession or of equitable estoppel was concerned, it was immaterial whether or not the waters of a natural stream which fed the ditch were appropriated in compliance with the statute as to posting notices, etc.

4. Evidence of the convenience and necessity of the ditch to defendant's farm was admissible, as

tending to show that the water-right was appurtenant to, and passed to defendant by a grant of, the land.

In bank. Appeal from superior court, Butte county; W C. VAN FLEET, Judge.

Action to determine the right to an easement. Judgment for defendant, and plaintiff appeals.

Hundley & Gale, for appellant. *F. C. Lusk*, for respondent.

BEATTY, C. J. Clear creek is a natural stream flowing in a southerly direction through the middle of the east half of section 23 of a certain government township in Butte county. In August, 1876, the government title to the S. W. ¼ of the same section vested in John Powers, who, in the fall of that year, completed the diversion of a portion of the water of Clear creek from its natural channel to said S. W. ¼, where the same has been since continuously used by him and his successor, the defendant, Hill, for watering stock, for domestic purposes, and for irrigating their crops and orchards. This diversion and appropriation was effected by means of a dam placed in the stream about the middle of the N. E. ¼ of the section, and a ditch heading at the dam, and extending thence southerly through said N. E. ¼, and south-westerly through the S. E. ¼ to the line of said S. W. ¼. In 1879 said S. E. ¼ was patented to the California & Oregon Railroad Company in pursuance of grants contained in certain acts of congress passed in 1866, 1868, and 1869. In 1882 the plaintiff, Coonradt, acquired the title of the railroad company to the W. ½ of said S. E. ¼, across which Clear creek flows in its natural course, and through which the Powers ditch extends. Four years after thus becoming the owner of the land crossed by the Powers ditch, and riparian proprietor on the creek below the point of his diversion of the water, viz., in July, 1886, Coonradt commenced this action, in which he seeks to have it adjudged that defendant has no title to the ditch, and no right to maintain it, or to divert any part of the waters of Clear creek through it. To sustain his suit, he relies upon his riparian right to the full natural flow of the stream as against one whose land does not border upon it, and who, as he contends, has made no valid appropriation of the water which he is diverting.

The defendant relies upon three separate defenses: *First*, a valid appropriation of the water by Powers under license of the government while it was property of the government; *second*, the statute of limitations; and, *third*, an equitable estoppel arising out of the acts and declarations of the plaintiff, by which he (defendant) was induced to purchase the Powers land in the belief that the ditch and water-right were appurtenant to it. The findings and conclusions of the superior court were expressly in favor of defendant as to the last two defenses, and substantially supported the first. The plaintiff appeals from the judgment entered in conformity to the findings, and also from an order overruling his motion for a new trial.

We perceive no error in any of the findings or conclusions of the superior court, but it is unnecessary to consider or to pass upon all the points covered by the discussion of counsel. It is very clear to our minds that the defense based upon the statute of limitations was fully made out, and it will be sufficient to notice the points relating to that part of the case. Every fact respecting the character and duration of the possession and use of the ditch and water by defendant and his predecessor, required to establish a prescriptive right to such possession and use, is found upon testimony entirely satisfactory and substantially uncontradicted. With respect to this ground of defense, the appellant urges but one objection to the conclusions of the superior court, and that is founded upon the amendment of April, 1878, to section 325 of the Code of Civil Procedure, which requires, in addition to adverse possession, the payment by the holder of "all taxes which have been levied and assessed upon such land." With respect to this point the finding of the superior court is "that no taxes have ever been levied or assessed against said ditch and water-right, or either, at any time during their existence, for any purpose whatsoever." Notwithstanding this finding, the appellant contends that the defendant did not bring himself within the statute, and is not entitled to plead it. For, he says, this ditch and water-right were of value; they ought to have been assessed, and ought to have borne their share of taxes. If they did not, it was solely because the defendant fraudulently evaded the duty cast upon all property owners by the statute, of including in their sworn returns to the assessor all property owned or claimed by them and subject to taxation; and he argues that the defendant should not be allowed to avail himself of the benefits of a law, the policy of which he has thus circumvented.

We do not think it by any means clear that defendant was required, under a proper construction of the revenue law, to include his ditch and water-right as a separate item in his return to the assessor. This is not the sort of ditch to which section 3663 of the Political Code seems to refer. It is a small ditch, supplying water for domestic purposes, watering stock, and irrigating a small and definite tract of land. It is used solely in connection with, is appurtenant to, and passes by conveyance of, that tract of land. Civil Code, § 662; Farmer v. Water Co., 56 Cal. 11. It would seem that the ditches referred to in the above-cited section of the Political Code are those which are constructed on a large and extensive scale, not appurtenant to any particular land, but held in gross, and operated for the supply of communities and neighborhoods for mining, manufacturing, irrigating, and other purposes. But we need not decide this point, for under the law as it is written, and as it has been construed and applied in this court, the defendant was not excluded from the benefit of his plea of the statute of limitations unless the property which he claims to have held adversely was actually assessed. Ross v. Evans, 65 Cal. 440, 4 Pac. Rep. 443; Heilbron v. Water Ditch Co., 17 Pac. Rep. 65. The doctrine of these cases, however, does not entirely dispose of appellant's objection for he contends that the easement claimed by defendant in his land, although not assessed separately and *eo nomine* to any one, was virtually and in effect assessed to him. He says: "My land, and the entire property therein, has been assessed to me, and I have paid the taxes. But the easement claimed by defendant is an interest in my land. If his claim is well founded, I own my land minus the easement which he owns. He should pay the taxes on that, and I only upon what remains after that is deducted." In support of this position he cites the case of McNoble v. Justiniano, 70 Cal. 395, 11 Pac. Rep. 742. That was an action to recover 160 acres of land, part of a larger tract belonging to plaintiff, the whole of which had been assessed to her, and upon which she had paid all the taxes. The defendant, although he had been for 10 years in adverse possession of the demanded premises, had never returned them for separate assessment to himself, and had never offered to pay the taxes on them. It was held that his plea of the statute of limitations could not be sustained.

But this case is essentially different. There the land was assessed by the acre and in proportion to its extent. Necessarily the plaintiff had paid the full amount of taxes upon every acre of land in dispute, and the defendant had paid nothing. In this case the defendant paid taxes on the land in connection with which the ditch was used and which was benefited thereby. The evidence shows that the land with the ditch was valuable, produced good crops, and grew fruit trees, etc., and that without the water it would be comparatively useless. It is fair to presume, therefore, that the value of the water-right was no greater than the enhanced value of the land to which it was appurtenant, and that in paying taxes on his land the defendant paid taxes on the water-right. On the other hand, there is no legal presumption or necessary inference that the ditch and water flowing therein either enhanced or diminished the value of plaintiff's land. Land so situated may be damaged, or may be benefited, and it must be presumed that the assessor, seeing plaintiff's land as it was, crossed by a ditch in the sole and exclusive use of defendant, made proper allowance for its advantages and disadvantages in valuing the land. As matter of fact, the evidence shows that plaintiff was greatly benefited by the ditch. Without going above the line of his own land, he could not divert any water from the creek, although an abundance was flowing therein, so as to bring it where he could use it, and up to the day he brought this action he never had acquired any right to divert the water on the lands above him. The defendant and his predecessor, Powers, however, had for 10 years enjoyed the right of diverting the water at their dam on the N. E. ¼ of the section, and by that means were enabled to conduct it across the higher parts of plaintiff's land, who, by their permission, when they did not require the full capacity of their ditch, made use of it for his own purposes and to his great advantage. His land, therefore, during the time of the running of the statute, was worth more by reason of the ditch than it would have been without it; and if it was assessed merely as so much land, and wholly without regard to the ditch, he paid less taxes rather than more than he ought to have paid. Certain at least it is the evidence does not show and there is no ground for presuming that he paid, and defendant failed to pay, taxes on the thing to which defendant asserts a prescriptive right, and consequently the decision in McNoble v. Justiniano, supra, does not apply. In this view the exception to the testimony of the defendant as to the manner in which the assessor regarded the ditch when assessing the land becomes immaterial. In the absence of the testimony, the court would have presumed that the advantages and disadvantages of the ditch had been considered in assessing the land.

As to other errors assigned by appellant, and based upon exceptions taken to rulings of the superior court in the course of the trial, it is sufficient to say that, so far as the defenses founded upon the statute of limitations and equitable estoppel are concerned, it is immaterial whether defendant or his grantor made an appropriation of the waters of Clear creek in compliance with the Code requirements as to posting notices, etc., or not. To sustain these defenses, the actual construction of the ditch could be shown, without showing the preliminary posting or recording of notice. There was no error in admitting evidence as to the convenience and necessity of the ditch to the Powers place. Such evidence was relevant and material to the defense of estoppel, and also to show that the water-right was appurtenant to the land, and passed to the defendant by grant of the land.

The evidence admitted over plaintiff's objection, as to the actual intention and understanding of the parties at the time of defendant's purchase of the Powers place, to the effect that they all understood that the ditch and water-right was included in the sale, and was to pass by the deed as appurtenant to the land, if incompetent, was clearly not prejudicial. In the absence of such testimony, no other construction could have been given to the deed. The other assignments of error relate exclusively to the other defenses, and need not be considered. Judgment and order affirmed.

We concur: WORKS, J.; MCFARLAND, J; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J

PAIGE *v.* ROCKY FORD CANAL & IRRIGATION CO. *et al.* (No. 12,645.)

(*Supreme Court of California.* July 13, 1889.)

WATER-COURSES—RIPARIAN RIGHTS—ADVERSE POSSESSION.

1. A stream which had been a natural water-course was obstructed by a flood, and from that time water flowed to plaintiff's lands, situated on the stream, only in time of freshets. Plaintiff purchased the right to turn other streams into the old channel for purposes of irrigation. Defendant corporation had obtained from plaintiff's grantors the right to turn water into the stream, with the privilege of turning it out again, and of clearing the obstructions from the stream. *Held* that, this being a natural water-course, defendants were not entitled to take out more water than they turned in, and would be restrained from building a dam across the stream, whereby all the water would be diverted, and none would flow by plaintiff's land.

2. Though the natural flow of water after the stream was obstructed only reached plaintiff's land on occasions of freshets, yet, when the flow of water was increased by the removal of the obstructions by defendants, the increase of flow accrued to the benefit of plaintiff, and not to that of defendants, who had no right to the natural flow.

3. Where it appeared that defendants removed the obstructions for the privilege of turning other waters into the stream, and not for the right to use the natural flow of the water, the holding of defendants was not adverse to that of plaintiff.

In bank. Appeal from superior court, Tulare county; W. W. CROSS, Judge.

For former opinion, see 4 Pac. Rep. 1152.

Brown & Daggett, for appellants. *A. J. Atwell* and *N. O. Bradley*, for respondent.

WORKS, J. This is a proceeding to enjoin the construction of a dam across, and a diversion of the waters from, a certain stream known as "Packwood Creek." The complaint, after alleging the corporate capacity of the defendants, and the ownership of the plaintiff and his grantors, for 10 years last past, in and to certain real estate described, alleges "that from time immemorial that certain natural water-course called 'Packwood Creek' has been accustomed to and did and does now flow through said lands, moistening and irrigating the same, and furnishing its waters to the plaintiff and to his grantors for the irrigation of such lands, and for the use of their live-stock; that for the purpose of increasing the flow of the waters of said stream the plaintiff's grantors many years since, and long before any wrongful acts of defendants hereinafter set out, acquired the right to divert from the St. Johns and Kaweah rivers, two large streams flowing from the Sierra Nevada mountains, waters into the said Packwood creek, and acquired the right of way to and the ownership of the bed and channel of said creek, and then and ever since has and still does divert from said streams into the said creek, and thence carry down through the same to the lands of plaintiff aforesaid, for the irrigation of said lands hereinbefore described, a large amount of water, all of which rights are now the property of plaintiff; that the plaintiff has now growing in and upon the lands aforesaid a large vineyard, and a great number of acres of grain, which he is engaged in irrigating with the waters flowing in said creek, and which, without such irrigation, will dry up, die, and become lost and worthless to plaintiff, but which, by irrigation, is of great value; that the defendants have entered upon said stream, Packwood creek, above plaintiff's said land, and are now engaged in constructing a dam therein, with the avowed purpose of turning the waters thereof, which otherwise would and of right ought to flow down to plaintiff's said land, out of said creek, and into a ditch constructed by them, and that such entry and construction of such dam is without any right whatever, and is against the protest of the owner of the land through which the said stream runs; that if defendants are permitted to proceed to construct such dam it will result in immediate and great and irreparable loss and injury to plaintiff, result in the loss of his vines and crops, and that such loss and injury will not be and is not susceptible of computation or determination in an action at law."

The defendants, in their answer, deny all of the material allegations of the complaint, and by way of a special defense allege, in substance, that certain of its predecessors and grantors acquired the right to divert and appropriate waters from St. Johns river, and to transfer the same to the Kaweah river, referred to in the complaint, which rights were then owned by said defendants, and that it obtained from said parties the right to use a portion of the waters so appropriated and conveyed by them into the Kaweah river from said St. Johns river aforesaid, which rights said corporation still owns; "that, prior to the year A. D. 1867, said Packwood creek united with and formed a branch of said Kaweah river; that during the winter season of the year 1867–68, by reason of the heavy freshets, the flood and rains which then occurred, the bed and channel of said Packwood creek for the distance of about one mile, commencing at the place where said creek united with said Kaweah river, became and were filled up with earth and *débris*, deposited therein by the action of said freshets and floods, and by reason thereof the water then and thereafter ceased to flow through the channel of said Packwood creek, and said Packwood creek then ceased to have, and ever since has ceased to have, any natural source of supply of water." It is further averred, in substance, that while said Packwood creek was so obstructed the corporation defendant informed the grantors of the plaintiff, who then possessed all the rights and privileges of turning and conveying water through the channel of said Packwood creek, that said corporation desired and intended to obtain from the owners of the land, through which that portion of the channel of said Packwood creek above referred to ran, the right to enter upon said portion of said channel, which was filled up as aforesaid, and remove the earth and *débris* therefrom, and appropriate and use the channel for the purpose of conveying water from the Kaweah river through said channel, and by means of a dam convey said water from said channel through a ditch to lands in the vicinity of Tulare City, in said county; and that said grantors of the plaintiff, with full and complete knowledge of their rights in the premises, and knowing that the defendant would have to expend large sums of money in order to remove said earth and *débris* from said channel, and construct said dam, for the purpose of deceiving said corporation defendant, and with intent to induce it to perform labor and expend large sums of money in digging out and removing from the said channel of Packwood creek the earth and *débris* deposited therein as aforesaid, plaintiff's said grantor declared, stated to, and informed said corporation defendant that he did not claim or intend to claim or use said channel of Packwood creek, or the waters turned or conveyed therein by said corporation defendant, and that defendant could appropriate and use said channel for the purpose of conveying water as aforesaid; that acting upon said statements the defendant in good faith entered upon that portion of the channel of said alleged Packwood creek which had been and was filled up with earth and *débris* as aforesaid, and with the knowledge and acquiescence of plaintiff's said grantor, and by means of labor performed at great cost and expense of time and money, removed all earth, *débris*, and obstructions therefrom, and appropriated to its own use said channel for the purpose of conveying water from said Kaweah river, and turned and conveyed therein water from said Kaweah river, and at great cost and expense constructed a dam in the channel of said Packwood creek, being the same dam complained of in said complaint, and at great cost and expense dug a ditch in said channel immediately above said dam to the vicinity of Tulare City, in said county, where said waters diverted from said Kaweah river through said channel were and are, by means of said dam and ditch, conveyed and used for the purposes of irrigation; "that during the time said labor of removing said obstructions, earth, and *débris*, and of building said dam and ditch, was being performed, and said sum of money expended for the same, plaintiff's said grantor knew of said labor being performed, and said money being expended, and did not object to the acts of said corporation defendant in that behalf, and did not claim, or pretend to claim, that any of said acts were interfering with, or would interfere with, or injure any of his rights to the channel of said creek, or the waters conveyed therein; and that, if said obstructions, earth, and *débris* had not been removed from the channel of said alleged creek in the manner and to the extent they were removed as aforesaid, no water whatever could or would flow from said Kaweah river, or from any other source, into said creek, at ordinary stages of water, above the place where said corporation had placed its said dam and constructed its said ditch." It is further averred that the defendant corporation has been in the notorious, exclusive, peaceable, and continuous possession of said dam and ditch, and of said channel above said dam, adversely to the plaintiff and his grantors, more than five years immediately preceding the filing of said complaint, under a claim of right adverse to the plaintiff and his grantors, and has, during all of said time, maintained said dam adverse to the plaintiff and his grantors, and during all of said time diverted said water by means of said ditch, adverse to the plaintiff and his grantors.

The court, after finding the corporate capacity of the defendant, the ownership of the property as alleged in the complaint, finds, in substance, that from time immemorial, down to the year 1868, a well-defined, natural water-course, known as "Packwood Creek," ran through the lands of the plaintiff, and irrigated his lands, and furnished water for his live-stock, and that of his grantors; that in the spring of 1868, by an unusual flood, the head of the creek became, by the action of the waters, so filled up with *débris* and sand that but little water ran into the creek, not sufficient to reach the lands of the plaintiff and his grantors, and the same ceased to be and was no longer a natural water-course through said lands of plaintiff; that from the year 1868, down to the spring of 1875, Packwood creek was a water channel into which and down which water ran in times of high water, but no water in its natural flow which entered into said creek reached the land of plaintiff aforesaid; that in the year 1875 plaintiff's grantors turned a large amount of water from a stream known as the "St. Johns River," down into the Kaweah river, so as to bring it down to said creek, and thence through the creek to the lands of the plaintiff, and acquired from the owners of the land through which they turned the water the right so to do, and also acquired from the owners of the land through which said creek ran the right to use the channel thereof for the purpose of conducting the water to said lands, where they used it for irrigation, and for their live-stock to drink; that plaintiff's grantors thereupon constructed a cut leading from the St. Johns river into the Kaweah river, which flowed down to and furnished water to Packwood creek, and constructed a cut leading from Visalia creek to Packwood creek, and cleaned out said creek so it would carry all the waters which they had turned into said creek, and the waters which came in their natural flow onto plaintiff's land; and said waters flowed down and through plaintiff's said lands in the channel of Packwood creek, and were used by the plaintiff and his grantors; that after the plaintiff and his grantors had so acquired the right to use the channel of said creek, and had so used it, the defendant, in the winter of 1875 and 1876, constructed from time to time dams in the north channel of said creek, and thereby turned away from said channel by means of the dam into the defendant's ditch the waters which the plaintiff and his grantors had turned therein, which dams were in each of said years torn down by the plaintiff's grantors, and rebuilt by the defendant, and that the defendant did not at any time turn any water into the channel of said creek. After further finding the use made of the water by the plaintiff, and that the diversion thereof would cause him great, immediate, and irreparable injury, the court finds that the defendants notified the grantors of the plaintiff of their intention to clear out the channel of Packwood creek, and to construct the dam as aforesaid, but finds expressly that the plaintiff's grantors gave the defendants the privilege of turning out whatever water it turned into said channel, and no more; and that the defendants never at any time turned any water into said creek after the year 1876, and that "neither the plaintiff nor his grantors ever induced said defendant to expend any money, or do any work, on the channel of said creek, nor ever informed the defendants that he or they did not claim, or intend to claim, and use the channel of said creek; and the only right which the defendant ever had to construct or maintain any dam in either of the channels of said creek was to turn out such water as it turned in, and the defendant, as aforesaid, never turned any water into said creek, but the plaintiff's grantors, in the years 1877, 1878, and 1879, tore up the dams and obstructions placed in the north channel of said creek by the defendant, so as to let the water flow down to plaintiff's land." The court further finds that the corporation did expend $20,000 in cleaning out the head of the channel and constructing its dams, and that the plaintiff's grantors knew of the expenditure of the money, but that the same was done under the aforesaid agreement as to the amount of water to be taken from the channel. The court found against the claim of the defendants that they had been in adverse possession of the channel and ditch for the term of five years. The court further finds that at the time the action was brought the defendant corporation was engaged in reconstructing its dam, the same having been removed by the plaintiff, the effect of which dam was to turn away from said creek into defendants' ditch the waters which plaintiff and his grantors had turned therein, as well as the waters which came therein in their natural flow. As conclusions of law the court finds "that the construction or maintenance of any dam in the channel of Packwood creek by defendant is without right, and will inevitably work great and continuous injury to plaintiff, not susceptible of compensation in any action at law, and create endless litigation;" and judgment was rendered for the plaintiff accordingly. A motion for a new trial was made by the defendants, and denied, and the defendants appeal.

The first contention of the appellants is that after the year 1868 the creek in question ceased to be a natural water-course, and that from that time the natural flow of the water therein did not reach the plaintiff's lands, and that, therefore, no right of his was interfered with by their action. The evidence tends to show, and the court finds, that, prior to the year 1868, this creek was a natural water-course, and that the waters flowed therein onto the plaintiff's lands, but that in said year, by an extraordinary freshet, the head of the stream was obstructed by *débris;* and that from that time on only a small quantity of water flowed naturally in the stream, not in sufficient quantity to reach the plaintiff's lands, but that water did reach his lands through the channel of the stream in extreme high water. In the case of riparian owners the rule has been held to be that "when a stream flowing through a person's land is diverted into a new channel, either artificially or by a sudden flow, affecting the rights of other riparian proprietors favorably, and the owner acquiesces in the new state of the stream for so long a time that new rights accrue, or may be presumed to have accrued, such acquiescence is binding, like a public dedication, and the stream cannot be lawfully turned to its former channel." Gould, Waters, § 159; Woodbury v. Short, 17 Vt. 387. So, where the owner of the land has changed the course of the stream so as to affect other riparian proprietors favorably, and acquiesces therein for a sufficient length of time, he cannot claim the right to change the flow of the water to the detriment of such other riparian owners. Ford v. Whitlock, 27 Vt. 265.

But it seems to us that this rule, which applies to riparian owners, has no application to a case like this, where the defendants have entered upon the stream, and claim to appropriate and divert the waters therefrom under the circumstances shown by the pleadings and the evidence. The fact that the plaintiff's grantors had purchased the right of way through the channel of the creek to flow their waters brought to the same by artificial means did not, as claimed by the appellant, show that the stream was not a natural water-course. The evidence tends to show that the channel of the stream was well defined, and that the waters had formerly flowed therein naturally down to the plaintiff's land, and that it was only prevented from so flowing by the obstruction above stated. The right to such water as was brought into the stream by the plaintiff's grantors might be, and we think was, held by an entirely different claim than that which entitled them to the natural flow of the water, (Hoffman v. Stone, 7 Cal. 46; Canal Co. v. Vaughn, 11 Cal. 143; Canal Co. v. Hoyt, 57 Cal. 46; Creighton v. Irrigation Co., 67 Cal. 221, 7 Pac. Rep. 658;) but this would not affect the character of the stream, or the right to the water naturally flowing therein. Besides, respondent does not rely in his complaint solely on the ground that this is a natural water-course, but on the further ground, which is found in his favor, that the flow of the water was increased by artificial means, the right to which was purchased and used by his grantors, and thereby, in connection with the natural flow of the stream, the water was carried onto his lands.

This being a stream in which water flowed naturally, the fact that the defendants had turned other waters into it would not entitle them to take out more than they turned in. Wilcox v. Hausch, 64 Cal. 461, 3 Pac. Rep. 108. The right of the riparian owner to the natural flow of the water, under the circumstances, remained the same as before. This case was here before, when it was held that the findings were too indefinite and uncertain to sustain the judgment, and the case was reversed on that ground. Paige v. Irrigation Co., 4 Pac. Rep. 1152. This same point, and the further one that the findings are contradictory, are urged now; but we think the findings are sufficiently definite, and that they are not so contradictory as to warrant a reversal on that ground.

It is further contended that the evidence is insufficient to sustain some of the findings. Counsel for appellants review the evidence in their brief, and argue this point at length and with great earnestness, but the evidence on the several points discussed is clearly in conflict to such an extent as must preclude us from entering upon the question. In pressing their views upon us as to some of these findings, the appellants contend that the respondent, like the appellant, was a mere appropriator of the waters flowing in the stream, and not a riparian owner; but the evidence sufficiently shows to the contrary as to a part of the waters of the stream, and as the evidence shows and the court finds that, although the natural flow of the water did not reach the respondent's lands, it does appear that the waters did reach his lands in high water, and that the natural flow of the water to his place was only prevented by the obstruction at the head of the stream. There is evidence upon which the court was warranted in finding that the appellant expended its money in removing this obstruction, opening up the channel, and constructing its dam, not for the purpose of using the natural flow of the water, but as a channel through which it might conduct the waters turned into it by the appellant. This being the case, the fact that the natural flow of the water was increased by the removal of the obstruction, whereby the same would or might flow onto the respondent's lands, must be held to have accrued to his benefit, and not to that of the appellant, because it had no right to the natural flow of the water under such circumstances. The very fact that the removal of the obstruction would increase the natural flow of the water may have been an inducement for the owners of the land to consent to the use of the channel by the appellant for the purpose of flowing other waters therein. The same evidence and finding that the expenditures were made by the appellant for the privilege of flowing water turned by them into the channel of the stream, and not for the right to use the waters naturally flowing therein, or brought into the same by the respondent, show conclusively that the claim and holding of the appellant was not adverse as to any right asserted in this action. For the same reasons, the claim that the respondent was barred by the statute of limitations cannot be maintained. Certain rulings of the court upon the evidence are questioned by the appellant, but no material error was committed in any of these rulings. Judgment and order affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

(80 Cal. 19)

WEST v. CRAWFORD *et al.* (No. 12,894.)

(*Supreme Court of California.* July 20, 1889.)

CONTRACTS—CORPORATIONS.

1. *Held*, affirming judgment of the court below, that an agreement to form a corporation and to pay 20 per cent. of the par value of the shares subscribed, in five days after the articles of incorporation were filed, to a person designated as agent, is valid, and the amount due thereunder is exigible.

2. That the mere signing of the agreement did not make the defendant a member of the corporation, but that the exigibility of the 20 per cent. sued for depends on defendant's express promise to pay.

3. That it is immaterial that the agreement sued upon does not state where the principal place of the corporation should be.

(*Syllabus by the Court.*)

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by F. M. West against B. C. Crawford and D. S. Rosenbaum, for 20 per cent. of the amount subscribed by them in an agreement signed by them for the formation of a certain corporation. Judgment was entered for plaintiff. From an order denying a new trial, defendants appeal.

W. L. Dudley, E. S. Pillsbury, (*Gordon Blanding*, of counsel,) for appellants. *J. C. Campbell, S. D. Woods, Joseph H. Budd, E. W. McKinstry*, (*Edward I. Jones*, of counsel,) for respondent.

WORKS, J. Action on the following contract: "We, the undersigned, hereby agree with each other, and the one with the other, that a corporation shall be formed by us, under the name of 'San Joaquin Land & Water

Company,' for the purpose of procuring water-rights on one or more of the rivers or streams running through the counties of Calaveras, Tuolumne, Stanislaus, and San Joaquin, in this state; purchase, erect, and construct dams, reservoirs, canals, aqueducts, and other water-ways in and by which the water so procured from said rivers, or any of the same, can be utilized for general purposes; to secure and impound springs, streams, and other water in any of said counties, and lead the water so secured to any of such canals or water-ways; to supply farmers, miners, cities, towns, and villages with any of the said waters for mining, farming, drinking, irrigation, and other purposes; to negotiate for, buy, sell, let, improve, and cultivate lands and town lots in said state; lay out town lots and colony tracts, and sell and let such town lots and colony tracts; that the capital stock of said corporation shall be $1,000,000, divided into 10,000 shares of $100 per share; and we hereby agree with each other, and one with the other, that we will take the number of shares of the capital stock of said corporation which appears opposite our respective names hereunto subscribed, and will pay 20 per cent. of the par value of the said shares so subscribed by us respectively, in five (5) days after the articles of said incorporation shall have been filed in the office of the county clerk of said county of San Joaquin, and will pay the same to F. M. West at the Stockton Savings & Loan Society Bank, at Stockton, Cal.; we hereby constitute said F. M. West as the agent to collect the amount which becomes due as aforesaid. We further nominate, constitute, and appoint L. U. Shippee, J. L. Beecher, and George Gray as our agents, and the agents of the corporation so to be formed, to negotiate for the purchase of any one or more water-rights, canals, reservoirs, aqueducts, or water-ways for said corporation, and draw from said West any or all moneys that may have been paid to him by us respectively, by virtue hereof, and use said money for paying the same; and any and all contracts which our said agents may make in said matter shall be binding upon said corporation, and also upon us. Our said agents are further authorized to employ engineers and other assistants, and have them survey routes for such canals and examine proper locations for dams, and do such other service as may be, in their opinion, for our best interest, and the interest of said corporation, to accomplish the object or purpose for which the same is to be formed. Dated November 19, 1887."

The complaint alleges the execution of the contract by various persons, including the appellants, and the facts showing that the company named in the agreement was incorporated and organized in all things as agreed upon therein; that at a meeting of the board of directors of the corporation it was ordered by the board that 20 per cent. of the subscribed stock be called in, in accordance with the agreement signed by the stockholders, and "that F. M. West be notified to notify the parties and collect the same;" that the plaintiff demanded of the defendants 20 per cent. of the amount subscribed by them, amounting to $2,000, which they refused and neglected to pay. There was a general demurrer to the complaint, which was overruled, and the defendants answered, admitting that they signed the instrument sued on, but denying that they "thereby, or at all, entered into an agreement with any of the persons whose names are attached to said agreement, or with any persons whomsoever, and allege that the signing and agreement by them was wholly without any consideration or benefit to these defendants from the plaintiff, or any other persons whomsoever," and denying all of the other material allegations of the complaint. They also answered, specially, that they did not participate in the organization of the company, and that they and others who signed the agreement repudiated the same, and notified the corporation that they would not pay the same, and that certain parties named, including the plaintiff, had procured the signing and filing of articles of incorporation of the company, for the purpose of defrauding the defendants, and without their knowledge or consent, and that certain persons, who were named as agents of the company, to negotiate for the purchase of water-rights, and draw on the plaintiff for the money to pay for the same, had since repudiated the contract and refused to act as such agents, and that they had so refused to act because of certain false representations by one Shippee, made before the agreement was signed, that certain water-rights could be purchased, and their value, upon which representation the parties relied, and were thereby induced to subscribe to said agreement; and that said water-rights were of little or no value, and said false representations were made for the fraudulent purpose of procuring said subscriptions; that said Shippee was interested in the sale of said water-rights, which was unknown to said subscribers at the time; and that upon hearing said facts they had repudiated the contract, and so notified the corporation.

The court found that the defendants "made and entered into a certain mutual agreement in writing with other persons, whose names are subscribed to the agreement in the finding set forth," being the one set out above; the incorporation of the company in conformity with the agreement; election of directors by the stockholders, and their organization by the election of officers; the making of the order calling in 20 per cent. of the stock; the payment of the same by a large number of the subscribers; the demand upon and refusal to pay by the defendants, and the delivery by defendants and a number of the other subscribers to the secretary of the corporation of the following notice: "Please take notice that we, and each of us, hereby withdraw, revoke, retract, rescind, and repudiate a certain paper or instrument in writing, dated November 19, 1887, signed by us and purporting to be an agreement for the formation of a corporation under the name of 'San Joaquin Land & Water Company,' and for the payment of certain money to F. M. West; the appointment of L. U. Shippee, J. L. Beecher, and George Gray as agents of said corporation and other purposes; and each and every part of said instrument. Stockton, Cal., February 24, 1888." That the subscribers had no notice of said revocation until after a large amount of their subscriptions had been paid, and that they did not accept said notice or agree to the terms of the same in any manner; and found against the defendants as to their allegations of fraud and their repudiation of the contract on that ground; and found in terms that "neither said defendants nor their associates, nor any of them, were induced to sign the said agreement by any false or fraudulent representations made by said Shippee, as set forth in the answer, or otherwise," but that they signed the agreement "for the purposes mentioned therein, and with the intent of carrying out the objects of said agreement, as mentioned, and for no other purpose."

Judgment was rendered in favor of the plaintiff for $2,000 and interest, a motion for a new trial was denied, and the defendants appeal.

Counsel for appellants have favored us with a long and able brief on the question of corporate powers and duties, involving grave questions of constitutional and statutory construction. But as this action does not in any way present any such questions, this discussion has tended to confuse the real question at issue and hinder rather than aid us in arriving at a conclusion. The action is not brought by a corporation, nor is this an attempt to enforce an assessment made by a corporation. The contract sued on is twofold; it amounts to a subscription to the stock of a corporation to be thereafter organized, and in addition it is an express promise to pay to the plaintiff in this action 20 per cent. of the amount of such subscription. The simple question, then, is whether or not this promise to pay the plaintiff can be enforced. The subsequent incorporation of the company named in the contract was a matter of no consequence, except that it fixed the time when the money should become due and payable, the agreement being to pay five days after the articles of incorporation should be filed. The subsequent action of the board of directors, ordering the collection of 20 per cent. of the money subscribed, was wholly unimportant. If this action is maintainable at all, it is not by reason of any such action on the part of the corporation, but by virtue of the mutual promise of these parties to pay to the plaintiff the amount of money named. Counsel insist that the corporation, when organized, had no power to levy an assessment exceeding 10 per cent. at any one time, and that to require the payment of a greater sum of the original subscribers to the stock would have been a discrimination against such stockholders, and therefore invalid, as against public policy. This may be conceded, but it does not meet the case. Here is a positive agreement on the part of the parties who subscribed to this stock to pay a fixed and certain sum of money, at a certain time, to a certain party. It is clear from the contract itself that it was not the intention that the liability to pay the sum of money named should in any way depend upon an assessment being made by the corporation after its organization. This is quite clear from the fact that the payment is fixed so soon after the organization of the company that such an assessment and its enforcement would have been impossible. Therefore the parties must be understood to have bound themselves to pay the sum of money agreed upon, without any reference whatever to an assessment being made by the company.

Again, it is urged that Mr. West after the collection of the money might appropriate the same to his own use, and the defendants not get the benefit of the payment made by them as a payment upon the stock subscribed for. But this, again, it seems to us, is beside the question. If they saw proper to contract to pay the money to West it was at their own risk. If the money should not be applied as they evidently expected, it would not, in our judgment, in any way affect their liability to pay according to their contract. So the question as to whether these parties, or any of them, subsequently acted with the corporation is a matter entirely immaterial in this case, and the same may be said with reference to the question whether the parties named as trustees to receive from West the money paid in, and use the same for certain purposes, acted or refused to act in that capacity. They were not the trustees to collect the money from the contractors, but to receive it from West after it was paid in, and apply it as agreed upon. Therefore, whether they subsequently received, or were willing to receive, the money and act as trustees, was wholly immaterial. It is true, as contended by counsel for the appellants, that the mere signing of this agreement to subscribe to the stock of the corporation did not make the defendants members of such corporation. To do so, the statute must have been complied with by the signing of the articles of incorporation, or otherwise complying with its provisions. Railroad Co. v. Tibbits, 18 Barb. 297; Railroad Co. v. Owen, 32 Barb. 616; Dorris v. Sweeney, 64 Barb. 639. But it seems to us that the question whether they thereby became members of the corporation or not is immaterial to this controversy. The right to recover here, as we have said, depends wholly upon their express promise to pay the money to the plaintiff in this action, and if the suit cannot be maintained on that ground it is quite clear to us that the judgment of the court below is erroneous.

It is further contended by the appellants that this action cannot be maintained for the reason that the contract itself is illegal and against public policy; and authorities are cited to show that a contract made in violation of the statute, or otherwise against public policy, cannot be enforced. But we are unable to see anything in this contract that contravenes any statute, or that can be said to be in any way against public policy. The further point is made that the contract itself does not provide or set out all of the acts necessary to be done in order to incorporate the proposed company, and particularly that it does not appear from the contract sued upon where the principal place of business of the corporation should be; but this, again, it seems to us, is immaterial. The contract simply makes it necessary, in general terms, that the company shall be incorporated, because the money does not become due until such incoporation takes place; but the findings show that the articles of incorporation contain all that the statute requires, and that the company was, in fact, legally incorporated. This, it seems to us, is all that it was necessary to show on this branch of the case; and it was not necessary that these facts should be set out in the contract agreeing to pay the money to the plaintiff. The point made by the appellants that the complaint is insufficient, and the cause of action not made out by the evidence, because of the fact that the parties named as agents to purchase water-rights and expend the money agreed to be paid therefor are not made parties plaintiff, cannot be maintained, for the simple reason that these agents had nothing to do with the collection of the money from the subscribers to the agreement, nor was there any obligation to pay to them. They were made agents for the purpose of purchasing water-rights and expending the money after the same had been paid to or collected by West. Therefore they were not interested in the action now being prosecuted, and would not have been proper parties. The same may be said with reference to other objections made by the appellants based upon the fact that these trustees failed to act as such. We regard all of these matters as being entirely immaterial to the question before us. So the objection made that the court erred in refusing to permit the defendants to prove the failure of these trustees to act is also unfounded. It is contended that the company was not incorporated as provided by the statutes of 1872, relating to the incorporation of water companies, (St. 1871-72, p. 733,) but it was organized as provided by the Civil Code, which applies to all corporations, and this was sufficient. The contention that the incorporation was illegal because the purposes of its incorporation, as named in the articles, were too numerous and "not susceptible of union," is equally groundless.

It is insisted that the agreement sued upon was not binding until all of the capital stock had been subscribed for, but we see nothing in the agreement indicating such an intention on the part of the signers, nor does any reason occur to us for so holding. There are authorities to the effect that a party agreeing to subscribe to a certain number of shares of a corporation to be organized cannot be held liable to pay assessments on his subscription until the whole of the stock is taken. Steam-Boat Co. v. Sewall, 78 Me. 167, 3 Atl. Rep. 181; Railroad Co. v. Veazie, 39 Me. 571; Cotton Mills v. Abbott, 9 Cush. 423; Railroad Co. v. Gould, 2 Gray, 277; Hughes v. Manufacturing Co., 34 Md. 316. But the contract under consideration bears evidence of a different intention on the part of its signers. They contract to pay a sum of money to a third party, and not to the corporation. We must presume that they contracted with knowledge of the fact that a valid incorporation of the company mentioned might take place under our Code without the whole of the stock being subscribed. Therefore, it cannot be presumed that their promise to pay was on condition that the whole of the stock should be taken. If this was their intention, it should have been expressed in the agreement. The parties mutually agreed with each other—that is, with those who signed the contract—to pay a certain sum of money to the plaintiff. He was thereby made a trustee of an express trust, and authorized to collect the money agreed to be paid. Code Civil Proc. § 369; Winters v. Rush, 34 Cal. 136; Considerant v. Brisbane, 22 N. Y. 389. The parties by their mutual agreement made the plaintiff their trustee, to collect and receive the money to be paid. He was not in any sense the trustee of the corporation. There is nothing to indicate that the money was ever to go to the corporation. On the contrary, the contract shows on its face that it was not. When collected by the plaintiff it was to go into the hands of the other trustees, to be used by them in the purchase of water-rights. How these water-rights were to be transferred to the corporation, if at all, is not stated, but this omission cannot affect the liability of the parties to pay their debt. Their mutual promise, one to the other, was a sufficient consideration for the promise of each, and the contract was valid and binding. Turnpike Road Co. v. Lancaster, 79 Ky. 552; College v. Hendley, 49 Cal. 347; George v. Harris, 4 N. H. 533; Academy v. Cowls, 6 Pick. 427; Funk v. Hough, 29 Ill. 145. The appellants offered to prove by the witness Shippee that he was the owner of certain water-rights mentioned in the agreement sued on, and interested therein, but the evidence was excluded. This is complained of as having been "peculiarly erroneous." We see no error in this ruling. There was no mention in the agreement of any particular water-right that should be purchased. This was left entirely to the trustees to determine. There was nothing in the agreement binding its signers to buy any water-right belonging to Mr. Shippee, or any one else. Therefore, the evidence was not only immaterial, but the question objected to should not have been allowed, for the reason that it assumed a fact that did not exist, viz., that certain water-rights were "mentioned in the exhibit and specified as rights to be purchased." Certain minutes purporting to be the minutes of the stockholders of the company were admitted in evidence on behalf of the plaintiff, and this is alleged as error. Counsel have pointed out many reasons why the court erred in admitting these minutes, the principal of which are that the proper notices of the meetings were not given, and the meetings were not held at the office of the company. We think these minutes were improperly admitted, not on the ground stated, but for the reason that they were wholly immaterial. Their admission, however, is no ground for reversing the case, for the reason that no injury could have resulted to the appellants on account of this evidence. As we have said before, the action of the corporation with regard to these matters was entirely immaterial. The incorporation of the company was proved by other evidence, showing a compliance with the provisions of the Code, and this was all that was necessary.

Finally the appellants make the point that the agreement sued upon was against public policy and void, for the reason that it attempted and purported to create an express trust in relation to real property. But this contention has no foundation, for the simple reason that there was nothing in the contract creating any such trust, or in any way relating to real estate, so far as the question here presented is concerned. When the time comes for the investment of the money some such question may arise, but it is not presented here. After favoring us with 116 pages of brief, counsel close the same by saying: "Many grave errors in regard to rulings on evidence, to the form and substance of the findings, and to the overruling of appellants' motion for a nonsuit, appear in the transcript. The points of error are so numerous that it would unduly extend this brief to repeat them in detail. They are believed to be sound, and are confidently relied upon by appellants, and this honorable court is respectfully referred to the grounds of appellants' motion for nonsuit, elaborately stated at pages 95 to 100 of the transcript, and to the specification of errors at pages 109 to 162 thereof." We do not feel it our duty, after the full investigation we have given to the points raised and discussed in the case, to search the record for errors, however grave they may appear to counsel, where not specifically pointed out to us. Judgment and order affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

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80 Cal. 8

JENNINGS *v.* LE BRETON *et al.* (No. 11,918.)

(*Supreme Court of California.* July 22, 1889.)

HIGHWAYS—ASSESSMENTS—EXECUTORS.

1. Act Cal. April 1, 1872, § 12, authorizing any person aggrieved by the act of the superintendent of highways in accepting street improvements, or in relation to any assessment therefor, to appeal to the board of supervisors, gives the only remedy to any person so aggrieved, and, after the acceptance of any such work, a land-owner cannot defend an action for an assessment on the ground that the work was not completed.

2. Section 9 of said act provides that the assessment shall not be made out until the work is completed to the satisfaction of the superintendent. Sections 21 and 24 provide that the deputy superintendent may perform the duties of the superintendent, except as to the acceptance of work done, and make it the duty of the city surveyor to survey and measure all work, and provide that his official certificates shall be *prima facie* evidence of their truth. Plaintiff introduced the certificate of the surveyor that he had examined the work, and found it to be in compliance with the contract, and an entry in a book in the superintendent's office, signed by the deputy, which stated that the work had been completed and accepted. There was no other documentary evidence to show whether the superintendent had accepted the work. The superintendent of the work testified that he did not remember personally examining the work, but he did not state whether he had approved it, or, if so, upon what evidence. *Held* that, as the superintendent was not required to personally examine the work before accepting it, but might approve it on the reports of subordinates, the evidence warranted the finding that the superintendent had accepted the work.

3. An assessment of the expense of an improvement, apportioned according to the frontage of property on the street improved, is constitutional; that question being *stare decisis.*

4. Where an executor files his resignation and final account, and the court appoints an administratrix *de bonis non,* in the absence from the record of the court minutes, an acceptance of the resignation and a revocation of the letters testamentary will be inferred, and it will be presumed that the executor complied with Code Civil Proc. § 1427, requiring an executor to deliver up all the assets in his hands as a condition precedent to his right to resign.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

W. C. Belcher, for appellants. *J. C. Bates* and *J. M. Wood*, for respondent.

VANCLIEF, C. The action is to recover an assessment amounting to $1,898, for grading Bay street, between Larkin street and Van Ness avenue, in the city of San Francisco, levied upon lot numbered 5 on the diagram of the assessment, having a frontage of 137½ feet on that part of Bay street alleged to have been graded. Judgment was given for plaintiff, and the defendants appeal from the judgment, and from an order denying their motion for a new trial. The grading was ordered in pursuance of an act of the legislature to authorize the board of supervisors of San Francisco "to order Bay street graded, and to change its grade," passed April 1, 1878, and was done between July 18, 1878, and July 23, 1879. This act authorized the board to order the grading of the whole or any part of Bay street from the east line of Larkin street to the east line of the Presidio reservation, "without receiving any petition from any person therefor." It also changed the originally authorized grade of said street in several places. The assessment and all proceedings leading to it were had under the general street improvement law, as modified by the act of April 1, 1878, supra. This is the second appeal of this case. The former appeal was under the title of Jennings v. Le Roy, (63 Cal. 397.)

1. The appellants contend, in the first place, that the assessment is invalid because the work required by the contract was never completed. The contract for grading had in it this clause: "The road-way, when completed, to have a proper crown to the center from the bottom of the gutter-ways." The grading was wholly in sand dunes, where the sand was much drifted and moved about by the force of the wind. It was proved that when the contractor quit the work of grading, the road-way had a plain surface, without crown or gutter-ways, and that immediately afterwards the drifting sand began to be deposited on the road-way; and the evidence tended to prove that on account of the natural softness of the sand the road-way was never passable for heavily loaded wagons; and also that the excavation made by the grading had become nearly filled by the drifting sands, at the time of the trial of this case in November, 1885. For these reasons it is contended that the work was not completed. Section 7 of the act of April 1, 1872, (St. 1871-72, p. 809,) in force at the time this work was done, provides that the work "must in all cases be done under the direction and to the satisfaction of the superintendent of public streets, highways, and squares;" and the contract under which the work was done in this case was drawn and executed accordingly; and the trial court found as facts that the work was done according to the contract, "under the direction and to the satisfaction of said superintendent, and that said work was duly approved and accepted by said superintendent." No fraud in the assessment or in any of the proceedings prior thereto is charged in the answer; and it is not disputed that the plaintiff made a *prima facie* case in the usual way, by introducing in evidence the assessment, diagram, warrant, etc., with the proper indorsements. Section 12 of the act of 1872 provides that "all persons, whether named in the assessment or not, feeling aggrieved by any of the acts or determinations of the said superintendent of public streets, highways, and squares, in relation to the acceptance of work or to the assessment, or to any act, proceeding, matter, or thing done, suffered, or committed by him, shall within fifteen days after the issuance of said assessment, as provided, appeal to said board of supervisors, as provided in this section." On such appeal the board is authorized to correct, alter, or modify the assessment, and may annul the same; "and may make any order or decision in relation to any contract or the performance thereof, or in relation to any of the acts of the contractor, or the said superintendent, etc., prior to the date of the hearing of said appeal." It seems to be well settled that the defendants had no other remedy for the alleged failure of the contractor to complete the work, or for misconduct of the superintendent of streets in approving or accepting the work before it was completed, than by appeal to the board of supervisors, as provided in section 12 of the act of 1872, from which the above extracts are taken; and that by failing so to appeal they waived the objections here made. Emery v. Bradford, 29 Cal. 75; Nolan v. Reese, 32 Cal. 485; Chambers v. Satterlee, 40 Cal. 498; Himmelmann v. Hoadley, 44 Cal. 278; Dorland v. McGlynn, 47 Cal. 47; Dyer v. Parrott, 60 Cal. 551; Boyle v. Hitchcock, 66 Cal. 129, 4 Pac. Rep. 1143.

2. The second objection to the validity of the assessment is that as a matter of fact the superintendent of streets did not accept or approve the work, and that the finding that he did so is not warranted by the evidence. The law does not prescribe any particular mode or form in which the superintendent shall manifest his approval or acceptance of work done under a street contract, nor does it require the approval to be expressed in writing. As the assessment and the warrant thereto attached are not to be made or given until "after the contractor of any street work has fulfilled his contract to the satisfaction of the superintendent, or board of supervisors, on appeal," (section 9,) the assessment and warrant, in due form, are certainly *prima facie* evidence that the work was completed to the satisfaction of the superintendent, and that he approved and accepted the same, if they do not imply as much. Moreover, the statute so provides, and appellants' counsel so admits. In addition to this the plaintiff introduced, from the office of the superintendent, the official certificate of the city and county surveyor, dated on the day the work is alleged to have been accepted, to the effect that he had examined the work of grading in question, and found it to be of official grade and width; and also introduced an entry in a volume of superintendent of streets' reports kept in the superintendent's office, a certificate of S. N. Roberts, deputy superintendent of streets, to the effect that the work had been performed and completed in accordance with the terms of the contract. But there was no other evidence on the part of plaintiff tending to prove that the work had been done to the satisfaction of the superintendent, or that he personally approved and accepted the same, than that he personally made and signed the assessment, diagram, and warrant, in due form, and that the warrant was countersigned by the auditor of the city and county. And it was admitted that the records of the street department contain no other evidence relevant to the matter of approval or acceptance of the work. Upon this issue the defendants called L. M. Manzer, who was superintendent of streets during the time the work was being done, and made the assessment in question, and who testified in answer to questions by defendants' counsel as follows: "*Question.* Did you in 1879 yourself personally inspect the work done under the Jennings-Dyer contract for the grading of Bay street, between Larkin and Van Ness,

whether by Jennings or Buckman? *Answer.* I did not; that is, I do not remember that I did. It is not usual for me to do so. *Q.* If you had, you would have remembered it? *A.* I think so." No other question was asked him. He was not asked, and did not state, upon what evidence he became satisfied that the work had been completed according to the contract; nor whether he had personally approved and accepted the work; nor in what way he had expressed or manifested his satisfaction, approval, or acceptance; yet it appears that personally he did not examine or see the work, and therefore must have acted upon the representation of others; probably, solely upon the certificates and reports of the city surveyor and the deputy superintendent. The statute (section 24,) makes the official certificate of the city surveyor "*prima facie* evidence in all courts in this state of the truth of its contents." And section 21 provides that deputy superintendents may perform all or any of the duties of the superintendent, "except the acceptance or approval of work done." Under this authority it would seem that the deputy may superintend the work, measure it, and report all material facts relating to it to the superintendent, though he may not accept or approve the work as completed. There is no express requirement that the superintendent shall personally examine, measure, or estimate the work before approving or accepting it; nor do we think such requirement is necessarily implied in the express provision that the work "must, in all cases, be done under the direction and to the satisfaction of the superintendent." The statute (section 24) provides that "the city and county surveyor shall be the proper officer * * * to survey, measure, and estimate the work done under contracts for grading streets." For what purpose is he required to survey, measure, and estimate the work done under grading contracts, and officially to certify to the result, if not to furnish to the superintendent evidence to be considered in judging whether or not the work has been done to his satisfaction? Must the superintendent, in the absence of any express requirement, personally repeat the surveys and measurements made and reported to him by his deputies, and by the city surveyor, before he can approve or accept the work? We think not, even though it may be, and doubtless is, his duty, as far as practicable, to give his personal attention to all work being done under contract, and to such extent, if possible, as to prevent fraudulent collusion between contractors and his subordinate officers and assistants. And since the law does not require the superintendent to file, or record, or even to express, in writing, his satisfaction with, or his approval of, the work, we think the admittedly *prima facie* proof that the work was completed to his satisfaction, and that he personally approved and accepted it, was not overcome by the evidence on the part of the defendants; and, therefore, that the finding of the trial court to that effect was justified by the evidence. This conclusion renders it unnecessary to decide whether or not a failure of the superintendent to accept and approve the work personally may be remedied by appeal to the board of supervisors.

3. The third objection to the assessment is that it was not levied in proportion to benefits, and was therefore beyond the constitutional power of the state and municipal governments. Upon this point the learned counsel for the appellants has submitted an able argument, evincing thorough research and critical examination of all the leading cases and text-writers upon this much-debated question, but it comes to this court too late. On the former appeal of this case the act of April 1, 1878, (St. 1877-78, p. 931,) alone was objected to on constitutional grounds, and all such objections were overruled. 63 Cal. 397. But, as that act made no apportionment of the assessment at all, the question here made did not arise on that appeal. The objection here made is that the mode of apportionment, viz., in proportion to frontage on the improvement, as authorized by the general street improvement law of 1871-72, (page 804,) and for many years before, is unequal, and not in proportion to benefits, and therefore unconstitutional. Twenty-four years ago these questions were deliberately considered by this court, and decided against the views of the learned counsel for appellants in Emery v. Gas Co., 28 Cal. 346, in which it was decided that the legislature may delegate to municipal corporations authority to assess real property to pay the expenses of local improvements, and to apportion the assessment in proportion to the frontage of the land assessed on the improvements; and that this is a constitutional mode of the exercise, by the legislature, of the sovereign right of taxation, which does not in any degree depend upon the right of eminent domain, nor involve the taking of private property for public use, in the sense of the constitutional prohibition. We are not aware that any of these propositions has been overruled or qualified, but understand that they have been repeatedly affirmed. Emery v. Bradford, 29 Cal. 75; Taylor v. Palmer, 31 Cal. 250; Chambers v. Satterlee, 40 Cal. 497; People v. Lynch, 51 Cal. 19; Whiting v. Townsend, 57 Cal. 515; Whiting v. Quackenbush, 54 Cal. 306; Lent v. Tillson, 72 Cal. 426, 14 Pac. Rep. 71. We are therefore not at liberty to accede to the earnest and respectful request of the learned counsel for appellants to open and reconsider these questions.

4. The last point made by counsel for appellants is that the finding that plaintiff was administratrix of the estate of Jennings is not justified by the evidence. Jennings died testate, and letters testamentary were duly issued to A. E. Buckman in February, 1879. On June 14, 1880, Buckman filed in the probate court his resignation, and on the same day filed in said court his final account. On June 18, 1880, plaintiff filed a petition for her appointment as administratrix. On the 29th of June, 1880, the court ordered her ap-

pointment, and letters of administration, with the will annexed, were issued to her on August 6, 1880. It appears that in connection with Buckman's final account plaintiff introduced as evidence the minutes of the court of June 25, 1880, in the matter of the Jennings estate, relating to and settling that final account. This order is not set out in the transcript, but appellants' counsel does not contend that it was not regular; and in support of the action of the court in appointing the plaintiff four days thereafter it must be presumed to have been a regular order settling the final accounts of Buckman, which implies that Buckman did all things necessary to be done on his part to complete the settlement; and, among them, that he delivered up all the estate in his hands to the custody of the court, or to a person appointed by the court to receive it, as required by section 1427 of the Code of Civil Procedure, if such delivery was necessary to complete his settlement. But, whether the settlement implies that he delivered up the estate or not, it must be presumed that he did so, if that was necessary to the support of the subsequent action of the court, since there is no evidence to the contrary. Luco v. Bank, 70 Cal. 340, 11 Pac. Rep. 650; Estate of Allen, ante, 426. The precise point, however, insisted upon by appellants' counsel is that there was no record evidence that Buckman's resignation had been accepted, or that his letters had been revoked on the 29th day of June, when the plaintiff was appointed; but we think the action of the court shown by the record, as above stated, was equivalent to, and substantially amounted to, an acceptance of Buckman's resignation, and a revocation of his letters testamentary.

The facts of this case are essentially different from those in the case of Haynes v. Meeks, 20 Cal. 288, cited by counsel for appellants. In that case it was proved by the records of the probate court that Smith,—the first administrator,—after having acted about three years, during which time he had sold real property by order of the court, filed his resignation on December 31, 1853. Thereupon the court ordered him to turn over the papers and effects of the estate to the public administrator, and to make with him a full settlement before the next term of court, and declaring that when he did so he and his sureties should be released. At the next term (January, 1854) he presented his report, showing a balance of funds in his hands more than sufficient to pay all the debts of the estate; but the court only approved a part of this report, and then ordered him to pay all the outstanding debts, and to make a final settlement at the next term of court, and at the same time revoked the former order of December 31, 1853, by which he had been directed to turn over the estate to the public administrator. About four months after these orders, (in May, 1855,) one Aspinwall applied to be appointed administrator of that part of the estate then unadministered, and in June following was appointed. Under these circumstances it was held that the appointment of Aspinwall was void. FIELD, C. J., said: "A resignation is not a matter absolutely in the power of an administrator, to be made at any time he may choose. The statute only confers upon him a conditional right to resign. Its language is that he may resign, 'provided he shall first settle his accounts, and deliver up all the estate to such person as may be appointed by the court.' Smith never complied with this condition, and it nowhere appears that the court ever dispensed with it. The court did * * * order him to turn over the estate to the public administrator; * * * but in the following month it vacated the order, and directed him to apply the moneys in his hands to the payment of the outstanding claims. And the subsequent proceedings show a recognition by the court of his continued existence as administrator of the estate. * * * So, too, the allegation by Aspinwall, in the petition for his appointment, that the 'administration of Smith had fully ceased and determined,' is without force against the record evidence to the contrary." In the case at bar it sufficiently appears by the record, as we have seen, that Buckman did comply with the condition precedent to his right to resign, by delivering up all the estate in his hands. Nor is there any record evidence, or any kind of evidence, that he ever acted as executor, or that the court ever recognized him as such after his final settlement on the 25th day of June. There is nothing whatever tending to dispute the *prima facie* presumption that all the conditions necessary to authorize the court to appoint the plaintiff on the 29th day of June then existed. We think the judgment and order should be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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80 Cal. 34

PEOPLE *v.* DUNNE. (No. 20,545.)

(*Supreme Court of California.* July 24, 1889.)

MURDER—EVIDENCE—MISCONDUCT OF JUROR.

1. Where, on a trial for murder, defendant testifies that he did not shoot deceased until he was shot at, but other witnesses testify that defendant shot first, and the testimony shows that all defendant had to apprehend was a trespass on his property, a verdict of guilty of murder in the second degree will not be disturbed.

2. Where the testimony of physicians was conflicting as to whether deceased died from blood poisoning caused by the wound, the verdict will not be set aside.

3. The fact that a juror was engaged in an earnest conversation with the prosecuting witness, while inexcusable, is not sufficient to raise a presumption that the juror was improperly influenced thereby.

4. After a physician had testified that deceased died from blood poisoning, resulting from the wounds received, a question on cross-examination, as to whether blood poisoning would ensue where a wounded person drank excessively of intoxicat-

ing liquors, was properly excluded, when there was no evidence of such conduct on the part of deceased, nor any offer to prove such conduct.

In bank. Appeal from superior court, Siskiyou county; EDWIN SHEARER, Judge.

James F. Farraher, for appellant. *G. A. Johnson*, Atty. Gen., and *J. S. Beard*, Dist. Atty., for the People.

SHARPSTEIN, J. Appellant was accused, by information of the district attorney of Siskiyou county, of the crime of murder, committed by shooting and mortally wounding one John Pearson. Appellant was found guilty of murder in the second degree. Counsel for appellant in his brief says he admits the shooting, "but maintains (1) that in inflicting these wounds he acted in self-defense; (2) that Pearson did not die from the effects of the wounds thus inflicted."

The verdict of the jury is against appellant on both of these propositions, and we cannot disturb it, so long as there is sufficient evidence to justify it. Aside from the testimony of defendant in his own behalf, we are unable to find any evidence upon which to base a defense of justifiable or excusable homicide. He says that he did not shoot at deceased until after deceased had shot at him. The other eye-witnesses state that he shot first. That, taken in connection with the evidence, which shows that defendant had no reason to apprehend any other or greater wrong than a trespass on his premises, would justify the jury in finding that the shooting by appellant was not done in self-defense. At the time of the shooting deceased was not committing any trespass, but was on a public highway, where he had an undoubted right to be. We think the evidence upon which appellant relies to support his first point tends rather to prove a motive than a defense for the shooting.

Upon the point that Pearson did not die of the wounds inflicted upon him by the shooting, we think the evidence sufficient to support the finding that he did. Dr. Robertson, a witness called by the prosecution, testified that he treated the deceased for a gunshot wound in the arm and hand, on the 20th day of October, 1887, and that he did not see him again until the 30th of the same month, at which latter time he found him in the acute stage of blood poisoning; that he grew gradually worse, and died three or four days afterwards. Witness performed an autopsy on the body, and states the condition and appearance of the lungs, heart, and liver, and continues by stating that in his opinion the cause of death was from the effects of acute blood poisoning, the immediate cause of death being extreme congestion of the lungs, and an insufficient aeration of the blood; and concludes as follows: "It is my opinion that these were caused by blood poisoning resulting from the wounds he received in his arm and hand." Conceding, which we do not, that other medical testimony tended, in some degree, to contradict that of Dr. Robertson, we could not on that ground disturb the verdict of the jury. We think the circumstance of one of the jurors, at some time during the trial, engaging "in a close and earnest conversation with the prosecuting witness" is not of itself sufficient to raise a presumption that the juror was thereby improperly influenced. At the same time we avail ourselves of this occasion to express our disapprobation of such conduct. It is inexcusable. After the witness Robertson had testified as above stated, defendant's counsel, on cross-examination, propounded the following question to him: "Suppose that a party had a wound inflicted upon him, and after that wound had been inflicted the party drank excessively of intoxicating liquors, would that have any effect, or would that probably produce blood poisoning?" To which the district attorney objected, on the ground that it was not cross-examination, and was immaterial and irrelevant, because it was an hypothetical question, not based upon the evidence in the case. The court sustained the objection, and defendant excepted. We think that in the absence of any evidence that deceased, after receiving the wounds inflicted on him, drank any intoxicating liquor, or any statement of the counsel who propounded the question that he expected to prove that deceased did drink intoxicating liquor after he was wounded, the ruling of the court was not erroneous. We think, however, that the district attorney might safely, and without any nelgect of duty, have withheld his objection. It is seldom, if ever, that an answer to an irrelevant question can prejudice a prosecution. Jurors are not so easily imposed upon or confused by irrelevant evidence as many prosecutors seem to suppose.

Witness Doggett was asked by defendant's counsel if he had ever seen the defendant working on his claim before that year. The question was objected to by the district attorney, and the objection sustained by the court, and defendant excepted. The witness then stated that defendant "had a wheel-pump there, and had started to sink down," and that "there were cribs out there that he had his wheel on." Defendant's counsel then asked the witness: "How much do you consider the evidence that you saw of mining and expenditure, in the way of labor there, would be worth?" Objected to as incompetent and irrelevant. Objection sustained, and exception. We think the ruling correct. The case, we think, was fairly submitted to the jury by the instructions of the court. We think there is no error in those given, or in refusing to give those requested and refused, for which the judgment and order denying the motion for a new trial should be reversed. Judgment and order affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; THORNTON, J.; WORKS, J.

3 Cal. Unrep. 117

Ex parte Sternes. (No. 20,480.)

(*Supreme Court of California.* July 25, 1889.)

Habeas Corpus—Evidence.

Petitioner was arrested on the charge of kidnapping, and examined, and committed by the justice. He applied to the supreme court to be released on *habeas corpus*, pending the decision of which an information was filed against him for the same offense for which he had been committed. On the hearing of the *habeas corpus* before the court in bank, (five justices present,) evidence offered to show that the commitment was ordered by the justice on no other evidence than that petitioner had arrested a person by virtue of a warrant, and that, therefore, the commitment was "without reasonable or probable cause," was excluded, (four justices concurring,) on the ground that the filing of the information was conclusive as to probable cause. The case was subsequently submitted on briefs, but when it was taken up for decision it was found that, on account of the retirement of the chief justice, "the concurrence of four justices present at the hearing," required by Const. Cal. art. 6, § 2, could not be had, and a rehearing was ordered, and the case resubmitted upon the original briefs. *Held*, that the ruling excluding the evidence was a final disposition of the question involved, and that petitioner must be remanded.

In bank. *Habeas corpus.*

Charles W. Kitts and *A. L. Hart*, for petitioner. *W. D. Long*, Dist. Atty., (*C. W. Cross*, of counsel,) for respondent.

Beatty, C. J. This is a proceeding upon *habeas corpus*. It appears from the petition upon which the order for the issuance of the writ was based that in April, 1888, the petitioner, George H. Sternes, was deputy-sheriff of Yuba county; that a warrant for the arrest of one Ah Fong, issued by the superior court of said county, was placed in his hands for service; and that he executed the writ by arresting Ah Fong in Nevada county, and bringing him before the superior court of Yuba county, at Marysville. It is further alleged in the petition that said Ah Fong thereafter procured a warrant to be issued by a justice of the peace in Nevada county, commanding the arrest of petitioner on a charge of kidnapping, and that, being arrested upon such warrant and taken before said justice of the peace, petitioner had an examination, and upon proof of said arrest of Ah Fong under said warrant issued by the superior court of Yuba county, and the delivery of the body of Ah Fong to said court in Marysville, and without other proof of the commission of any offense, said justice made an order holding the petitioner to answer upon said charge of kidnapping, and thereupon committed him to the custody of George Lord, sheriff of Nevada county. This petition was filed September 26, 1888, and on the same day the late chief justice made an order directing the issuance of the writ of *habeas corpus* as prayed, returnable before this court on the 22d day of October following, and ordered that pending the hearing the petitioner be admitted to bail. On the 22d of October the respondent, Lord, filed his return, showing that the petitioner had been in his custody, and had been confined by him in the county jail of Nevada county, under and by virtue of a commitment for kidnapping, a copy of which is annexed to the return; that after service of the writ of *habeas corpus* he had discharged the petitioner on bail; and that subsequent thereto, on October 18, 1888, an information had been filed by the district attorney of Nevada county, accusing petitioner of said crime of kidnapping. The court, sitting in bank, five justices present, including the late chief justice, thereupon proceeded with the hearing. It appears from the notes of our official reporter, and statements of members of the court, that counsel for petitioner offered in evidence certified copies of the depositions taken at the examination of petitioner by the committing magistrate, for the purpose of establishing the ground upon which he claimed that his imprisonment was unlawful, viz., that he had been "committed on a criminal charge without reasonable or probable cause." Pen. Code, § 1487, subd. 7. To the introduction of this testimony respondent's counsel objected upon the ground that the filing of the information by the district attorney put an end to all inquiry in this proceeding as to the existence of reasonable or probable cause for holding the petitioner to answer. Four of the justices present at the hearing, including the late chief justice, concurred in sustaining this objection. Justice Paterson did not concur in the ruling. But under the decision of the four other justices the testimony was excluded. None of these occurrences at the time of the hearing have been made matter of record, the minutes of the clerk merely showing that the cause was orally argued by counsel for petitioner and for respondent, and submitted upon briefs to be filed. In the printed briefs subsequently filed counsel for petitioner elaborately argue the proposition that if a person has been held to answer on a criminal charge, without reasonable or probable cause, he has an undoubted right to be discharged upon *habeas corpus*, and that his right to be so discharged cannot be impaired by the subsequent filing of an information by the district attorney, and more especially where the information is filed after the issuance and service of the writ of *habeas corpus*. Counsel for respondent in their brief completely ignore the argument made on behalf of petitioner, and rest entirely upon the claim that the whole question was decided and finally disposed of at the hearing. When, however, after the final submission of the cause, it was taken up for decision, it was found that, on account of the retirement of the late chief justice, "the concurrence of four justices present at the hearing," which is made by the constitution (article 6, § 2) essential to a judgment of this court in bank, could not be obtained, and it became necessary to set aside the previous order of submission and to direct a rehearing. This having been done, counsel have again submitted the case upon the briefs already filed.

From the foregoing statement it will appear that the condition of the cause is decidedly anomalous. It is an original proceeding in this court, and evidence is necessary in support of the allegations of the petition in order to make out the ground upon which the petitioner claims his discharge. The only evidence offered for that purpose at the hearing was by the ruling of a competent number of the sitting justices excluded from consideration. This order did not need to be in writing, like the determination of a cause, (Const. art. 6, § 2,) and seems to have been a final disposition of the question involved. At all events, the case was submitted at the time and has been resubmitted without the evidence upon which alone—conceding the correctness of the proposition so ably argued by his counsel—we could order the petitioner's discharge. For this reason, therefore, and without deciding any other question presented by the record, we feel constrained to remand the prisoner. It is so ordered.

We concur: WORKS, J.; SHARPSTEIN, J.; PATERSON, J.; FOX, J

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3 Cal. Unrep. 113

MOYLE *et al.* v. LANDERS *et al.* (No. 11,906.)

(*Supreme Court of California.* July 1, 1889.)

CORPORATIONS—SUITS BY STOCKHOLDERS.

1. A suit to procure relief for the misappropriation of the funds of a corporation is properly brought by the stockholders, without any demand on the directors to bring such suit, where the complaint alleges that the corporation is under the control of the defaulting directors, and that such demand would be useless.

2. Such a suit is not barred by the statute of limitations where the defaults are said to have occurred between August 1, 1882, and May 1, 1885, and the suit is brought July 1, 1885; Code Civil Proc. Cal. § 338, providing that suits for relief on the ground of fraud shall be brought within three years of the discovery of the fraud.

3. Where a general demurrer is filed to a complaint containing two counts, on the ground that the causes of action are barred by the statute of limitations, the demurrer must be overruled, if a good cause of action is stated in either count.

4. An averment that the plaintiffs were owners of the stock of the corporation before suit brought, and ever since 1881, sufficiently alleges ownership of the stock.

5. Such suit may be brought by any one or any number of stockholders.

6. The directors who are charged with having connived in such defaults are proper parties defendant in such action.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Messrs. Moyle and Holling, stockholders in the Andes Silver Mining Company, sued Michael Landers and others, directors of said company, to obtain relief from certain frauds perpetrated by the directors. A demurrer to the complaint was sustained, and plaintiffs appeal.

L. E. Bulkeley, for appellants. *H. C. Sieberst*, for respondents.

PER CURIAM. The complaint contains two counts. The defendants demurred to the whole complaint, and "to the second alleged cause of action set out in the plaintiffs' complaint," which we shall consider as a demurrer to the second count of the complaint.

The demurrer was sustained, and, plaintiffs declining to amend, final judgment was given and entered in favor of defendants. From this judgment plaintiffs have appealed.

The object of the action is to procure relief from certain alleged fraudulent misappropriations of the funds and property of the corporation defendant the Andes Silver Mining Company by some of its directors. The defendants contend that the complaint is defective in this: That the action should have been brought by the corporation as plaintiff, and not by the present plaintiffs, who are stockholders of the corporation. The general rule undoubtedly is that an action of this character must be brought in the name of the corporation. The recovery, if any, belongs to the corporation, and must go into its coffers. But there are exceptions to this rule. One is where a demand is made on the corporation to bring such action, and it refuses to bring it. This demand must be considered and passed on by the managing authority of the corporation, which is its board of directors. But where such a demand would be useless, as where the peccant directors still control the affairs of the corporation, such a demand would be regarded as useless, and will not be insisted on. We think the averments of the complaint show that the corporation is still under the control of the alleged defaulting directors, or their tools and servants, and that it sufficiently appears that a demand to sue would have been nugatory. In such a case the law dispenses with a demand, and allows a stockholder to bring the action to which the corporation, as is here the case, must be a party.

It is contended, further, that the causes of action set forth in the complaint are barred by the statute of limitations, and that such appears on the face of the complaint to be the case. The action is brought for relief on the ground of fraud, in which case the cause of action is not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. Such is the law of this state fixed by statutory enactment. The action, under such circumstances, is not barred if the discovery of the facts constituting the fraud has been made within three years before the commencement of the action. Code Civil Proc. § 338. Now, it seems to us that the defaults set forth in the second count of the complaint, hereinafter pointed out, were not discovered until within three years before action brought.

The defaults referred to are as follows: An overallowance of $3,850 to Michael Landers on account of expenses of trips to Virginia City, Nev.; the transaction with regard to the purchase of furniture of Burnham, for which it is averred $800 was allowed, of which sum only $346.45 was used in the purchase, and the balance was retained by Michael Landers, while the furniture bought was taken by said Landers to his private residence, and there used by him from the time of the purchase; the misappropriation of funds to pay the assessments on the stock of the directors of the Andes Silver Mining Company; the misappropriation of a portion of the proceeds of the sales of certain shares of the stock of the corporation above named. The above defaults are alleged to have occurred, the first in August and September, 1882, the second on the 1st of August, 1882, the others in December, 1882, August, 1883, and since the 1st of May, 1885. The action is averred to have been commenced on the 1st day of July, 1885. The above defaults are averred to have been committed and discovered within three years before this date, as will be seen by comparison of the dates above given.

As the demurrer which embraces the first count is a demurrer to the whole complaint, if a good cause of action not barred by the statute of limitations is stated in either count, the demurrer, on the ground above stated, must be overruled; this being in accordance with the long-settled rule that where the demurrer is to the whole complaint it is not well taken, if any count of the complaint is legally sufficient. The averment as to the ownership of the stock is sufficient. The averments are that the plaintiffs, Moyle and Holling, were owners of the stock of the Andes Company above named before the beginning of the action, and have been such owners ever since some time in the year 1881. We can see no tenable objection to the joinder of Holling with Moyle as plaintiff. Any one or any number of stockholders may unite in bringing such action. In our opinion the directors made defendants are properly made such. They are at any rate proper parties, and, indeed, it is highly proper that they should be made such, as the defaults set forth in the second count of the complaint are alleged to have occurred with their connivance. As to the other defaults set forth in the complaint, and whether or not they are barred by the statute of limitations, we think it proper to say nothing. We have said enough to warrant us in holding that the court below erred in sustaining the demurrer to the complaint, for which reason the judgment is reversed, and the cause remanded, with directions to overrule the demurrer to the complaint, and the second count thereof, to permit the defendants to answer, and for further proceedings in accordance with law. So ordered.

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80 Cal. 74

Greenwood *v.* Adams *et al.* (No. 12,742.)

(*Supreme Court of California.* July 31, 1889.)

Taxation—Pleading—Evidence.

1. A tax-sale certificate, reciting that the lands were assessed to a person named, "and all known owners or claimants, and, when unknown, to unknown owners or claimants," and a tax-deed with like recitals, are void.

2. The holder of an invalid tax-deed cannot aid it by introducing in evidence the delinquent assessment roll.

3. The holder of an invalid tax-deed cannot claim, either in law or equity, that his purchase at the tax-sale vested the state's lien in him.

4. It is no abuse of discretion to impose, as a condition of leave to file a second supplemental answer setting up title under a tax-deed obtained on the day of the trial under a sale made two years previously, the payment of $20, and, if a continuance should become necessary by reason of such answer, the payment of costs.

5. Where there is no motion for a new trial, and the appeal is not taken within 60 days after entry of judgment, the question whether the findings were justified by the evidence cannot be raised.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county.

V. A. Gregg, for appellants. *S. M. Swinnerton*, for respondent.

Belcher, C. C. Action to quiet title to certain lands in the county of San Luis Obispo. Judgment for plaintiff. Appeal by defendants.

The defendants by their original answer denied plaintiff's ownership of the lands described in the complaint, and by a supplemental answer they alleged that since the commencement of the action they had acquired title thereto in fee. At the trial it was admitted that John Q. Greenwood held title to all the lands described in the complaint under patents issued by the United States in 1870. The defendants then, in support of the issues on their part, introduced in evidence a certificate of sale for non-payment of taxes made to them by the tax collector of San Luis Obispo county, under date of March 3, 1884. The certificate recited that the lands were assessed for the fiscal year ending June 30, 1884, for state and county taxes, "to J. H. Greenwood, and all known owners or claimants, and, when unknown, to unknown owners or claimants." Defendants next offered in evidence a tax-deed, made to them in pursuance of the certificate, and dated March 27, 1885. The deed purported to convey the lands described as fully and absolutely as the tax collector could lawfully convey the same, "together with all and singular the tenements, hereditaments, and appurtenances thereto belonging or in any wise appertaining, of the said J. H. Greenwood, and all owners and claimants thereof, known and unknown." The plaintiff objected to the deed being received in evidence, on the ground that it was void and irrelevant and immaterial. The court sustained the objection, and defendants reserved an exception. We see no error in the ruling. It has been frequently held in this state that an assessment of real property to some person named, "and to all owners and claimants, known or unknown," is void, and that a certificate or deed reciting such an assessment is also void. Grotefend v. Ultz, 53 Cal. 666; Grimm v. O'Connell, 54 Cal. 522; Daly v. Ah Goon, 64 Cal. 512, 2 Pac. Rep. 401. The recital in the certificate here is in substance the same as that in the cases cited.

The defendants next asked leave to file a second supplemental answer setting up that they had acquired title to the lands in controversy under a tax-deed made to them on the day of the trial. The plaintiff objected, but the court offered to allow the answer to be filed on payment of $20, and, if a continuance was made necessary thereby, on payment of costs. The defendants excepted to the conditions proposed, and thereupon the court denied the application. An application to file a supplemental answer is addressed to the sound legal discretion of the court, (Harding v. Minear, 54 Cal. 502,) and in granting such an application the court is authorized to impose such terms as may be just and proper. The answer which defendants wished to file set up a tax-deed made in March, 1887, and based on a tax-sale made in March, 1885,—nearly two years before the action was commenced. They had ample time, therefore, if they needed the deed, to have obtained it, and set up their rights under it in their original or first supplemental answer. Under the circumstances, we see no abuse of discretion in the ruling of the court.

The defendants next offered in evidence the delinquent assessment roll of property in the county for the year 1884. The plaintiff objected to the evidence as irrelevant and immaterial, and the court sustained the objection. There was no error in this ruling, for, as said of the plaintiff in Grimm v. O'Connell, supra, (page 524,) one "must recover, if at all, on his tax-deed, supported by evidence of the regularity of the prior proceedings, if the same are attacked. He cannot recover on the tax-roll or delinquent list."

The defendants next introduced in evidence two certificates of sale and tax-deeds of portions of the land made to them for delinquent taxes of the year 1884–85; and it is urged that under these deeds they acquired title to the land described therein, and the court should have so found. We cannot consider this point, for the reason that, as there was no motion for new trial, and the appeal was not taken within 60 days after the judgment was entered, the question as to whether the findings were justified by the evidence or not cannot be raised.

Finally, the defendants offered in evidence the deed made to them during the trial, but, on objection of plaintiff, it was excluded. No copy of the deed is found in the bill of exceptions, but it is urged that this and all the other rulings complained of were erroneous, because, when defendants purchased the land at the tax-sales, the lien of the state vested in them, and could only be divested by a repayment of the purchase money, and that they were entitled to have the amount so paid out repaid before any decree could be entered against them. We fail to see any force in this point. Parties who purchase property at tax-sales acquire the title to the property if all the proceedings for the levy of the taxes and the sale are regular and in strict conformity to law, but, if not so, they acquire no rights to the property which either a court of law or equity can enforce. As the case is presented before us we cannot say that appellants had acquired any rights to the property in controversy which were disregarded by the court below, and we therefore advise that the judgment be affirmed.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

MORAN *et al.* v. FARLEY. (No. 12,696.)

(*Supreme Court of California.* July 1, 1889.)

WORKS, J. The facts and points made in this case are the same as in Moran v. Ross, No. 12,697, ante, 958, (opinion filed this day,) and for the reasons stated in the opinion in that case the judgment appealed from herein is reversed, with instructions to the court below to modify the same in accordance with said opinion.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

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79 Cal. 612

MARTIN *v.* HUDSON. (No. 12,917.)

(*Supreme Court of California.* July 2, 1889.)

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Church & Cory, for appellant. *Wharton & Short* and *D. S. Terry*, for respondent.

PER CURIAM. Rules 5 and 6 of this court provide specifically how transcripts on appeal to this court shall be arranged and printed, and in rule 6 it is said: "The chronological arrangement of the several parts of the transcript, and a strict compliance with the other requirements of this rule, will be exacted of the appellant or party filing the record here in all cases by the court, whether objection by the opposite party be made or not; and for any failure or neglect in these respects which is found to obstruct the examination of the record the appeal may be dismissed." It has become quite common for attorneys to overlook or evade these rules, and for this reason the court finds it necessary to bring the matter to their attention. The case before us presents a flagrant disregard of the rules referred to, and we might properly dismiss the appeal, but we prefer to give counsel an opportunity to correct the error, if they desire to do so. It is ordered that the submission of the case be set aside, that the transcript on file be stricken out, that the appellant be allowed 30 days within which to print and file a transcript conforming to the rules of the court, the cost of which shall be borne by him and not taxed as costs, and that upon failure to comply with this order the appeal be dismissed.

Ex parte STERNES. (No. 20,481.)

Ex parte LEE. (No. 20,482.)

(*Supreme Court of California.* July 25, 1889.)

In bank. Application for *habeas corpus.*

BEATTY, C. J. These cases are like Ex parte Sternes, (No. 20,480,) ante, 1132, and upon the authority of that case the petitioners are remanded.

We concur: WORKS, J.; SHARPSTEIN, J.; PATERSON, J.; FOX, J.

WEST *v.* HITCHCOCK. (No. 12,959.)

(*Supreme Court of California.* July 20, 1889.)

In bank. Appeal from superior court, San Joaquin county; F. T. BALDWIN, Judge.

W. L. Dudley, E. S. Pillsbury, (*Gordon Blanding,* of counsel,) for appellant. *J. C. Campbell, S. D. Woods, Joseph H. Budd, E. W. McKinstry,* (*Edward I. Jones,* of counsel,) for respondent.

WORKS, J. This cause is the same in all material respects as that of West v. Crawford, ante, 1123, (this day decided,) and has been submitted on the same briefs, and on the authority of that case the judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.; McFARLAND, J.

WEST *v.* BELDING. (No. 12,960)

(*Supreme Court of California.* July 20, 1889.)

In bank. Appeal from superior court, San Joaquin county; F. T. BALDWIN, Judge.

W. L. Dudley, E. S. Pillsbury, (*Gordon Blanding,* of counsel,) for appellant. *J. C. Campbell, S. D. Woods, Joseph H. Budd, E. W. McKinstry,* (*Edward I. Jones,* of counsel,) for respondent.

WORKS, J. This cause is the same in all material respects as that of West v. Crawford, ante, 1123, (this day decided,) and has been submitted on the same briefs, and on the authority of that case the judgment and order appealed from are affirmed.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

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80 Cal. 1

Raisch v. City and County of San Francisco. (No. 11,759.)

(*Supreme Court of California.* July 22, 1889.)

Street Contracts—Extension of Time.

1. An agreement extending the time for completion of a street contract, made after the expiration of the time originally agreed upon, is void against the city, as well as against property owners, under Act Cal. April 1, 1872, which makes time of the essence of such contracts.

2. It is immaterial that such extension was made with knowledge on the part of the city that the work had not been finished, and that upon the faith of such extension the contractor expended money in good faith.

3. Where the street contract sued on provided that the city would levy a special assessment to pay the contractor, but should not be liable for the contract price except as otherwise provided by statute, and the work was not done within the time provided, plaintiff was not entitled to recover upon a *quantum meruit* without alleging and proving either that no assessment had been made, or that, if made, there had been a failure to enforce the same, through no fault of his.

Department 1. Appeal from superior court, city and county of San Francisco; M. A. Edmonds, Judge.

Garber & Bishop and *George Flournoy, Jr.*, for appellant. *D. H. Whittemore* and *William M. Pierson*, for respondent.

Paterson, J. This is an action to recover the sum of $3,728.50, claimed to be due from defendant to plaintiff for work done under a contract between the plaintiff and the superintendent of streets. It is alleged in the complaint that the board of supervisors on August 22, 1876, adopted a resolution of intention to lay asphaltum sidewalks on Third street from Market to Mission; that the resolution was published for 10 successive days; that a resolution ordering the work was passed September 11, 1876; that notice of the proposed work was duly published and posted by the clerk; that plaintiff, among others, put in a sealed proposal, and accompanied it with a certified check in the sum of $500; that on October 2, 1876, the contract for doing said work was awarded to plaintiff, which award was afterwards duly published; that thereafter, October 13, 1876, the superintendent of streets in his official capacity and plaintiff entered into an agreement wherein plaintiff agreed to perform the work in a good and workman-like manner, etc.; that plaintiff gave bonds in the sum of $1,000, and $500; that said contract was duly recorded; that plaintiff duly performed all the conditions according to the terms of the contract, and to the satisfaction of the superintendent; that the contract price of the work was $3,728.50. The complaint then alleges that in December, 1863, that portion of Third street in question having been constructed to the satisfaction of the superintendent and committee of streets, said committee recommended the adoption of a resolution by the board of supervisors accepting said portion of Third street, "excepting the sewering necessary in Third opposite the small or subdivision streets;" that such resolution, after being passed to print and published five days, was adopted by the board on January 4, 1864, and signed by the mayor. The only allegation of non-payment of plaintiff's demand is "that on the 2d day of January, 1877, plaintiff presented to said board of supervisors a demand for the payment of said sum of $3,728.50 for said work, but that said board rejected and disallowed said claim, and refused to pay the same." The amended answer sets out, in substance, that the only contract between plaintiff and the superintendent of streets for said work was made on October 12, 1876. A copy of the contract is annexed to the answer. By the terms of this contract the plaintiff was to perform the work in a good and workman-like manner, commencing the same within five days, and completing the same within twenty days after the date of said contract, at the rate of $4.50 per front foot for sidewalks, and $75 for each crossing; and that the said superintendent should make an assessment to pay for the same; and that the said city and county should in no case be liable therefor, (except where otherwise provided in the acts mentioned in said contract,) or for any delinquency in said assessment. It is further alleged that the plaintiff did not perform the work in a good or workman-like manner, or within the time specified in said contract, and that no extensions of said time were ever given, or permitted to be given, except certain attempted extensions, none of which were given within the 20 days specified in the contract. The answer denies that the board of supervisors ever acquired jurisdiction to adopt a resolution accepting that portion of Third street referred to, or that the street was ever constructed to the satisfaction of the superintendent or said committee, or that the resolution of acceptance was ever published, or legally passed. The answer further alleges that certain specific sums, amounting to $549.40, were at various times paid and accepted by the plaintiff on an assessment which had been made by the superintendent pursuant to the contract.

It is claimed by counsel for the appellant that, inasmuch as it is not shown, either by the pleadings or in the findings, that the portion of Third street in question had ever been constructed so as to give the board jurisdiction to accept it, and that the alleged acceptance was partial only, the proceedings of the board were void, and the defendant was not liable, under any circumstances, for work performed on said street. In view of the conclusion we have reached upon another point in the case, we deem it unnecessary to pass upon this question. The court found the fact to be, as alleged by defendant, that the work was done under the contract set forth in the answer; that the work was not performed within the 20 days mentioned in the contract, but was performed within the time given in certain extensions; that the resolutions granting said extensions were not given within the 20 days mentioned in the contract, but were given before the work was completed, "with full knowledge that said work was not completed, and to induce said plaintiff to complete the same."

It has been held in many cases that neither the board of supervisors nor the superintendent of streets possesses the power to grant any extensions of time for the performance of work under such a contract, after the expiration of the time limited in the contract, and that any order granting such extension is absolutely void. Beveridge v. Livingstone, 54 Cal. 54; Fanning v. Schammel, 68 Cal. 428, 9 Pac. Rep. 427; Dougherty v. Coffin, 69 Cal. 454, 10 Pac. Rep. 672. It is claimed, however, by respondent that the rule laid down in these cases does not apply in an action brought against the city on a contract for performing the work for the city; that the cases cited were between contractors and property owners, and were based upon the principle that in all proceedings *in invitum* an assessment cannot be imposed without a strict compliance with the law. There is nothing said, however, in the cases cited, which limits the rule to actions upon assessments against abutters. The decisions in those cases seem to have been based upon the idea that the statute itself makes time the essence of contracts for street work. The provision which is construed to prohibit the extension of the time of performance after the expiration of the time named in the contract, or any previous extension, evidently was not intended simply to protect abutters, because the same provision in terms applies where the owners themselves undertake to perform the work. St. 1871-72, p. 808. It seems to have been the intention of the legislature to secure punctual completion of street improvements, whoever might undertake them, and to prevent the revival of contracts long after they had expired, and at a time when, under a new contract, the improvement might be made more cheaply. The object is equally important whether work is to be paid for by the city or by the owners, and there is no reason why an improvement upon an unaccepted street should be completed within the time prescribed in the contract, while contractors for work on accepted streets should be permitted to perform the work at their leisure, under grants of extensions made through the grace or improvidence of the board of supervisors. "Accepted streets" are generally in those portions of the city in which traffic and travel are greatest. It would seem that greater promptitude should be required with respect to them than in the case of "unaccepted streets," where a fewer number would suffer from the effects of torn-up pavements, *débris*, etc. The provision which forbids extensions of time after the expiration of the contract time is general and comprehensive, and applies to all contracts made under the act.

There is nothing in the language used to limit it to any particular class of contracts, or to any particular class of streets, and we could not, without ingrafting an exception upon the statute, sustain the contention of the appellant in this regard.

The fact that the extension was made with the knowledge that the work had not been finished, and that upon the faith of such extension plaintiff expended money in good faith, as is found by the court below, cannot cure the invalidity of the extension. A knowledge that the work has not been completed is presumed always from the fact of extension. There would be no necessity for an extension of time, if the work were finished. It is doubtless true, also, that when work is performed under a contract of this sort, after the contract has expired, it is done upon the faith of the extension; but, "where there is no power or authority vested by law in officers or agents, no void act of theirs can be cured by aid of the doctrine of estoppel." 2 Herm. Estop. 1365; Martin v. Zellerbach, 38 Cal. 300; Thompson v. Doaksum, 68 Cal. 593, 10 Pac. Rep. 199; Zottman v. San Francisco, 20 Cal. 96.

There are other matters fatal to a recovery by plaintiff herein. It was expressly agreed by the parties to the contract that the city and county should not "be liable for any portion of the expense of the work aforesaid, nor for any delinquency of the persons or property assessed," except where it is otherwise provided in the acts referred to. If the plaintiff can hold the city and county liable at all under this contract, it must be upon a failure to obtain payment through the assessment; and to recover it would be necessary for him to allege and show, either that no assessment had been made, as provided in the contract, or that after the issuance of such assessment the property holders had resisted the assessment, and had not paid the amounts assessed to them. No such thing is averred, proved, or found herein. Furthermore, it is alleged in the answer that some of the lot-owners have paid their assessments, amounting in all to $549.40. Upon this issue the findings are silent. The court has found, it is true, that the city has paid no part of the $3,728.50, but there is nothing to show how much, if anything, has been paid by the abutters.

If it be claimed that the plaintiff is entitled to recover upon a *quantum meruit*, it is sufficient to say that there is nothing in the complaint and nothing in the findings to sustain a judgment for the plaintiff on any such theory. The complaint counts entirely upon the express contract, and the findings follow it. There is no averment that the work performed by plaintiff was worth anything. Plaintiff's action is founded upon a contract which shows upon its face that it was made under the provisions of the act of April 1, 1872. The contract shows upon its face that it was the intention of the parties thereto to be governed by the provisions of that act. That is to say, if defendant can be held liable at all, it is clear that the parties understood that the plaintiff was first to exhaust his remedy against the owners and their land by an assessment before the city should in any event be liable. The provisions of the act have become a part of the contract, and the rights of the parties should be measured by them. It is a contract to make an assessment to pay for the proposed improvement. There is no allegation or finding that the defendant or its agents have refused to comply with the terms of the contract, and there is no finding that the assessment agreed to be made was not in fact made, as alleged in the answer. Therefore, if there could be a recovery upon an implied contract or *quantum meruit*, upon a failure to follow the mode prescribed by law, plaintiff is not entitled to recover here, because, as we have seen, there are no averments or findings of fact from which such implied contract could arise. It will not do for the plaintiff to say that an assessment, if issued, could not have been enforced; that the abutters could not have been compelled to pay for the work. It is not entirely clear that such would be the fact, (San Francisco v. Certain Real Estate, 42 Cal. 513; State v. Newark, 37 N. J. Law, 424;) but, assuming it to be so, before the plaintiff can recover on an implied contract, he must show either that no assessment has been made, or that, if made, there has been a failure to enforce it through no fault of his own. Judgment reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; WORKS, J.

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3 Cal. Unrep. 102

PEOPLE v. O'LEARY. (No. 20,358.)

(Supreme Court of California. June 26, 1888.)

CRIMINAL LAW—PLEAS.

1. Pen. Code Cal. § 1017, provides that pleas must be oral, and entered upon the minutes in substantially the following form, if defendant plead a former conviction or acquittal: "The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of," specifying the time, place, and court. If he plead once in jeopardy: "The defendant pleads that he has been once in jeopardy for the offense charged," specifying the time, place, and court. Defendant's pleas, as entered on the minutes, (though his counsel offered written pleas which were much fuller,) were: "*First*, defendant pleads not guilty of the offense charged; *second*, a former acquittal; *third*, once in jeopardy." *Held*, that the two latter pleas were insufficient.

2. Under Pen. Code, § 1185, providing that a motion in arrest of judgment may be "founded on any defects in the indictment or information mentioned in section 1004," a bill of exceptions, prepared for and used only upon a motion in arrest, cannot properly contain a written plea offered by defendant; and the contents of such writing cannot be looked to in this court to aid the pleas actually entered on the minutes.

3. Under Pen. Code, § 1008, providing that the allowance of a demurrer to an indictment or information is a bar to another prosecution, unless the court, "being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, * * * directs a new information to be filed," it is not necessary that the court actually render such opinion; it is sufficient if the court directs the district attorney to file a new information.

In bank. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Information against Arthur O'Leary for practicing medicine without a certificate. Defendant was convicted. The opinion of the commissioners is reported in 16 Pac. Rep. 884. Pen. Code, § 1008, provides that, "if the demurrer is allowed, the judgment is final upon the indictment or information demurred to, and is a bar to another prosecution for the same offense, unless the court, being of the opinion that the objection on which the demurrer is allowed may be avoided in a new indictment or information, directs the case to be submitted to another grand jury, or directs a new information to be filed. * * *"

R. Clark, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

PATERSON, J. The defendant was charged in the information with having practiced medicine without having first obtained a certificate authorizing him to do so as required by the "Act to regulate the practice of medicine in the state of California." Deer. Pen. Code, 625–629. The language of the information is sufficiently full and explicit in charging the offense, and we think that the court did not err in overruling the demurrer. The appeal is from the judgment only. The bill of exceptions contains none of the evidence. We cannot say, therefore, that the court erred in refusing certain instructions referred to in appellant's brief. In the former decision filed herein (16 Pac. Rep. 884) it was held that "the pleas of former acquittal and once in jeopardy, as the defendant asked to have them entered, were in substantially the form required by the Code." In support of this proposition there was quoted in the opinion a portion of the contents of a written plea offered by defendant's counsel, and it was said: "If the clerk failed to make the entry as fully as he ought to have done, the defendant cannot be made to suffer for that failure." The pleas actually entered upon the minutes of the court were as follows: "*First*, defendant pleads not guilty of the offense charged; *second*, a former acquittal; *third*, once in jeopardy." The jury found the defendant guilty, but did not find on the issues of former acquittal and once in jeopardy. The pleas, as entered upon the minutes, were insufficient. Section 1017, Pen. Code, prescribes the form for such pleas. If the defendant plead a former conviction or acquittal the form is as follows: "The defendant pleads that he has already been convicted [or acquitted] of the offense charged by the judgment of the court of ——, [naming it,] rendered at ——, [naming the place,] on the — day of ——." If he plead once in jeopardy, the form is as follows: "The defendant pleads that he has been once in jeopardy for the offense charged, [specifying the time, place, and court.]" The object of these forms is plain. The people should be informed of the circumstances as to time, place, and court. None of these circumstances are named in the plea actually entered upon the minutes of the court below; and we cannot resort to the written document, which, it is claimed, was filed at the time the plea was entered in aid of the plea actually entered. Section 1017, supra, provides that "every plea must be oral, and entered upon the minutes of the court in substantially the following form: * * *" The bill of exceptions in the record before us was prepared for and used only upon the motion in arrest of judgment. The bill of exceptions does not purport to be a bill prepared to present exceptions to the rulings of the court, upon any other matter than that of the motion in arrest of judgment. The written plea referred to is not properly in the bill of exceptions. Section 1185, Id., prescribes the grounds upon which a motion in arrest of judgment may be made. It is "founded on any defects in the indictment or information mentioned in section 1004."

There was no error in the ruling of the court below upon the defendant's motion in arrest of judgment, and, the pleas referred to not being in the form required by the Code, it was not necessary for the jury to find on them.

We see no merit in the contention that the defendant should have been discharged from custody because the court below failed to render an opinion that the objection to the information to which the demurrer had been sustained could be overcome by filing another. The court directed the district attorney to file a new information, and this was a sufficient compliance with section 1008 of the Penal Code. It was not said in People v. Jordan, 63 Cal. 219, that the court must, in addition to directing the district attorney to file a new information, render an opinion that the objection to the information could be overcome by filing another. Judgment and order affirmed.

We concur: SEARLS, C. J.; MCFARLAND, J.; THORNTON, J.

(80 Cal. 118)

SIMONS *v.* MILLS. (Nos. 13,082, 13,083.)

(*Supreme Court of California.* Aug. 2, 1889.)

ARBITRATION AND AWARD.

1. Under a submission to arbitrators of all questions in difference between the parties concerning the business of brick-making, in which they had been engaged as partners, so that all rights of action arising therefrom may be conclusively settled, the arbitrators have power to determine what amount of the uncollected assets are due to each party.

2. It is no objection to an award that the arbitrators took advice relative to the questions before them if they decided on their own judgment.

In bank. Appeals from superior court, Los Angeles county; A. W. HUTTON, Judge.

A. N. Metcalfe and *W. T. Williams*, for appellants. *M. C. Hester*, for respondent.

THORNTON, J. Appeal from a judgment entered on an award of arbitrators, and also from an order denying a motion to vacate the award. We see no error in the proceeding brought here to be reviewed on appeal. The submission provided that it should be entered as an order of court. The matters were such as could be submitted to arbitration under the statute. The court below had jurisdiction of the proceeding. No objection appears to have been made in the court below that the submission was not entered as required by law, and therefore should not be considered here. The motion to set aside the award was made on the grounds of misconduct of the arbitrators, and that the arbitrators exceeded their powers. Painter was not an arbitrator. Though the arbitrators consulted with him, they acted on their own judgment in making their determination.

This clearly appears from the affidavits of the arbitrators. The question presented as to the determination by the arbitrators is similar to that of the verdict of a jury where it is agreed that each juror shall set down in figures what shall be the amount of their verdict, and divide the whole sum by 12 to fix the amount, without agreeing to be bound by it, then afterwards agreeing to determine the same upon consideration of the evidence. A verdict so found has been held to be good. Wilson v. Berryman, 5 Cal. 45.

We do not think the arbitrators exceeded their powers under the submission. The matters referred to the determination of the arbitrators related to a certain difference which had arisen between the parties, growing out of partnership transactions in making and selling bricks. The articles of copartnership were made part of the submission, and were attached to it as an exhibit. The submission provided that the arbitrators "shall decide upon the amounts of money that each party hereto may owe the other party hereto at the date of this submission, arising or becoming due upon any of the transactions, acts, or omissions referred to in the preambles to this submission, and, having found such amounts, shall therefrom arrive at their award, and said award may be entered as a judgment," etc. It is declared in the submission that the reference to arbitrators is made "in order that all matters in difference now existing between" the parties, "in reference to said brick-making business," and "that all rights of action of each of said parties against the other arising out of said brick business may be conclusively settled." This the arbitrators proceeded to do, and determined, first, that of the profits Simons had received in money, in excess of his share, $1,926.73, for which sum Mills was entitled to a judgment against him. There were bills due the concern, not collected at the date of the submission, a list of which is appended to the award, as to which the arbitrators made the following finding: "That there are still assets existing under the terms of said agreement in the shape of 'bills receivable,' which are due to said Mills as trustee for said Simons and Mills under the terms of said agreement, and of which, after collections are made and expenses of collection paid, Simons will be entitled to two-fifths, and Mills to three-fifths." We are of opinion that the arbitrators were called in, under the terms of the submission, to determine what amounts were due to each of the uncollected assets, styled in the above finding "bills receivable." Under the articles of partnership all moneys received on account of the business of brick-making were to be paid to and disbursed by the parties of the first part. These parties of the first part were originally Mills and one Rosenberger. Mills acquired by purchase Rosenberger's interest, and Mills then represented the parties of the first part. The above finding of the award is objected to by counsel for Simons as giving Mills the authority to collect the uncollected assets. But this view is erroneous. Mills had that authority under the articles, and the statement in the finding is a reference to and recital of that authority, as existing under the terms of the partnership agreement, and properly directs that after Mills has collected the bills referred to Simons will be entitled to two-fifths and Mills to three-fifths of such moneys; in other words, that when Mills collects the moneys referred to he will owe Simons two-fifths of such collections, and he (Mills) will be entitled to retain three-fifths, expense of collection to be deducted. This division of the moneys to be realized on collections made is also in accordance with the terms of the agreement of partnership. The amount due by Mills to Simons when he has made the collections referred to was thus determined, and correctly determined. We think this was within the powers conferred on the arbitrators by the submission. We find no error in the records, and the judgment in one case, (13,082,) and the order denying the motion to vacate the award in the other case, (13,083,) are affirmed. Ordered accordingly.

We concur: Sharpstein, J.; Works, J.; Paterson, J.; McFarland, J.

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79 Cal. 633

Sharon v. Sharon. (No. 11,991.)

(*Supreme Court of California.* July 17, 1889.)

Appeal—Record—Res Adjudicata—Marriage—Evidence.

1. Where certain exhibits, claimed to have been used in evidence, are referred to in the body of the statement on motion for new trial, as, "Plaintiff's Exhibit, No.—, [giving the number,] see end of statement," and such exhibits are set out in an appendix to such statement, properly numbered, preceded by the recital, "The following are the exhibits offered and read in evidence on behalf of the plaintiff, and mentioned in the foregoing statement," they are thereby sufficiently identified and incorporated in, and made a part of, such statement.

2. The certificate of the judge that "the foregoing statement on motion for a new trial has been settled and allowed by me" includes and authenticates such exhibits, as a part of such statement, although the certificate is attached to the body of the statement and precedes the exhibits. Kimball v. Semple, 31 Cal. 657; People v. Bartlett, 40 Cal. 146; Bush v. Taylor, 45 Cal. 112; Thompson v. Patterson, 54 Cal. 542, distinguished on this point.

3. Where such exhibits appear to have been included in the statement, in the manner above stated, the fact that some of them have been omitted from the transcript is not ground for striking out the whole statement. The remedy of the respondent is to suggest a diminution of the record, and have them brought up. Thornton, J., dissenting.

4. Depositions, being on file, may be made part of the statement, by calling for them by the words "here insert" at the proper place; and when the transcript is made up they should be copied, in full, where called for.

5. Where an exhibit is omitted from the statement, and no objection is made, and the attorneys for respondent indorse on the statement, "The foregoing statement agreed to by us," and the same is thereupon signed by the judge, the objection that such exhibits have been omitted is waived, and such omission presents no cause in this court for striking out the statement, or any part of it.

6. Where counsel stipulate that all depositions on file may be "read and referred to on the hearing of defendant's motion for a new trial herein as part of the foregoing statement," and the same "shall be printed in the transcript on appeal," and "form a part of the statement," a strict compliance with the requirements of the statute as to the manner of making them parts of such statement is waived.

7. The point that the subject-matter of this action has been adjudicated and determined against the respondent by a United States circuit court cannot be presented for the first time in this court by the presentation of the proceedings and judgment of said court, where it appears that, conceding said last-named judgment is paramount to that of the court below, both of said courts had jurisdiction of the subject-matter and the parties, and that, without the pendency of the action in the federal court being brought to its attention, the court below proceeded to final judgment.

8. The fact that two courts of concurrent jurisdiction render judgments antagonistic to each other, involving the same subject-matter, does not prove that the judgment of either is void, or, necessarily, that either is erroneous, but, the question being which shall prevail, the question may be raised when an attempt is made to enforce the judgment in the court below.

9. Whether the federal court had, or had not, jurisdiction, and the question as to which of the judgments referred to should prevail, not decided.

10. Where two appeals are taken in the same case,—one from the judgment, and the other from the order denying a new trial,—a judgment of this court on the appeal from the judgment, which has not been acted upon by the court below, or the parties, does not become the law of the case, so far as to affect the right or power of this court to determine any and all questions presented on the appeal from the order denying a new trial, to the extent, if necessary, of modifying the former decision. THORNTON, J., dissenting.

11. Where there are two such appeals, the whole case must be held to be under the control of this court until the whole is disposed of and the cause remanded for further proceedings in the court below. THORNTON, J., dissenting.

12. Where there is a substantial conflict of evidence, the findings of the court below will not be disturbed on the ground that such findings are not sustained by the evidence.

13. A finding that the plaintiff and defendant lived and cohabited together in a way usual with married people, and that they assumed towards each other marital rights, duties, and obligations, is not sustained by evidence that after executing a contract of marriage they secretly occupied the same bed, concealed the fact that such a contract had been executed, or that they were husband and wife, and held themselves out to the public as single and unmarried people, occupied separate dwelling places, had no common home, and in all things conducted themselves towards the public as unmarried people. THORNTON, J., dissents on ground of former adjudication.

14. The mere fact that parties who have agreed to become husband and wife thereafter have sexual intercourse is not sufficient, of itself, to show a consummation of the marriage, or that they have assumed towards each other marital rights, duties, and obligations, within the meaning of section 55 of the Civil Code. THORNTON, J., dissents on ground of former adjudication.

15. Consent to marry is not enough under section [illegible] of the Civil Code. It must be followed by solemnization or a mutual assumption of marital rights, duties, and obligations. Cohabitation is a "living together as husband and wife," and will amount to a consummation or mutual assumption of marital rights, duties, and obligations, but sexual intercourse in the manner usual with man and mistress, and without living together as husband and wife, will not amount to such consummation. THORNTON, J., dissents on ground of former adjudication.

16. Whether, giving full credit to it, the evidence proves a mutual assumption by the parties of marital rights, duties, and obligations, is a question of law, and not a question of the weight of evidence.

17. The validity of a written marriage contract otherwise valid as a consent to marry, is not affected by a covenant therein by one of the parties that the contents of the writing and its existence shall be kept secret for a certain time after its execution, unless the other party shall see fit to make it known.

18. Evidence on the part of the plaintiff that she had, long prior to any difficulty between herself and the defendant, shown to a third party what she alleged to have been a marriage contract between them, and which the defendant claimed to have been a forgery, was competent, as tending to show its genuineness.

19. A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness as to such matters on cross-examination. THORNTON, J., reserves his opinion.

20. But where such a question is asked, but no answer is required or given, no available error is committed.

21. Where a question as to a particular wrongful act is asked, and objected to, and the court states to counsel what he may ask, and he proceeds to ask further questions as directed by the court, but within the objection already made, a further objection to each of the questions so asked is not necessary to raise the question of the competency or relevancy of the evidence in this court.

22. Whether the question put is pertinent or not, the witness may decline to answer on the ground that to do so would tend to criminate him; but, where the question is not pertinent, the party introducing him may object thereto, and his objection should be sustained, whether the witness objects to answering or not. THORNTON, J., reserves his opinion.

23. The testimony of a witness as to conversations with a party to an action cannot be excluded on the ground that the witness was an attorney at law, and the communication was confidential, unless it appears that he was the attorney for the party, and the communication was made in the course of professional employment.

24. And it must appear that the communication was in fact confidential, or at least that it was so regarded at the time by the party making it.

25. The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute relating to confidential and privileged communications.

26. The presumption is that all communications between attorney and client are confidential, but this presumption may be rebutted.

27. Where the witness has testified, and his testimony is stricken out, on motion, on the ground that the same relates to communications that were confidential, the question as to the correctness of such ruling is properly preserved by an exception thereto, and may be presented to this court by assigning the same as an error of law.

28. That a witness who has testified to a conversation is not positive that the person with whom he had such conversation was the party, but gives it as his opinion that she was, his testimony cannot be stricken out on the ground that he has not identified the person. Whether he has or not goes to the weight to be given to the evidence, and not to its competency or relevancy.

29. Where the plaintiff had testified that during a certain time she was the wife of the defendant, evidence of a statement by a third party, in her presence and hearing, during said time, that she, the plaintiff, desired to bring a suit against the defendant for breach of promise of marriage, was competent and material.

(*Syllabus by the Court.*)

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Sarah Althea Sharon against William Sharon, since deceased, for a decree declaring valid an alleged marriage, by contract, without solemnization, between defendant and plaintiff; for divorce, and a share of the community property. The court below declared the contract valid, and granted the divorce and a share of the community property. From an order denying defendant's motion for a new trial, Frederick W. Sharon, as executor, appeals. For former decisions, see 7 Pac. Rep. 456, 635, 639; 8 Pac. Rep. 614, 709; 9 Pac. Rep. 187; 16 Pac. Rep. 345.

Wm. F. Herrin and *S. M. Wilson*, for appellant. *D. S. Terry, J. G. Maguire*, and *W. T. Baggett*, for respondent.

Works, J. This action has been before this court on an appeal from the judgment. The findings were held to support the judgment, and the judgment was affirmed. Sharon v. Sharon, 75 Cal. 1, 16 Pac. Rep. 345. The present appeal is from the order denying a new trial, and presents for our consideration, in addition to errors alleged to have occurred during the trial, the question whether the findings of the court below, on the main issues in the case, are supported by the evidence. Preliminary to these questions arising on the merits, we are called upon by both the respondent and the appellant to determine certain objections to the consideration of the case. The respondent contends that the statement on motion for a new trial, as it appears in the transcript, was not properly made up and authenticated, and on that ground moves to strike out what purports to be such statement. She also moves to strike out certain parts of the transcript, purporting to be a part of the statement, on the ground that such parts are not included in the statement as certified by the judge of the court below. The objection most relied upon in respect to these motions is that certain exhibits used in evidence do not appear in the body of the statement, but are referred to therein, and included in what may be called an appendix, following the authentication of the judge, and mainly in a separate volume of the record. The record in this cause consists of five large volumes in no way connected with each other or identified as belonging to the same action except by the number and title of the case, and the consecutive numbers of the volumes and pages. The certificate of the judge to the statement appears in volume 3 of the transcript, and is as follows: "The foregoing statement on motion for a new trial has been settled and allowed by me and is correct." In the body of the statement certain exhibits are referred to as follows: "Plaintiff's Exhibit No. —, [giving the number,] see end of statement." Immediately following the authentication of the statement by the judge are certain exhibits preceded by the following statement: "The following are the exhibits offered and read in evidence on behalf of the plaintiff, and mentioned and referred to in the foregoing statement," "Plaintiff's Exhibit No. 1," followed by such exhibit in full; and so on with the others in their order, as referred to in the statement, where introduced in evidence. The point made is that the exhibits appear by the statement to have been a part of the evidence in the case; that the reference to them in the manner above stated does not make them a part of the statement; and that, therefore, the statement is a mere "skeleton," and the whole of it should be stricken out. In support of this contention counsel cite Kimball v. Semple, 31 Cal. 657; People v. Bartlett, 40 Cal. 146; Bush v. Taylor, 45 Cal. 112; Thompson v. Patterson, 54 Cal. 542. The case of Kimball v. Semple differs materially from the one at bar. There the court said: "This statement, however, is but a skeleton statement. It states, for example, that certain patents, deeds, etc., were introduced in evidence, and then says: '(here insert patent,)' '(here insert deed,)' '(here insert all of deed except acknowledgment,)' '(here insert descriptive part of deed and conditions,)' etc.; but the transcript does not contain the deeds, patents, descriptive portions," etc. The transcript before us does not call for the exhibits by a mere "here insert," and then omit them. They are called for by reference to them by their numbers, and to the place where they will be found at the end of the statement. Instead of being omitted they are found in the transcript at the place referred to. The other cases cited are to the same effect as Kimball v. Semple, and do not support the objection made. The documents referred to are set out in the statement. The reference to them in the body of the statement, and the introductory matter preceding such exhibits, where they appear at the end of the statement, are amply sufficient to identify them.

But it is further contended that the authentication of the judge precedes these exhibits, and that, as he only certifies to the correctness of the "foregoing" statement, they are not covered by his certificate, and are not, for that reason, authenticated at all. There might be some force in this position if it were not for the fact that the "foregoing" calls these exhibits into, and makes them a part of, the statement. But, as they are so brought into it, it is wholly immaterial whether the exhibits precede or come after the judge's certificate. Kirstein v. Madden, 38 Cal. 160. It is further claimed that a part of these exhibits do not appear in the transcript, either in the body of the statement, or in what we have called the "appendix." If they do not, the remedy of the respondent was to suggest a diminution of the record, and have them brought up. They appear to have been made a part of the statement, but do not appear in the transcript. In the case of Kimball v. Semple, supra, cited and relied upon by the respondent, this court said: "Some portions of the record may be accidentally omitted, or some error made, and not discovered till after the transcript is filed. Such accidental omissions may be corrected on suggestion of diminution of the record, in pursuance of rule 12. But when a diminution of the record has been suggested, and an order directing the clerk to certify up the part desired, it is still the duty of the appellant to see the order complied with." This court will not entertain a motion to strike out the entire statement because of the omission to insert in the transcript and bring up some paper called for and made a part of such statement, until the proper steps have been taken to have the paper certified up by the clerk of the court below.

In respect to certain depositions, they are called for as follows: "(Here insert the deposition of C. D. Cushman.)" The deposition is not inserted at this place, but does appear in another place in the record, viz., with the exhibits at the end of the statement, and is there identified as "Deposition of C. D. Cushman." Unlike the exhibits, it

.s not referred to as being set out at this place. But we think the respondent has effectually estopped herself to object to the statement on this ground. If the statement did not contain the evidence necessary to present the questions relied upon properly, the time to make the objection was at the settlement of the statement. Not only did she fail to raise the question of the sufficiency of the statement in this respect, but her then attorneys indorsed upon it: "The foregoing statement agreed to by us." Two objections were then made to the settlement of the statement, not affecting its form; the first being that the court had no jurisdiction, for the reason that an appeal had already been taken from the judgment; and the second, that the same was not prepared and served within the time allowed by law. In this condition of the record the respondent cannot be heard to question the sufficiency of the statement as a whole, conceding that the deposition was omitted entirely.

The motion to strike out parts of the record goes to the exhibits and depositions above referred to, and is based upon the ground that such papers are not properly authenticated. To sustain this motion would be a convenient and easy way of disposing of the case. It would take out of the statement evidence absolutely necessary to sustain the findings in favor of the respondent, and compel us to reverse the case on that ground. The respondent could not properly complain of the court for making this disposition of her case, at the instance of her own attorneys, but we are firmly convinced that the motion is not maintainable, and must be overruled.

As to the exhibits, we have shown above that they are so referred to and made parts of the statement as to bring them under the judge's certificate. Therefore they are properly authenticated. So far as the motion goes to certain affidavits, used in support of the motion for a new trial, the appellant has furnished us with the judge's certificate, authenticating the affidavits used by the appellant, and he admitted at the argument that the affidavits purporting to have been used by the respondent in opposition to the motion are the affidavits actually used by her, which disposes of that part of the motion. As to the depositions, they were a part of the files in the case, and we think, in addition to what is said above with reference to them, that they were properly called for in the statement by a "here insert," and, if not in the proper place in the transcript, they could be brought up by an order of this court. Papers on file with the clerk may be called for by a mere reference, and afterwards inserted. Darst v. Rush, 14 Cal. 83; Connor v. Morris, 23 Cal. 450. Besides, there appears in the transcript this stipulation, signed by the attorneys for both parties: "It is hereby stipulated and agreed by and between the respective parties hereto that the whole or any portions of the depositions on file in this case, which were used on the trial thereof, may be read and referred to on the hearing of defendant's motion for a new trial herein as part of the foregoing statement, and that the whole of said depositions, or the portions so read or referred to, shall be printed in the transcript on appeal from the order refusing or granting a new trial herein, and shall form a part of defendant's statement on motion for new trial or on appeal." This stipulation must be held to be a waiver of the strict requirements of the statute with respect to the manner of setting out these depositions in the statement, if the statute had not been complied with.

This action is for a decree declaring valid an alleged marriage by contract, without solemnization, between the deceased, William Sharon, and the respondent, for a divorce, and for a division of the community property. The mariage alleged was by a written contract, which the plaintiff claimed to have been genuine. The deceased, on the contrary, maintained the alleged contract to be a forgery. The court below determined that the contract was valid, rendered a decree so declaring, and granting the respondent a divorce and a share of the community property. The defendant moved for a new trial, which was denied, and it is from this order denying a new trial that the executor is prosecuting this appeal.

Shortly before the commencement of this action the defendant commenced an action in the circuit court of the United States, Ninth circuit, district of California, against the respondent, as Sarah Althea Hill, in which he alleged, in substance, that he was a resident of the state of Nevada; that he and the respondent were both unmarried; that she was claiming to be his, the said Sharon's, lawful wife, and had assumed his name; that she was pretending that they had entered into a written contract of marriage, and did in said writing jointly do and perform all and singular the acts required by section 55 of the Civil Code of the state of California to constitute a marriage between them, and thereby became, and had ever since been, husband and wife according to the laws of the state of California; that said claims and pretensions were false and maliciously made by her for the purpose of injuring him, the said Sharon, in his property, his business, and his social relations, for the purpose of obtaining credit by the use of his name with merchants and others, and thereby compelling him to maintain her, and for the purpose of harassing him into the payment of large sums of money to quiet her said false pretensions, and for the purpose of harassing and injuring his estate and his true heirs at law and next of kin in the event of his death, and of compelling his heirs at law and legatees to pay her large sums of money to quiet her false and fraudulent claims and pretensions; that the respondent was not, and never had been, the wife of him, the said Sharon, by a solemnization of marriage, contract, declaration in writing, or otherwise; that they did not, on the day and year alleged, or at any other time, at the place alleged or elsewhere, jointly or otherwise, make in writing or otherwise, the said alleged written contract of marriage; that the respondent claimed to have in her possession said written contract of marriage, executed as above stated, but that the instrument held by her, and claimed to be such contract, was false, forged, counterfeit, and fraudulent; that he never made or signed the same or any part thereof, and that the same was null and void as against him, and ought in equity and good conscience to be so declared, and ordered to be delivered up to be annulled and canceled. The substance of the prayer of the bill was that it be adjudged and decreed that the said Sarah Althea Hill was not, and never had been, the wife of the said Sharon; and that they did not make the said joint declaration of marriage, or any marriage between them; and that she be perpetually enjoined from making said allegations, representations, and pretensions of marriage with him; and that said false and forged contract of marriage be decreed and adjudged to be false, fraudulent, and forged, and to be delivered up to be canceled and annuled. There was an answer traversing the material allegations of the bill, and alleging the pendency of this action in the court below. By a supplemental answer it was shown that the court below had in this action, since the filing of the defendant's answer, filed its findings and decree, wherein it was adjudged that the agreement sought to be canceled in that suit was a genuine contract of marriage between the parties, and that said parties became, by reason of said contract, and other matters, and were, husband and wife. The circuit court, upon a full hearing of said cause on its merits, entered a decree in favor of the complainant therein, declaring that said pretended declaration of marriage was never executed by said parties, and that the same was false, counterfeited, fabricated, forged, and fraudulent, and as such was utterly null and void, and that the same be delivered up to the clerk of said court to be canceled. Said decree also contained the following: "And it is further ordered, adjudged, and decreed that the respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators, and all persons claiming any interest thereunder by or through said respondent and her and their agents and attorneys, be, and they and each and all of them are, hereby perpetually enjoined from alleging the genuineness or the validity of said instrument, and from making any use of the same in evidence or otherwise to support any right claimed under it, or making any claim, or setting up any right, interest, or claim of any kind under or by virtue of said instrument or declaration of marriage, either as wife of complainant, or for any interest in property, or right of any kind or nature against said complainant, his heirs, executors, administrators, or successors in interest, and that complainant recover his costs of suit." See Sharon v. Hill, 11 Sawy. 290, 26 Fed. Rep. 337; Sharon v. Terry, 36 Fed. Rep. 337. This decree was rendered subsequent to the decree of the court below, and has since been revived in the name of the personal representatives of the said William Sharon, now deceased. Sharon v. Terry, supra. In conformity to said decree above mentioned, a writ of injunction has issued out of the circuit court enjoining the respondent, in the language of said decree, from in any way using or asserting any rights under said pretended marriage contract.

The appellant has filed in this court these proceedings in the United States court as a bar to the respondent's rights under the judgment in the court below, and by virtue thereof asks this court to declare the marriage contract a forgery, and give effect to the decree of said United States court. The kind of judgment to be entered by this court to give effect to said last-named decree is not pointed out in the brief of the learned counsel for the appellant. They assert with confidence that they are entitled to some relief, but what it shall be is left to the court to find out. The point made and relied upon by the appellant as to this branch of his case is that the court below, and the federal court, had equal and concurrent jurisdiction of the subject-matter and of the parties; that the contract declared to be invalid by the federal court is the basis and foundation of the respondent's action now before us, and that the federal court having first taken cognizance of the case, its judgment must prevail over that of the state court, in which the action was commenced at a later day, no matter in which court final decree was first rendered. This presents for our consideration the somewhat novel and important question whether this court can, upon undisputed evidence of the facts relied upon by the appellant, step aside from the strict line of its appellate jurisdiction to adjudicate upon the effect of these conflicting decrees. The general rule undoubtedly is that this cannot be done. This is conceded by counsel for appellant, but they contend that there are exceptions to the rule, and that in extraordinary cases where, but for the right of an appellate court to look beyond the record on appeal, great wrong and injustice must result, the court will exercise such right. There are cases which give countenance to this contention, and in which appellate courts have, in furtherance of justice, considered matters *dehors* the record, and acted upon them. Poole v. Seney, 70 Iowa, 275, 24 N. W. Rep. 520, and 30 N. W. Rep. 634; Waldron v. Ely, 2 N. J. Law, 79; Steelman v. Ackley, Id. 165; Anderson v. Radley, 4 N. J. Law, 1034; Dakota Co. v. Glidden, 113 U. S. 222, 226, 5 Sup. Ct. Rep. 428; The Peggy, 1 Cranch, 103, 109; U. S. v. Preston, 3 Pet. 57; Yeaton v. U. S., 5 Cranch, 281; Smith's Com. §§ 772, 774; Com. v. Duane, 1 Bin. 601, 608. But a careful examination of these cases discloses the fact that the matters brought to the attention of the appellate courts show, beyond controversy, either that the judgments appealed from were invalid or erroneous, and that in case such matters were disregarded by the courts, the parties contending against the judgments appealed from must be left without any remedy if the same should be affirmed. These cases differ materially from the case at bar in both these respects. If this court should consider the offered evidence, and give it all the weight that is claimed for it by the appellant, it would not prove either that the order appealed from is erroneous, or that the judgment rendered by the court below is invalid. The case, as presented by the record on appeal and the offered evidence, is simply this: Conceding that the subject-matter of the two actions was the same, and that the federal court had jurisdiction in the premises,—both of which the respondent denies,—here are two courts of concurrent jurisdiction, both of which have assumed and are exercising jurisdiction over the same subject-matter and the same parties. The federal court has first taken jurisdiction, but this fact is not called to the attention of the state court in any legal way, and it proceeds to final judgment. Subsequently the federal court renders a judgment contrary to and in direct conflict with that of the state court. Does this prove that the judgment of the state court is either void or erroneous? Not so. But, as a matter of public policy, one or the other of these conflicting judgments must be held to prevail over the other, whether right or wrong; which one, is not for us to say. Both of the judgments may be valid, and, as they may have been rendered upon different evidence, it may be that neither of them is erroneous. It is purely and solely a question, therefore, as to which one of them shall prevail over the other, and this is a question that cannot be determined on this appeal.

The appellant is not without his remedy. If the order appealed from should be affirmed, and an attempt be made to enforce it upon the *remittitur* of this court being set down, the question as to the force and effect of the two judgments could then be determined by a direct proceeding for that purpose.

We do not regard it as at all necessary to extend this necessarily long opinion by attempting to review and distinguish the above cases cited by counsel, except in the general way above stated. We are quite clear that they do not cover this case.

Counsel have argued at great length the question whether the federal court had jurisdiction in the action before it, and as to the effect of the conflict in the jurisdiction and final judgments of the two courts; but the conclusion we have reached renders it unnecessary for us to consider these questions.

Before passing to an examination of the questions directly presented by the record, it may be well to consider and determine what effect the decision of this court on the appeal from the judgment has upon the present appeal. It is contended by the respondent that so far as the question as to what is necessary to constitute a valid marriage is concerned, the decision on the former appeal has become the law of the case, and couclnsively binding upon this court, as well as upon the parties to the action. In view of this contention it may be important to ascertain definitely what was actually decided on the former appeal. As to the acts and conduct of the parties tending to show a valid marriage, the court below found:

"(2) That on the 25th day of August, A. D. 1880, the plaintiff and defendant each signed a certain declaration of marriage in the words and figures following, to-wit:

"'In the city and county of San Francisco, state of California, on the 25th day of August, A. D. 1880, I, Sarah Althea Hill, of the city and county of San Francisco, state of California, aged 27 years, do here, in the presence of Almighty God, take Senator William Sharon, of the state of Nevada, to be my lawful and wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon of the state of Nevada. SARAH ALTHEA HILL.'

"'August 25, 1880, San Francisco, Cal. I agree not to make known the contents of this paper, or its existence, for two years, unless Mr. Sharon himself see fit to make it known. S. A. HILL.'

"'In the city and county of San Francisco, state of California, on the 25th day of August, A. D. 1880, I, Senator William Sharon, of the state of Nevada, aged 60 years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city of San Francisco, California, to be my lawful and wedded wife, do here acknowledge myself to be the husband of Sarah Althea Hill. WILLIAM SHARON, Nevada. August 25, 1880.'

"Which was the only written declaration, contract, or agreement, of marriage ever entered into between said parties; and at the time of signing said declaration plaintiff and defendant mutually agreed to take each other, as, and henceforth to be to each other, husband and wife.

"(3) That afterwards and about the —— day of September, 1880, the plaintiff and defendant commenced living and cohabiting together in the way usual with married people, although their cohabitation was kept secret, and so continued for the space of more than one year, and down to the 25th day of November, 1881, and during all of said time the plaintiff and defendant mutually assumed towards each other marital rights, duties, and obligations.

"(4) That during the time plaintiff and defendant so lived together, defendant visited her relations with her, escorted her to places of amusement, and introduced her to respectable families, and to members of his own family, and wrote to her several letters while absent from her, in which he addressed her as 'My Dear Wife.'

"(5) From the foregoing facts the court finds that plaintiff and defendant intermarried in August, 1880, and that the allegations of paragraphs 2 and 3 of the complaint as to the fact of marriage are true, except in so far as the declaration therein referred to is alleged to be in compliance with section 75 of the Civil Code of this state."

These findings were binding on this court, on the appeal from the judgment, the evidence not being in the record.

Three material facts were distinctly found in favor of the respondent: *First*, the execution of the contract; *second*, that the plaintiff and defendant, after the execution of the contract, commenced living together in the way usual with married people; *third*, that they mutually assumed towards each other marital rights, duties, and obligations. These findings completely covered the requirements of section 55 of the Civil Code, which provides: "Marriage is a personal relation arising out of a civil contract, to which the consent of parties capable of making it is necessary. Consent alone will not constitute marriage; it must be followed by a solemnization, or by a mutual assumption of marital rights, duties, or obligations." But the court found one fact favorable to the defendant, viz., that their cohabitation was kept secret, and so continued for more than one year. Therefore the sole and only question presented to this court for decision on the appeal from the judgment was whether or not, assuming that every act necessary to constitute a valid marriage had been done by the parties, the fact that one or more of those necessary requirements of the statute had been kept secret would nullify the same, and render the same invalid. This is clearly demonstrated by some of the language of the prevailing opinion in the case, in which it is said: "The court below found as facts that during a certain period after the consent to marry 'the plaintiff and defendant lived and cohabited in the way usual with married people, * * * and mutually assumed towards each other marital rights, duties, and obligations.' If, as we have said, they might mutually assume marital rights and duties, although their relation was kept secret, the insertion of the words 'towards each other' does not vitiate the finding, and the finding of facts is conclusive on this appeal." 75 Cal. 36, 16 Pac. Rep. 361. Also the following: "Our conclusion is that the provision of the Code requiring a mutual assumption of marital rights and duties to follow consent does not make it indispensable to the validity of the marriage that the relation between the parties shall be made public. The section of the Code does not purport to require it. The policy of the common law does not demand it, and the policy of the common law has not been changed by statutory enactment." 75 Cal. 37, 16 Pac. Rep. 361. Also in the concurring opinion of Mr. Justice TEMPLE: "Persons capable of marriage consented to present marriage. Thereafter they cohabited in the way usual with married persons for more than one year, during which time they mutually assumed towards each other marital rights, duties, and obligations. The cohabitation and supposed marriage was, however, kept a secret, pursuant to an agreement in writing, made at the time of the mutual consent to present marriage." 75 Cal. 49, 16 Pac. Rep. 367. Doubtless much was said in the opinions on that appeal that was unnecessary to a decision of the question presented, but the point raised was clearly defined and cannot be misunderstood. We have said this much in order to show that nothing was then decided that can in any way interfere with or prevent a full and fair consideration of the questions presented by this appeal.

The decision there was that the findings supported the judgment. The main question presented here is whether or not the findings are sustained by the evidence. In other words, is the evidence sufficient to show that the parties did execute the contract, live and cohabit together in the way usual with married people, and mutually assume towards each other marital rights, duties, and obligations? And in the consideration of these questions of fact, as we shall see further on, the fact of secrecy, found by the court below, must become a most important element in determining whether their cohabitation was such as is usual with married people, and whether they did mutually assume towards each other marital rights, duties, and obligations. But lest a discussion of the questions arising here may result in a conflict between the former decision and the present one, we prefer to meet and decide the question whether the doctrine that a decision once made in an action is forever after the law of the case is applicable to this case in its present *status*. In support of the contention that the former decision is binding upon us here, counsel for respondent say: "The validity of the contract of marriage set forth in the findings was directly involved in, and directly adjudicated on, that appeal, and no question concerning its validity can now or hereafter be agitated in this court;" and cite as supporting this position: Gwinn v. Hamilton, 75 Cal. 265, 17 Pac. Rep. 212; Reclamation Dist. v. Goldman, 65 Cal. 636, 4 Pac. Rep. 676; Clary v. Hoagland, 6 Cal. 685; Davidson v. Dallas, 15 Cal. 75; Mulford v. Estudillo, 32 Cal. 131; Jaffe v. Skae, 48 Cal. 540; Donner v. Palmer, 51 Cal. 636; Megerle v. Ashe, 47 Cal. 632; Heinlen v. Martin, 59 Cal. 181; Doyle's Estate, 73 Cal. 570, 15 Pac. Rep. 125. We have shown above that counsel are mistaken in their statement that the former decision directly adjudicated upon the validity of the contract of marriage, as now presented. It did determine the validity of the contract as presented by the findings of the court below. The authorities cited sustain the general and well-established rule that a question presented and decided by an appellate court becomes thereafter the law of the case, and a guide in all subsequent proceedings therein, and that the rule is binding on the appellate court if the case again comes before it after having gone down to the lower court for further proceedings, the facts on the second appeal being the same as on the first. The reason of the rule is apparent. This court having declared the law, and the parties and the court below having acted upon it, as a matter of policy the law, as thus declared and acted upon, whether right or wrong, cannot afterwards be changed. But for this salutary rule litigation might go on indefinitely to the great detriment, not only of the parties concerned, but of the public. But we are clear that the reason of the rule does not apply here, and that where the reason does not exist the rule itself is not applicable. The law of this state permits two appeals in the same case,—one from the judgment, and the other from the order denying a new trial. Both of these appeals have a direct effect on the judgment, and, if successful, may vacate it entirely or modify it, as the court may determine. These appeals may both be prosecuted and be pending in this court at the same time, as was the case here until the appeal from the judgment was disposed of. The fact that this court has declared a rule of law in deciding the appeal first reached for decision, and upon which no action has or can be taken until the second appeal is also disposed of, cannot, by reason of the rule invoked by the respondent, prevent the court from fully investigating and deciding the second appeal to the extent of modifying or wholly changing its former decision, if it be satisfied that an error has been committed. The case must be regarded as within the control of this court until both appeals are determined. See, as bearing on the point that the disposition of one of the appeals allowed by the statute does not affect the rights of the party under the other, Fulton v. Hanna, 40 Cal. 278; Walden v. Murdock, 23 Cal. 548; McDonald v. McConkey, 57 Cal. 325. The rule has no application where the facts presented on the second appeal are materially different from those on which the decision was rendered. Nieto v. Carpenter, 21 Cal. 454; Meeks v. Railroad Co., 56 Cal. 513; Cross v. Zellerbach, 63 Cal. 623; Dodge v. Gaylord, 53 Ind. 365.

We come now to an examination of the points made by the appellant on the merits. The first point is that the finding that the alleged marriage contract was executed by the defendant is not sustained by the evidence. There is direct and positive evidence in support of this finding, which brings the case clearly within the well-established rule that where there is a substantial conflict in the evidence this court will not disturb the finding. The second point is that the evidence does not sustain the finding that "the plaintiff and defendant commenced living and cohabiting together in the way usual with married people, although their cohabitation was kept secret, and so continued for the space of more than one year," and that "during all of said time the plaintiff and defendant mutually assumed towards each other marital rights, duties, and obligations." Both of these branches of the finding complained of will be examined together; and, in order to consider the evidence, and apply the law thereto in such way as to be understood, it becomes absolutely necessary to set out the material facts which the evidence in favor of the respondent tends to prove, and a part of the evidence itself, which might otherwise be profitably omitted.

The alleged marriage contract bears date August 25, 1880, and the respondent claims that it was executed as of that date. The contract itself contains a stipulation on the part of the respondent that she will keep its contents a secret for two years. Giving full faith and credit to the respondent's evidence in support of these findings, it appears that the contract was written by her at the dictation of Mr. Sharon, and signed by them; that, upon the contract being signed, they immediately separated, she going to the Galindo hotel in Oakland, and he to Virginia City, Nev. Soon after, and before Mr. Sharon's return, the Galindo hotel was destroyed by fire, and the respondent removed to the Baldwin hotel in San Francisco. It does not appear that there was any communication between the parties during his absence at Virginia City. He returned a few days before the 25th of September, which was just after the respondent had removed to the Baldwin. On the 25th of September he wrote her several notes, sent by a private messenger. They were as follows:

"My Dear Allie: Can you see me in the parlor of the Grand at five o'clock? Want to put you on your guard about some matters. Answer. Yours, WILLIAM SHARON. Monday, September 25, 1880."

"Palace Hotel, San Francisco, September 25, 1880. My dear Miss Hill: Can you meet me this evening, say about 5 o'clock, in parlor of the Grand Hotel? Something I want to tell you about of interest to yourself. Will not do to meet you at the Baldwin, so if you cannot see me at the Grand, name a place and hour. Very truly, WM. SHARON."

"Palace Hotel, San Francisco, September 25, 1880. My Dear Allie: There are reasons why I should not call. But as we have tried to meet, and failed, will call in twenty minutes after you get this, and explain. Yours, W. SHARON. Will call at your room."

The respondent testifies that he had called to see her before the 25th, when these different letters were written, "nearly every evening and every afternoon; he was there constantly;" that upon his visit after sending the last above note he said there was no use talking, she must leave the Baldwin, and go either to the Palace or the Grand; that his coming there, and being with her so much, created a good deal of comment; that some parties were going to attempt to put up a job on them, so as to expose them, and he would have to come out and acknowledge the marriage. He accordingly gave her a letter to Mr. Thorn of the Grand, as follows:

"My Dear Sir: The bearer, Miss Hill, a particular friend of mine, and a lady of unblemished character, and of good family, may want rooms. Give her the best, and as cheap as you can, and oblige, WM. SHARON. Sep. 25th, 1880."

She accordingly took rooms at the Grand. Mr. Sharon, she says, was away a good deal of the time following, but when in the city he had rooms at the Palace Hotel, and she at the Grand. He paid for the furniture to furnish her room, and money with which to pay her expenses, amounting to $500 a month, as agreed upon, between them. She visited him at his rooms, sometimes taking meals with him there, sometimes spending the evening or the night with him. She at one time, when he came down from Virginia City, gave a musical for him at her rooms, to which a number of persons were invited and were present. Whether the guests knew the musical was given for him or not does not appear. She at one time went with him to his place at Belmont, near the city, taking a lady friend with her, she says, for the reason that "I did not care to go down alone, as it was not known that we were married." She visited Belmont at several different times subsequently, but always in company with others; never with him alone. At some of those times, she says, she went to assist him in entertaining company. The following are some of his invitations to her to take meals with him:

"My Dear A.: Come and take dinner. Answer."

"Miss H.: Have ordered a nice dinner, and have a sample bottle of wine I want you to try."

"My dear Allie: Come over and join me in a nice bottle of champagne, and let us all be gay before Christmas. December 21, 1880."

She was invited to and attended a general reception given at the marriage of his daughter, and was given blank invitations by him to fill up and send to her friends.

She testifies in general terms: "During the fall of 1880, down to the time Mr. Sharon went east, I spent my nights with Mr. Sharon in his own apartments at the Palace Hotel. I used to go everywhere with Mr. Sharon. He scarcely went anywhere that I did not go with him; either riding or driving, or attending to business, or going to Oakland on business, that he did not take me with him." He frequently introduced her to friends and acquaintances, but always as Miss Hill. The court below found that he "never introduced her as his wife, nor spoke to her as such in the presence of other persons." There were certain letters purporting to be from him to the respondent, and which she says were written by him, addressed, "My Dear Wife." They were as follows:

"My Dear Wife: In reply to your kind letter I have written Mr. Thorn, and inclosed same to you, which you can read, and then send it to him in an envelope, and he will not know that you have seen it. Sorry that anything should occur to annoy you, and think my letter will command the kind courtesy you deserve. Am having a very lively and hard fight. But think I shall be victorious in the end. With kindest consideration, believe me, as ever, WM. SHARON."

"My dear Wife: Inclosed find $310 to pay bills with, etc. W. S. August 29, 1881."

"My Dear Wife: Inclosed send you by Ki the balance, $250, which I hope will make you very happy. Will call this evening for the joke. Yours, S. April 1st."

"Palace Hotel, San Francisco, October 3, 1881. My Dear Wife: Inclosed $550, which will pay expenses till I get better. Will then talk about your eastern trip. Am much better to-day; hope to be up in three or four days. Truly, S."

About the 24th of August these parties began to have difficulty. He charged her with having abstracted some of his papers, which she denied; and she testifies he demanded her signature to a paper to the effect that she was not Mrs. Sharon, and agreeing to pay her $500 a month for life, which she refused to sign. She was then turned out of the rooms at the Grand Hotel, under instructions from him. This was in December of 1881. In connection with her removal from the hotel she wrote the following letters to him, which throw light upon the relations the parties then bore to each other:

"My Dear Mr. Sharon: I have written you two letters and received no reply, excepting to hear that they have been read & commented upon by others than yourself. I also hear you said you were told that I said I could and would give you trouble. Be too much of a man to listen to such talk, or allow it to give you one moment's thought. I have never said such a thing, or have I had such a thought. If no woman ever makes you any trouble until I do, you will go down to your grave without the slightest care. No, Mr. Sharon, you have been kind to me. I have said I hope my God may forsake me when I seise to show my gratitude, & I repeat it, I would not harm one hair of your dear old head, or have you turn one restless night upon your pillow through any act of mine. If you are laboring under a mistake, and not bringing the acquisition for the purpose of quarreling with me, the time will come when you will find out how you have wronged me, & I believe you too much of a man at heart not to send for me & acknowledge it to me. But in your anger you are going to the extreme. I have no way of proving to you my innocence, but God knows I am innocent, as much so as your own daughter, who is now in England. But when I say you are going to the extreme, I mean by calling Thorn or any of your relatives or outsiders, and letting them know of your anger—it simply gives them an opportunity of saying ill-natured things of me, which are unnecessary. Mr. Sharon, I have never wronged you by word or act, and were I to stay in this house for a thousand years I should never go near your door again until you felt willing to say to me you had spoken unjustly to me. You once said to me, 'There was no woman that could look you in the face & say, "William Sharon you have wronged me.'" If that be the case don't let me be the first to utter the cry. I had hoped to always have your friendship & best will throughout life, and always have your good advice to guide me, & this unexpected outburst & uncalled-for actions was undeserved. If you would only look at how absurd and ridiculous the whole thing is, you surely would act with more reason. Why should I do such a thing? What was I to gain by doing so? Pray give me credit for some little sense. I valued your friendship more than all the world. Have I not given up everything and everybody for it, & one million of dollars would not have tempted me to have risked its loss. I feel humiliated to death that Thorn or any one else could have it to say I was ordered out of the house. I have a world of pride, & I ask you to at least show me the respect to let Thorn have nothing more to say or do in the affair. I have always been kind to you, & tried to do whatever I could to please you, & I hope at least in your unjust anger you will let us apparently part friends, & don't do or say anything that could create or make any gossip. Think how you would like one of your daughters treated so. If you have any orders to give or wish to make known, make them known in any other way than through your relatives, or through Thorn. Don't fight me. I have no desire or wish to in any way be unkind to you. I have said nothing to any one about the letter I have received, nor do I wish to even speak to Thorn on the subject. You have placed me in a strange position, senator, & all the pride in me rebels against speaking upon the subject. I have been looking at some very nice places, but I cannot get them until some time during the coming month. If you still desire me to go away, make it known to me, & I will obey you. As ever, A."

"Palace Hotel, San Francisco, ——, 188–. My Dear Mr. Sharon: I cannot see how you can have any one treat me so—I, who have always been so good and kind to you—the carpet is all taken up in my hall—the door is taken off and away—and it does seem to me terrible that it is you who would have done—I met Mr. Thorn in the hall as I started to come over to see you, and asked him if you had order such a thing done—& he said that I must move out; that it was your wish—I told him that I had written you a note when I received his, and told you if you wished me to go to send me word—for it was not convenient to get the place I wanted until some time in this month—he said that you had told him to see that I went—so I said no more, but came over to see you—Ah, Senator, dear Senator, do not treat me so —whilst every one else is so happy for Christmas, don't try to make mine miserable—remember this time last year—you have always been so good, don't act so—now—let me see you and talk to you—let me come in after Ki has gone, if you wish—& be to me the same Senator again—don't be cross to me—please don't—or may I see you, if only for a few minutes—be reasonable with me, and don't be unjust—you know you are all I have in the world—& a year ago you asked me to come to the Grand—don't do things now that will make talk—you know you can find no fault with me—may I see you for a few minutes, & let us talk reasonably about all this—I know you will —I know it is not in your nature to be so hard to one that has been so much to you —don't be unjust—Say I may see you.—"

"Mr. Sharon: I received a letter from Mr. Thorn in regard to my room. Of course I understand it is written by your orders, for no human being can say aught of me except with regard to yourself. Now, Mr. Sharon, you are wronging me; so help me God, you are wronging me. I am no more guilty of what you have accused me than some one who never saw you; and would you, who asked me to come to this house, whom I have been up with nights and waited on and cared for, and would have done anything on earth to help you, be the one to wrong and injure me,—a man whom the people have placed enough confidence in his honor to put him in the United States senate, to stoop to injure a girl, and one whom he has professed to love? Is——"

From the way this letter terminates a part of it must have been missing. She took up her residence at a private house after leaving the Grand, and during the summer of 1882 they seem to have adjusted their difficulties to some extent, and she again visited him at his rooms; but there is nothing in these visits tending in any way to strengthen the respondent's case. At one time she secreted herself, and saw Sharon and another woman undress and go to bed together in his room, and afterwards told it as a laughable joke, and this at a time when she testifies she was his wife. Again, at another time, evidently when she began to think it necessary that she should have some proof of her intimacy with him, she secreted a young girl, not yet 20 years of age, and who seems to have become a kind of a confidant of hers, behind the bureau in his room to see Sharon and herself go to bed together, and hear what was said, and the girl remained there until they had retired and he had fallen asleep, and then crept out of the room.

The defendant testified positively that the relation of husband and wife never existed between him and the plaintiff; that she was his mistress, for which he agreed to and did pay her $500 a month; that the alleged marriage contract was never signed by him, and that he never addressed a letter to her as "My Dear Wife;" and there was evidence strongly tending to show that the contract and addresses to these letters were forgeries. It seems to us that this evidence shows conclusively that these parties did not live and cohabit together "in the way usual with married people." They did not live or cohabit together at all. They had their separate habitations in different hotels. Her visits to his room and his visits to hers were occasional and apparently as visitors. They had no common home or dwelling-place. This did not constitute a living together, or cohabitation. Yardley's Estate, 75 Pa. St. 207; Ohio v. Connoway, Tapp. 90. Their acts and conduct were entirely consistent with the meretricious relation of man and mistress, and almost entirely inconsistent with the relation of husband and wife. It may be said that the public manner in which he received her, and introduced her to his friends, was inconsistent with his claim that she was his mistress, and not his wife. This might be so with some men, but the record before us bears unmistakable evidence of the fact that this man had sinned so long and so openly in this respect that he did not care to conceal his wrong-doing even from his own family. Besides, it must be remembered that there was nothing openly improper in their relations, in connection with their association with other persons. She was received and treated as a mere lady friend and acquaintance, and not otherwise. That any greater intimacy existed between them than would have been proper as between friends of the opposite sex was carefully concealed from the public.

Again, it may be said that this branch of the finding was immaterial; that it was not a question whether they had lived and cohabited together in the way usual with married people, but whether or not they had mutually assumed marital rights, duties, and obligations; and, although this point is not directly made by the respondent, we are inclined to that view, except so far as it was necessary to show cohabitation, or a living together as husband and wife in order to sustain the other branch of the finding, and for that reason pass to the real question in the case, viz., whether the evidence was sufficient to sustain the finding that they "mutually assumed towards each other marital rights, duties, and obligations." The contentions of opposing counsel on this important question turn mainly upon the understanding they have as to what is necessary to constitute the mutual assumption required by the statute, and their views of the statute are radically different, and in our opinion the construction claimed by each of the parties is strained and unwarranted. The position of the appellant is that to constitute a mutual assumption of marital rights, duties, or obligations, it is not sufficient that such rights, duties, and obligations be fully and mutually assumed by the parties, as between themselves, but that they must be openly and publicly assumed. This is based on the theory that this mutual assumption is intended by the statute to take the place of a solemnization of the marriage, and must be such as to furnish evidence, on the part of third parties, who are disinterested, of the fact of marriage. We can easily conceive of a case where parties have fully assumed all of the rights, duties, and obligations of husband and wife in such way as to fill the requirements of the statute without making known the fact to the public, yet without any direct act of concealment, or any intention to conceal their true relation towards each other. For example, if a couple should consent to marriage, as the statute requires, and take up their abode in some place uninhabited as yet by others, and live openly and in good faith as husband and wife, in the way usual with married people, we are quite clear that it could not be said that because of the fact that their assumption of the rights and duties of husband and wife was unknown, the marriage should be held to be invalid. The contention of the respondent is thus expressed in her brief: "We repeat, the first mutual act, be it of sexual commerce, or the assumption of any other right, duty, or obligation, of the marital relation, after the execution of the written contract of marriage, instantly establishes the relation of husband and wife." The exigencies of her case drive her to this position. If it cannot be upheld the conclusion reached by the court below must inevitably be wrong.

Let us see to what this would lead us. It means, supposing a case, that where a couple are associated together in the meretricious relation of man and mistress, and in the habit of meeting occasionally, solely for the purpose of gratifying their passions, and, while so connected, they consent, no matter how informally, to marry, and thereafter continue to live precisely as before, the mere fact that sexual intercourse, under such circumstances, follows after the consent, amounts to a mutual assumption of marital rights, duties, and obligations, and from that time they are husband and wife. It means, therefore, that, in some cases at least, this requirement of the statute amounts to nothing. It means that a couple may consent to marry; may live precisely as if they are unmarried, and their relations meretricious; to the world they may appear to be unmarried, and their children, if they have any, appear to be bastards; if they conclude to violate their "consent" to marriage they may go their ways; that they were husband and wife cannot be proved, and their children are bastards indeed. We cannot so far reflect upon the law-making powers as to hold that such was their intention. The case before us presents the strongest possible argument against this construction. Take the respondent's statements to be true in every respect. She entered into this contract believing it constituted a legal marriage. She consented to conceal from the world her true relation to the defendant, and place herself in a position that might, and if she should be detected in the act of treating him as a wife, would, inevitably, brand her as his mistress. He could deny her, and she would be helpless, and her character would be ruined. On the other hand, such a construction would enable a designing and unprincipled woman to impose herself on a man as his wife without right and against his will. We think just such results were intended to be prevented by the statute we are considering, and that in requiring that they should assume marital rights, duties, and obligations it was clearly intended that they should so conduct themselves towards each other as to give evidence to those with whom they might come in contact that they were husband and wife.

With these general observations we notice some of the authorities relied upon by counsel. Counsel for respondent cite no authorities in favor of their position, and dismiss the question so important to their client in a general statement of their views covering three pages of their brief. The New York Code, from which ours was taken, did not contain the clause we are considering. Code, N. Y. § 34. It must be assumed, therefore, that by the change made our legislature intended to add something more to the contract of marriage than was necessary under the New York Code. Section 35 of the New York Code and section 57 of our own do not relate to what shall be necessary to constitute a valid marriage, but to the manner in which it shall be manifested and proved. Section 36 of the New York Code and section 56 of our own provide who shall be capable of marriage. It is said in the prevailing opinion on the former appeal that "consummation," as used in sections 56 and 57 of our Code, means "simply sexual intercourse, copulation, nothing more nor less." If this be conceded, it is unimportant, as section 55 does not use the term. If it had been intended to prove that mere consummation, in the sense indicated, following consent, should amount to marriage, no doubt this well-defined legal term would have been used as it was in the following sections. That it was not used is amply sufficient to show that the legislature intended that something more than mere consummation, by copulation, should be required. As to what the meaning of the language is, we quote with approval the following language in the dissenting opinion of Mr. Justice McFARLAND on the former appeal: "Again, what plainer and more obvious construction can be put upon the language in question than to say that the legislature meant by it that kind of conduct which generally, and we might say universally, characterizes married people who have assumed marital rights, duties, and obligations? The legislature must be presumed to have had that common knowledge which all people have of the familiar and habitual social customs of the country with respect to the marriage relation, and of the usual deportment of persons who have assumed that relation. Now, can it be pretended that married people usually (or at all) refuse to recognize each other as husband and wife in the presence of others; that they never speak of each other as husband and wife; that they never so live together that their residence, however humble,—though it be but a room in a garret,—is the recognized home of a family, with its usual relations and associations; that they so carefully guard their conduct that they are never reputed, or even suspected, among their acquaintances and friends to be husband and wife; that they never indulge in any deportment whatever that would intimate in the slightest way to any human being except themselves that they were married? It seems difficult for any human understanding not too much swayed by artificial distinctions and attenuated niceties to receive such conduct as an 'assumption of marital rights, duties, or obligations.' What marital rights has a woman 'assumed,' who could not even protect herself against apparent shame by asserting the honorable name of wife? What marital obligations of protection can a man fulfill towards a woman whose wifehood he publicly repudiates? And how can society enforce its rights in a relation of which it can have no knowledge, and of the existence of which it has no grounds of suspicion? And what of the children, if any, of such a marriage? Is there to be no one whom they can call 'father' or 'mother?' And what possible protection could there be against fraudulent pretenses of marriages, made, perhaps, for the first time after the deaths of alleged husbands or wives?"

We may gather from common-law rules and the decisions of the courts of other countries and states some idea as to what has been regarded as requisite to a valid marriage, but the language of our Code is peculiar, and stands alone. Whatever may have been the common-law rule on the subject, the express language of the Code must control, if we can ascertain its meaning. But certainly, if consent and consummation by sexual intercourse were sufficient to constitute marriage at common law, it clearly appears to have been the intention of our legislature to change that rule, and require something more. But where proof of marriage depends on the conduct of the parties towards each other, authorities are ample to show that the evidence in this case was wholly insufficient to prove such marriage. Cohabitation, which is evidence of the assumption of marital rights, duties, or obligations, must be a "living together as husband and wife." Cannon v. U. S., 116 U. S. 55, 6 Sup. Ct. Rep. 278; Calef v. Calef, 54 Me. 365; Yardley's Estate, 75 Pa. St. 211; 1 Bish. Mar. & Div. § 777, and note; 3 Amer. & Eng. Cyclop. Law, 308; 2 Com. Dig. 194; Clark v. Cassidy, 64 Ga. 662; Port v. Port, 70 Ill. 488. At common law, and under statutes authorizing marriage by consent, without formal ceremony, if the parties agree presently to take each other for husband and wife, and from that time live together professedly in that relation, proof of these facts is held to be sufficient to constitute marriage. Hutchins v. Kimmell, 31 Mich. 126; Teter v. Teter, 101 Ind. 134. Certainly nothing less than this can be held to be sufficient under the latter clause of section 55. The proof of the contract is not enough. There must be evidence sufficient to show that they assumed the relations of husband and wife, which calls for the same degree of proof, if cohabitation be depended upon, as was required at common law to establish the marriage. In our judgment sexual intercourse is not necessary to the validity of a marriage of the kind we are considering. If the parties agree to marriage, and commence to dwell together, in pursuance of the contract, as husband and wife, they have assumed marital rights, duties, and obligations, and are legally married, although sexual intercourse is not had until later, or not at all. The commencement of true and open matrimonial cohabitation, under such an agreement, is a mutual assumption of marital rights, duties, and obligations, while mere copulation without such cohabitation is insufficient. The courts have used the word "consummation" generally as the completion of the marriage relation, and not necessarily as the act of sexual intercourse. Clayton v. Wardell, 4 N. Y. 238; Lewis v. Ames, 44 Tex. 341; Bashaw v. State, 1 Yerg. 193; Clark v. Cassidy, 64 Ga. 662; Newbury v. Brunswick, 2 Vt. 160; Robertson v. Cole, 12 Tex. 363. And even where a marriage *per verba de future cum copula* is allowed, the marriage does not become consummated by copulation unless the parties so intend, (Peck v. Peck, 12 R. I. 488; Stoltz v. Doering, 112 Ill. 234; Hebblethwaite v. Hepworth, 98 Ill. 126;) and where the fact is to be established by the conduct of the parties, under a statute like ours, the copulation must be under such circumstances as to give evidence of the fact that it is not illicit. Under our statute two things must be proved to constitute a marriage, viz., the contract and the mutual assumption of marital rights, duties, and obligations. The proof of one of these cannot establish the other. Therefore the assumption required must be proved by something more than copulation; and nothing less than cohabitation in the manner above stated will establish the necessary fact where it depends for its proof upon the acts and conduct of the parties towards each other and the public. Hebblethwaite v. Hepworth, supra. In the light of the statute and these authorities, does the evidence sustain the clause of the finding under consideration? Cohabitation is evidence from which marriage may be presumed. 1 Fras. Husb. & Wife, 391. So the presumption that parties have assumed marital rights, duties, and obligations towards each other, under the statute, may be established by like evidence. But by what stretch of judicial interpretation of the statute, upon what rule of evidence or of common sense, can it be held that parties assume a relation by uniformly and persistently denying it, or upon what principle of law or evidence can it be presumed that parties are husband and wife from evidence that they have lived as single and unmarried people, and held themselves out to the world as such? These parties had no common home or place of abode. They held themselves out to their relatives, friends, acquaintances, and the world as unmarried. The respondent never at any time assumed the name of her alleged husband. There is nothing to show that they had taken upon themselves the mutual duties and obligations of the sacred and confidential relation of husband and wife. Their private letters and notes, with the single exception of the addresses "My Dear Wife" on some of them, which are so vigorously attacked as forgeries, do not contain a single word indicating that such a relation existed between them, no mention of it, no reference to each other as husband or wife, no words of affection or endearment, nothing that one might expect to find in communications between husband and wife. But the strongest and most conclusive evidence to our minds that no such relation existed, or was supposed by the respondent to exist, is presented by her letters to him when she was about to be turned out of doors at his instance. She appeals to his friendship, but not to his love, or to his duties and obligations as a husband. She pleads her service to him as a friend, and as a nurse, but not as a wife. No claim of her right to his protection; no assertion of her rights as a wife. It is past all belief that any woman could have passed through an experience so bitter and humiliating, and allow herself to be thrust into the street by her own husband, and in her many appeals to him make no mention of the relation that existed between them. We are clear that the evidence was insufficient to sustain this finding. It is not a question of the weight of the evidence, but whether, giving full credit to it, it proves the assumption by these parties of marital rights, duties, and obligations. It is a question of law, and not of fact, and, as matter of law, we hold the evidence to have been insufficient.

The appellant contends that the court erred in allowing the respondent to prove by the witness Martha Wilson that the respondent, in October, 1880, exhibited to her the alleged marriage contract, and the conversation that occurred between them at the time with reference to it. The evidence of the existence of the paper at the early date mentioned was competent. It at least tended to show that it had not been forged subsequent to the commencement of difficulties between the parties, when the temptation to manufacture evidence would seem to have been the strongest. As to the conversation, it consisted of a statement that the respondent had requested the witness to keep secret the fact that she had seen the paper. We cannot see how the defendant could have been injured by this. The evidence that the respondent was attempting to keep the contract a secret tended to show that the writing was a forgery, rather than that it was genuine, and that the contract, if genuine, was not made in good faith, and for that reason could not amount to a sufficient basis for the alleged marriage. Therefore, the ruling was harmless. Another female witness for the defendant was asked by the plaintiff on cross-examination: "How many gentlemen have you gone with besides your husband, when your husband was not present, to the California House, and taken luncheon?" in connection with which plaintiff's counsel proposed to show "that this lady is in the habit of visiting houses that are not reputable, and a good deal more, even, than that." The question was objected to on the ground that it was irrelevant, immaterial, and incompetent. The court overruled the objection. This ruling was erroneous, and the statement of counsel in connection with it was improper. A witness cannot be impeached by evidence of particular wrongful acts, nor is it proper to question the witness with reference to such matters. Code Civil Proc. § 2051; Hinkle v. Railroad Co., 55 Cal. 627; People v. Hamblin, 68 Cal. 101, 8 Pac. Rep. 687; Com. v. Shaw, 4 Cush. 593. But the witness was not required to, and did not, answer the question, and therefore the ruling resulted in no injury. The answer of the witness, if given, might have shown that she had been guilty of no wrong or impropriety. A witness, having testified favorably to the defendant, on cross-examination by the plaintiff testified that her husband was dead; that he had left a will, of which she was the sole legatee; that he died of paralysis and softening of the brain, and that she could not tell the exact state of his mind. Whereupon the following occurred: "*Question.* Was he of sound mind? Did you consider him of sound mind when he made his will? *Counsel for Plaintiff.* I object to it on the ground that it is irrelevant and immaterial. *The Court.* You may ask whether, at the time he made the will, he was imbecile, and that she went into the court and said that he was of sound mind. (To which ruling defendant's counsel then and there duly excepted.) *Counsel for Defendant: Q.* Did you not, at the time he made that will, know that he was not in a sound and disposing mind, and able to make a will? *A.* When my husband made that will he was sick. *Q.* Did not you know when your husband made that will that he was utterly unable to take care of himself, and of weak mind, and unable to make a will? *A.* Yes, I did. I was the executrix and sole devisee in that will. I do not know that when that will was admitted to probate I swore that he was of sound mind. I said whatever my lawyers told me to say. I never read a single paper." This evidence could have been offered for no other purpose than to impeach or discredit the witness; and for that purpose, or any other, it was clearly incompetent and immaterial. As we have said above, a witness cannot be impeached, on cross-examination or otherwise, by proof of specific wrongful acts. The matter about which she was questioned was entirely foreign to the case, and was wholly immaterial, except to discredit the witness, and thereby break the force of her testimony. Counsel for respondent contend that the questions following the statement of the court as to what the plaintiff might ask were not objected to, and therefore no question is presented for our consideration. The first question, which was improper, was objected to. The court then stated in reply to the objection just what the plaintiff might ask, to which the defendant excepted, and the improper questions, authorized by the court in advance, were asked and answered. It was not necessary for the defendant to renew his objections to the questions, as they were asked, so long as they were within the direction of the court as to the extent to which the examination might go. Again, it is claimed that the right to refuse to answer the questions was a personal privilege of the witness, and that the questions could not be objected to by the defendant. But this point has no merit. The weight which should be given to the testimony of the witness was a question in which the defendant was interested. He had the right to object to any questions on cross-examination which tended to weaken the evidence of the witness on direct examination, and which were improper, without reference to the question whether the witness might also refuse to answer on the ground of privilege. If the questions had been pertinent the right to object to them or refuse to answer would have rested with the witness alone. Clark v. Reese, 35 Cal. 89, 95. But the question here was not pertinent, and for that reason was subject to the objection of the party.

A witness, being called for the defendant, testified that he was an attorney at law, and said further: "I know Miss Hill. I have seen her in this court-room, and I met her once before. That was a year ago, on the corner of Montgomery and California streets. She was with Mrs. Samson. I had two conversations previous to that, in the same month of March, a year ago, with Mrs. Samson. At that time Mrs. Samson introduced me to Miss Hill. She said: 'This is the lady I have spoken to you about, that desires to bring an action against Mr. Sharon for breach of promise of marriage.' Now, the plaintiff here, if this was the lady, she had a veil on. I never saw her before or since, until I came here in this court-room. Mrs. Samson said she had fifty letters. I told her three or four letters—good, square promises from old Sharon—was all I should want. She said she hadn't time to look over them, but she would in a few days; and I told her when she got ready to come into my office, and fetch the papers with her. The ladies were coming down from Montgomery street, from the north going south, on the west side of the street, and after the conversation I passed on. It was, I suppose, about 4 o'clock in the afternoon. This was in March, 1883,—about the 28th or 29th of March." And on cross-examination he testified: "I do not remember how she was dressed. She had a dark veil on at the time, and I don't swear positively that that is the woman, but I believe this is the lady. I did not see her face except through the veil. I was admitted to practice in the supreme court of this state a year and a half ago. At the time of the conversation referred to I was a lawyer. I was not her lawyer. If she had employed me instead of you, then, of course, I would have been in a different position. She employed you instead of me. * * * When Mrs. Samson introduced me to the lady, who was veiled, she said, 'This is the Miss Hill,' and I think I bowed to the lady, and the other conversations Mrs. Samson spoke about, which you didn't want to hear; and this lady said, 'Well, I have fifty letters from Mr. Sharon.' I told her all I wanted was three good, square letters that had a good, square promise. The reply that she made was that she hadn't yet looked over her letters sufficiently, but that she would come back in a few days. This is the last I saw of her. I never saw her since until I saw her here in this court-room. I cannot say that the statement that I made to her about the three letters was advice given her as a lawyer, because I was not her lawyer. Mrs. Samson brought this lady to me for the purpose of making her a client; and I had a talk with her with the understanding that she was to get these letters, select the three with the promises in them, and bring them to me. I understand it to be the duty of a lawyer to keep secret what he hears from his client, but I do not understand it is the duty of a lawyer, if he is called upon to testify in court, that he can claim his privilege as a lawyer to testify to anything he hears from anybody who is not his client and not given to him in a confidential manner. * * * I think Mrs. Samson first spoke to me about the case about the 18th or 19th of March, in front of the Nevada Bank, or somewhere along there. She asked me how I was getting along. She says, 'I have got a case for you that there is $100,000 in; do you want to make it?' I said, 'Yes.' She said, 'You will have to furnish some money. Have you got any?' I said, 'I have got $6,000 or $7,000 in this bank. If it is a legitimate case I want it.' 'Well,' says she, 'it is.' I says, 'What is it?' Says she, 'It is a breach of promise case against Mr. Sharon.' I said, 'Oh, is that all?' She said it was, and I met her again. The next time I met her she said: 'Well, what do you think of that case now?' I said, 'I never gave it a thought.' She said, 'I am going to fetch the lady down.' I said, 'All right; fetch her down.' The next time I met her was on the sidewalk in front of my office. I did not take her up into my office. I had never met Miss Hill before." The plaintiff then moved to strike out the whole of the testimony of the witness "on the ground that it was a privileged communication, and that he had no right to disclose it," and the motion was sustained, and the evidence stricken out, to which the defendant excepted. This ruling was erroneous for two reasons,—it was not shown that the witness was the attorney for the plaintiff, or that the communication was confidential, if he had been. The witness testifies positively that he was not her attorney, and the facts testified to by him show that he was not. And the communication that took place was on a public street, and in the presence of, and mostly with, a third party, and was not, for that reason, in any sense, confidential, or in the course of his employment.

The Code provides: "An attorney cannot, without the consent of his client, be examined as to any communication made by the client to him, or his advice given thereon, in the course of professional employment." Code Civil Proc. § 1881. The burden is upon the party seeking to suppress the evidence to show that it is within the terms of the statute. Earle v. Grout, 46 Vt. 113; Weeks, Attys. § 147. And it must appear that the witness learned the matter in question only as counsel, or attorney or solicitor for the party, and not in any other way, and that it was received professionally, and in the course of business. Hager v Shindler, 29 Cal. 61; George v. Silva, 68 Cal. 272, 9 Pac. Rep. 257; Hatton v. Robinson, 14 Pick. 423; Goltra v. Wolcott, 14 Ill. 90; Granger v. Warrington, 3 Gilman, 309; De Wolf v. Strader, 26 Ill. 225; Borum v. Fouts, 15 Ind. 52; Bank v. Suydam, 5 How. Pr. 254; Flack v. Neill, 26 Tex. 273. And communications made by a third person, with a view to employ the witness as an attorney for the party, are not privileged as confidential, unless it be shown that such communications were authorized to be made by the party for whom such person assumed to act. Lynde v. McGregor, 13 Allen, 178. Nor does the rule apply to conversations had between the attorney and a third party, or between the third parties in the presence of the attorney and client. Gallagher v. Williamson, 23 Cal. 333; Railway Co. v. Yeates, 67 Ala. 164; Moffatt v. Hardin, 22 S. C. 9; Levers v. Van Buskirk, 4 Pa. St. 316. The communication must be confidential, and so regarded, at least by the client, at the time. The presumption is that all communications between attorney and client, in the course of professional employment, are confidential, but this is a presumption that may be rebutted; and, if it clearly appears that the same were not intended by the client to have been confidential, they are not privileged. Hager v. Shindler, 29 Cal. 63; Gower v. Emery, 18 Me. 82. The respondent contends that there was no error in this ruling, for the reason that the witness did not positively identify her as being the person who was present at the time the conversation took place. But the witness testified that he believed her to be the person. If he was mistaken in this it could easily have been proved. But, whether it could or not, the point made goes to the weight to be given to his testimony, and not to its competency, and could not justify the order striking it out.

Again, it is urged that the question is not properly presented. Counsel say that the question submitted to the court below was a question of fact to be determined from evidence, and that, in order to present the question properly, it must have been specified in the statement that the evidence was insufficient to sustain the finding of the court that the witness was incompetent. This would be a novel practice, indeed, and one that we are not inclined to adopt. While it is true that the question of the competency of the witness was one of fact, the evidence upon which the court ruled against the testimony and struck it out appears in the record, and the question as to the correctness of the ruling is directly and properly presented by an exception to the ruling. It is further contended that the evidence was immaterial, and to strike it out worked the appellant no injury. The statement in the presence of the respondent, that she was the person who desired to bring an action against Mr. Sharon for breach of promise of marriage, was inconsistent with her claim that she was then his wife, was a declaration against her interest, and, if not true, called upon her for a denial. Having failed to deny it, the fact that such statement was made, and her failure to controvert its truth, were competent and material evidence against her.

As to the main question, whether the communication was confidential or not, counsel for respondent cite a number of cases, but they are not in conflict with the rules above stated. Some of the cases hold that communications made in contemplation of an employment, although the employment did not occur until later, or the attorney for some reason subsequently refused to accept employment, should be protected, (Young v. State, 65 Ga. 525;) and others, that it is not necessary that a fee should have been paid at the time of the communication. Cross v. Riggins, 50 Mo. 336; Bacon v. Frisbie, 80 N. Y. 394, McLellan v. Longfellow, 32 Me. 494. We do not question the correctness of these decisions, but they do not reach this case. There is no evidence here that these communications were made in contemplation of the employment of the witness, or that the respondent intended, at any time, to employ him, or to take his advice, as her attorney.

The appellant contends that the contract of marriage, conceding its execution, was void on account of the clause of secrecy contained in it. In discussing this question counsel have confounded the contract or consent required by the statute, and the other requirement that the parties shall assume marital rights, duties, and obligations. They say: "We insist that an agreement for absolute secrecy of the marriage relation is void, as contrary to good morals, within the true intent and meaning of the third subdivision of section 1667 of the Civil Code." And their whole argument proceeds upon the assumption that the agreement was to keep secret the marriage relation. It is this assumption alone that gives force to their argument. But there was in fact no agreement or stipulation in the contract that the marriage relation claimed to have existed between these parties should be kept secret. The stipulation was: "I agree not to make known the contents of this paper, or its existence, for two years, unless Mr. Sharon himself see fit to make it known." This stipulation did not in any way operate to prevent the full and open assumption by them of marital rights, duties, and obligations, nor could it prevent her from declaring that they were husband and wife. This written consent was not necessary to the validity of the marriage. Had they commenced at once to live together as husband and wife, under a verbal consent to become such, and had mutually and openly assumed marital rights, duties, and obligations, the marriage would undoubtedly have been upheld. We have decided that, decause they did not assume such rights, duties, and obligations, or, in other words, concealed and kept secret the marriage relation, there was no valid marriage, but we are quite clear that the secrecy clause in the contract, if the statute had been complied with in this respect, would not have rendered the marriage invalid, and that is the real question involved. Nor do we think it would render the contract void as a consent to marriage, if the statute in other respects had been complied with. Taking this view of the clause of secrecy, it is unnecessary for us to discuss the effect of a strictly secret marriage, which is by stipulation of the parties to be kept secret thereafter. The parties here did keep the marriage and their relation as husband and wife a secret, if there was a marriage, and for that reason we have held above that the marriage was not consummated, but the question was presented by evidence outside of the contract itself, and could not arise in any other way. Order reversed, and cause remanded.

We concur: BEATTY, C. J.; SHARPSTEIN, J.

MCFARLAND, J., (*concurring.*) I concur in the judgment. I also concur in all the points decided in the opinion of Mr. Justice WORKS, and in nearly everything that is said in that opinion. It is barely possible, however, that the opinion might be construed as indicating that the decision of this court on the appeal from the judgment was correct; that is, that the findings support the judgment of the court below, and that its invalidity appears only upon a review of the evidence upon this appeal from the order denying a new trial. I could not concur in that view. I am as fully convinced now as I was on the other appeal, that the findings present a case of logical *felo de se*, and show conclusively, on their face, that the parties did not commence "living and cohabiting together in the way usual with married people," and had not "mutually assumed towards each other marital rights, duties, and obligations." In all other respects I concur in the opinion of Mr. Justice WORKS.

THORNTON, J., (*concurring.*) This is an appeal by defendant from an order denying his motion for a new trial. I agree with what is said in the opinion of Justice WORKS as to the record here, except what is said with reference to certifying exhibits left out of the statement on a suggestion of diminution of the record. I do not understand that on its being made to appear that the record has been diminished by the omission to insert a part of it that this court can order certified to it anything but what is contained in the record in the court below. To constitute a part of the record the exhibits offered in evidence must be inserted in the statement. This may be done by copying them into the statement, inserting them *in hæc verba*, or by stating their substance or contents. The statement must be complete, must have all the evidence engrossed in it, when allowed and certified by the judge. When the exhibits are not inserted as pointed out above, they are not part of the record of the court below, whether on file or not, and cannot be brought to this court by its order on any suggestion of diminution. I have examined the statement as to the exhibits said not to be inserted in it, and find that the contents of several of them do appear in the statement. All of the exhibits referred to are "plaintiff's exhibits." Number 21 is inserted *in hæc verba* on p. 1199 of volume III. The contents of Exhibit 9 are stated in Cushman's deposition, which I think are properly here. It is there entitled "Exhibit C." Exhibit 23 was an invitation given by Sharon to his daughter's wedding, and the contents were stated by plaintiff in her testimony when it was produced, and marked as an exhibit. Exhibit 24 was a blank envelope which contained an invitation to Miss Sharon's wedding, which had been furnished to plaintiff. In the envelope, with the invitation, was a card "to go on a train," which had to be presented at the train. The plaintiff stated that it was such a card. Exhibit 26 is Dobinson's visiting card, so stated by the plaintiff when giving her testimony. Exhibits 51, 54, and 55 appear to be letters shown a witness, (Mrs. Shawhan,) who admitted they were in her handwriting. They were signed "1,132." Could they be material to any issue before this court? Exhibit 71, according to plaintiff's testimony, was a bill and receipt for meals furnished her from a restaurant. Exhibit 8 was a letter produced by a witness, (Cushman,) who stated that it was in the genuine handwriting of the defendant, Sharon. The engrossed statement, in the form in which it now appears in the transcript, was stipulated to be correct by the attorneys for the plaintiff, and on this statement the motion for a new trial was heard. It could not have been heard until the statement was filed, (Code Civil Proc. § 660,) and it could not have been filed until it was engrossed and certified to be correct by the judge, (Id. § 659.) This statement, as it appears here, must have been used on the motion for a new trial, and the statement so used, by the words of the statute, is to go into the record, to be used on an appeal from an order denying a new trial. Section 661, Id. I think that no exhibits at all material have been left out of the record; that those not inserted were omitted because they were regarded by the counsel for both plaintiff and defendant as immaterial.

As regards the depositions, it may be said that the stipulation of the attorneys of plaintiff on the record covers them; and plaintiff cannot object, in the face of this stipulation, to their being regarded as properly in the statement.

In passing on the questions presented by counsel in this case, it becomes necessary to determine what was determined in Sharon v. Sharon, 75 Cal. 1, 16 Pac. Rep. 345. The appeal in 75 Cal. was from the judgment, and this is an appeal from an order denying a motion for a new trial in the same case. The opinion of the court in the former appeal was drawn up by Justice MCKINSTRY and concurred in by SEARLS, C. J., and TEMPLE and PATERSON, JJ. To determine what was ruled on the former appeal we have to examine that opinion. In my judgment the following propositions were there decided to be law and applicable to the case: *First.* That an agreement between a man and a woman to become husband and wife, made *per verba de præsenti*, is not invalidated by the fact that it contains a collateral promise by one of the parties not to make the marriage known for two years, without the consent of the other. *Second.* That under section 55 of the Civil Code it is not necessary to the validity of a marriage, not attended by a solemnization, that the present consent to marry should be followed by a public mutual assumption of marital rights, duties, and obligations. *Third.* That sexual intercourse may be inferred from cohabitation; that evidence that a man and woman have had sexual intercourse, whether direct, or consisting of proof of a further fact from which the intercourse may be inferred, as cohabitation, is, when preceded by the present consent of the parties to marry, evidence that the parties have actually assumed all the duties incident to marriage. *Fourth.* That present consent to marry, kept secret, followed by secret cohabitation, is sufficient to constitute marriage. Near the close of the opinion it is said: "The court below found as facts that during a certain period after the consent to marry 'the plaintiff and defendant lived and cohabited in the way usual with married people, * * * and mutually assumed towards each other marital rights, duties, and obligations.' If, as we have said, they might mutually assume marital rights and duties, although their relation was kept secret, the insertion of the words 'towards each other' does not vitiate the finding, and the finding of facts is conclusive on this appeal." 75 Cal. 36, 16 Pac. Rep. 361. As summing up the ruling in the opinion it is said: "Our conclusion is that the provision of the Code requiring a mutual assumption of marital rights and duties to follow consent does not make it indispensable to the validity of the marriage that the relation between the parties shall be made public." 75 Cal. 37, 16 Pac. Rep. 361. Although the word "public" is used in the portion last quoted from the opinion to qualify the nature of the relation, it should be observed that in the portion previously quoted (which, by a few sentences, precedes the portion last quoted) the qualifying words are, "although this relation was kept secret." It seems to me that the fair construction of the opinion is that it was intended to lay down the rules of law set forth in the propositions above stated, as applicable to the relation between the parties, though it was during the whole period of their intercourse kept secret. In holding that the findings sustained the judgment, the points above stated were, in my view, necessarily held. If they had not been, the court could not have determined to affirm the judgment. Justice TEMPLE concurred in the prevailing opinion, and expressed his views in plain and direct terms. He said: "The word 'consummation' was avoided in section 55, because it has come to be a euphemism for the more indelicate word '*copula*,' and thereby has acquired a more narrow meaning than was intended. Therefore the phrase which only indicates the assumption of the contract relation was used. But in section 57 the word 'consummation' is substituted for the phrase. It cannot mislead here, for it has been defined; but it shows that the mutual assumption of marital rights, duties, or obligations is of the nature of consummation,—something in the nature of part performance of the consent to present marriage; though that is not limited to the *copula*. 'Sec. 57. Consent and consummation may be manifested in any form, and may be proved under the same general rules of evidence as facts in other cases.' 'Subsequent consummation, as well as consent, may be manifested in any form. What can this mean except exactly what I have claimed for it? And if in any form, why not by secret cohabitation, where the husband claims the right, believing himself a husband, and the wife submits because she believes herself a wife?'" 75 Cal. 51, 16 Pac. Rep. 368.

The points ruled as above stated arose in the case, and were argued by counsel. They cannot in any respect be regarded as *obiter dicta*. The points decided in a cause by this court constitute "the law of the case." This has been frequently held by this court. It was substantially so held in the case of Dewey v. Gray, 2 Cal. 377, which was the first case in this court in which the doctrine of the law of the case was applied. In Clary v. Hoagland, 6 Cal. 685, the court (by MURRAY, C. J.) said: "It is well settled that when a case has been taken to an appellate court, and its judgment obtained on points of law involved, such judgment, however erroneous, becomes the law of the case, and cannot on a second appeal be altered or changed." Id. 687, 688. "A previous ruling by the appellate court," said the court, by FIELD, J., in Phelan v. San Francisco, 20 Cal. 45, "upon a point distinctly made may be only authority in other cases, to be followed and affirmed, or to be modified or overruled, according to its intrinsic merits." The same proposition is stated again as sound law in the opinion in Leese v. Clark, Id. 416, 417, and it is further said in that opinion: "The decision is no longer open for consideration, whether right or wrong. It has become the law of the case." See cases cited in Leese v. Clark, supra, and Mulford v. Estudillo, 32 Cal. 131; Megerle v. Ashe, 47 Cal. 632; Jaffe v. Skae, 48 Cal. 540; Donner v. Palmer, 51 Cal. 636; Heinlen v. Martin, 59 Cal. 181. It is true that what has been decided as the law of the case is applicable only while the facts are the same,—substantially unchanged. Megerle v. Ashe, supra; Donner v. Palmer, supra. It is contended here, conceding the rule as to the "law of the case" to be as stated above, that it does not apply to this case,—that it only applies where the cause is sent back to the court *a quo* for some further proceeding to be there had in it; as, when a judgment or order denying a new trial is reversed, and the cause remanded to be again tried. In Leese v. Clark, the question of the conclusiveness of the former decision in this court is considered. It is there said: "But in the case in which the decision is made it is more than authority; it is a final adjudication, from the consequences of which the court cannot depart, nor the parties relieve themselves." After stating that this has been the uniform doctrine of this court for years, and after repeated examinations and affirmations it cannot be considered as open to further discussion, and that it is the doctrine of the supreme court of the United States and of the supreme courts of several of the states, citing several authorities for the statements made, the opinion proceeds thus: "And the reason of the doctrine is obvious. The supreme court has no appellate jurisdiction over its own judgments. It cannot review or modify them after the case has once passed, by the issuance of the *remittitur*, from its control. It construes, for example, a written contract, and determines the rights and obligations of the parties thereunder, and upon such construction it affirms the judgment of the court below. The decision is no longer open for consideration. Whether right or wrong, it has become the law of the case. This will not be controverted. So, on the other hand, if upon the construction of the contract supposed this court reverses the judgment of the court below and orders a new trial, the decision is equally conclusive as to the principles which shall govern on the retrial. It is just as final to that extent as a decision directing a particular judgment to be entered is as to the character of such judgment. The court cannot recall the case and reverse its decision after the *remittitur* is issued. It has determined the principles of law which shall govern, and, having thus determined, its jurisdiction in that respect is gone. And if the new trial is had in accordance with its decision, no error can be alleged in the action of the court below."

The same rule is laid down in Ex parte Sibbald, 12 Pet. 488. In that case the supreme court had entered its decree reversing in part the decree of the superior court of East Florida in U. S. v. Sibbald, (see 10 Pet. 313–325,) and had remitted to the superior court its mandate to be executed. The lower court refused to execute the mandate, and the party concerned (Sibbald) proceeded by petition (there were two) to procure the enforcement of the mandate of the court. On the hearing of these petitions Mr. Justice BALDWIN delivered the opinion of the court. He said: "Before we proceed to consider the matter presented by these petitions, we think proper to state our settled opinion of the course which is prescribed by the law for this court to take, after its final action upon a case brought within its appellate jurisdiction, as well as that which the court whose final decree or judgment has been thus verified ought to take. Appellate power is exercised over the proceedings of inferior courts, not on those of the appellate court. The supreme court have no power to review their decisions, whether in a case at law or in equity. A final decree in chancery is as conclusive as a judgment at law. Both are conclusive on the rights of the parties thereby adjudicated. No principle is better settled, or of more universal application, than that no court can reverse or annul its own final decrees or judgments, for errors of fact or law, after the term in which they have been rendered, unless for clerical mistakes, or to reinstate a cause dismissed by mistake, from which it follows that no change or modification can be made which may substantially vary or affect it in any material thing. Bills of review in cases in equity, and writs of error, *coram vobis*, at law, are exceptions which cannot affect the present motion. When the supreme court have executed their power in a cause before them, and their final decree or judgment requires some further act to be done, it cannot issue an execution, but shall send a special mandate to the court below to award it. Whatever was before the court, and is disposed of, is considered as finally settled. The inferior court is bound by the decree as the law of the case, and must carry it into execution according to the mandate. They cannot vary it, or examine it for any other purpose than execution, or give any other or further relief, or review it upon any matter decided on appeal for error apparent, or intermeddle with it, further than to settle so much as has been remanded. After a mandate no rehearing will be granted. It is never done in the house of lords; and on a subsequent appeal nothing is brought up but the proceeding subsequent to the mandate." 12 Pet. 491. The above, it will be observed, is stated as the settled opinion of the supreme court of the United States as to the course they should pursue upon its decree or judgment, after its final action upon a case brought within its appellate jurisdiction. In the case cited the trial court had taken no action upon the mandate sent down to it. The supreme court held it, nevertheless, as binding on itself as though it had. It laid down the general rule that no court can interfere with its own judgments after its jurisdiction over them has ceased, (except in a few cases, neither of which appears here;) that when the cause has gone beyond its jurisdiction it can neither reverse nor annul its decree or judgment for any errors, whether of fact or law; that in such a case the judgment is just as binding on the higher as on the lower court. The ruling in Sibbald's Case was approved in Bridge Co. v. Stewart, 3 How. 426, and is, no doubt, the settled law of the United States supreme court. There are other cases to the same effect in that court, which need not be referred to. They can be readily found in the digests.

We think it settled law in this state, fixed and beyond debate, that the points involved in a cause finally decided by this court are beyond its jurisdiction; that it has no power to reverse or modify its judgment after the case has passed, by the issuance of its *remittitur*, from its control; that such decision, whether right or wrong, is binding on this court and every other court; that it is a final adjudication, from the consequences of which this court cannot depart, nor the parties relieve themselves. As was said by FIELD, C. J., speaking for the court, in Leese v. Clark, supra: "The court cannot recall the case, and reverse its decision, after the *remittitur* is issued." 20 Cal. 417. Its jurisdiction over the case is gone. The contention of the defendant limiting the applicability of the rule of the law of the case, finds no countenance in any decision of this court. The *remittitur* has long since issued on the former appeal, and cannot now be recalled. The power of this court in regard to that appeal has long since ceased. In none of the cases cited by counsel for appellant (Walden v. Murdock, 23 Cal. 540, 549; Fulton v. Hanna, 40 Cal. 278, 281; and McDonald v. McConkey, 57 Cal. 325) is there anything, in my judgment, adverse to what has been said above. They are all in harmony with it. Where a judgment is affirmed a new trial may still be granted after such affirmance on errors of law not considered or passed on in affirming the judgment, but a new trial cannot be granted when the court, in order to grant it, contravenes what has been adjudicated by the previous decision. The numerous cases decided by this court, with regard to the law of the case, may be easily found by reference to the digests; what has been said above is in line with what is decided in them.

We pass to the points made on the insufficiency of the evidence to justify the decision. **It is urged** that the second finding, that "the marriage contract" was signed by William Sharon, cannot be held by this court to be justified by the evidence. *In limine*, I will say that in my judgment the opinion of the learned judge in this case, before whom it was tried in the superior court, is not a part of the record on this appeal. That opinion is not in the transcript on this appeal, and this court cannot look into it in another record. The record on the former appeal can be looked into to ascertain what facts were then before the court, so as to see to the correct application of the rule that such decision is the law of the case. McKinlay v. Tuttle, 42 Cal. 576. We can look into the opinion of Judge SULLIVAN in this case, when it relates to any question of law arising in this case, or in any other case, just as we may examine the opinions or judgments of any court to enable the court to determine what the law is applicable to the facts of a case which is before it for determination, but we cannot look into the opinion of Judge SULLIVAN to ascertain in what mode he dealt with the credibility of witnesses, or what weight or value he accorded to the evidence before him in deciding this case. To pass on any point in the case, whether relating to insufficiency of the evidence or any other matter debated, we are confined by the law to that which may be found on the pages of the transcript furnished to us on this appeal. Now, in regard to the evidence as to the signing of the marriage contract by William Sharon, the plaintiff testifies that he signed it in her presence, after it was written. Sharon testified that he never signed it. This presents a substantial conflict. The circumstantial evidence bearing on the issue of the execution of this paper does not remove this conflict. That evidence is also conflicting. Whatever view is taken of the evidence on this issue, a substantial conflict is presented. Hence there can be no reversal of the order on the ground that the evidence is insufficient to justify the second finding. Granted that it does appear, on a comparison of the finding and the evidence, that the court below must have found that the plaintiff testified falsely as to Sharon's introducing her as his wife, still the law does not require the rejection of her testimony on other points. The rule for the guidance of the trial court is thus expressed in the Code: "That a witness false in one part of his testimony is to be distrusted in others." Code Civil Proc. § 2061. I cannot go so far as to say that this distrust was not exercised, and that the credibility of the plaintiff was not weighed by the trial court according to the mandate of this rule. The credit to be given to the witness was for the court below and not for this court. Admitting that this court might go further on an extreme case, I cannot say on this record that this is such a case.

It is also urged that the evidence is insufficient to justify the third finding, which is in these words: "That afterwards, and about the —— day of September, 1880, the plaintiff and defendant commenced living and cohabiting together in the way usual with married people, although their cohabitation was kept secret, and so continued for the space of more than one year, and down to the 25th day of November, 1881, and during all of said time the plaintiff and defendant mutually assumed towards each other marital rights, duties, and obligations." In the sense in which cohabitation is regarded by the counsel for the appellant, the evidence does not show it. There is no evidence of such cohabitation as is defined in Yardley's Estate, 75 Pa. St. 211; or Ohio v. Connoway, Tapp. 90; or in Calef v. Calef, 51 Me. 366; or in Bouv. Law Dict., under the word "Cohabit;" or in any other case or book of authority. The evidence does not show any "living together" by the parties ostensibly as husband and wife. See 1 Bish. Mar. & Div. (6th Ed.) § 777, and note 2. But the evidence does establish what was found by the trial court, and the court on the former appeal held this was, with other matters, found sufficient to constitute marriage.

As appropriate to this question, and to show what was decided on the former appeal in this case, in addition to what has been said previously in this opinion, and the quotations from Justice McKINSTRY's opinion, I will refer to some other portions of the opinion. In it is said: "The word 'consummation,' whenever used as something different from the mere consent or formal solemnization of marriage, had always been held to mean 'simply sexual intercourse, copulation; nothing more nor less.' Section 57 of our Civil Code provides how this consummation may be proved." On page 33 it is said: "'There are two principal ends of marriage,—a lawful indulgence of the passions to prevent licentiousness, and the procreation of children under the shield and sanction of the law.' Stew. Mar. & Div. § 103. The intercourse, which is the means by which these ends are attained, is both a right and duty. Evidence that the man and woman have enjoyed the right and discharged the duty, whether direct or consisting of proof of another fact from which the intercourse may be inferred,—as cohabitation,—is, when preceded by present consent to marry, evidence that the parties to the contract have actually assumed all the duties incident to marriage." Taking the paragraphs quoted together, I think it was intended to decide, and that the court did hold and decide, that secret sexual intercourse, following a present consent to marry, consummates the marriage. Cohabitation is only regarded as a circumstance proving such intercourse, while it is said that this intercourse may be proved by direct evidence. The court intended to decide that the consent and the intercourse above stated consummated the marriage, and was an assumption of marital rights, duties, and obligations. The cohabitation spoken of in the opinion of Justice McKINSTRY means nothing but occupying the same bed. In determining what is decided in a cause we must give to the words used the sense in which they were employed in it; and in my judgment the word "cohabitation" is used in the opinion to denote what is stated above. Cohabitation was only evidence of what was regarded as consummation, viz., the intercourse mentioned above. In my opinion it was decided, and the court intended to decide, that if the parties consented to marry *per verba de præsenti*, this consent was followed by sexual intercourse, though everything in relation to the marriage was enacted by them under "a cloak of darkness;" that the marriage was perfected, became *verum matrimonium*. The decision of the court may be expressed by a little change in the maxim, "*Consensus non concubitus facit nuptias.*" Let it be read, "*Consensus et concubitus faciunt nuptias*," and it will express the conclusion reached. In this view, the kind of cohabitation spoken of by counsel becomes immaterial. The court having decided as is explained above, there was no necessity for the cohabitation contended for, to constitute the marriage. The evidence does establish such cohabitation as was found by the court, and does not establish the cohabitation urged in the argument of apellant's counsel. The court has to apply the law of the case to the facts which are established by the court. This rule must be applied in all the proceedings in the case. The evidence establishes the same facts as the court acted on, and the law of the case must always be applied when the facts are unchanged. To fail to do so would be a mere evasion, and in making such application to the evidence it must be held to prove all the cohabitation required by law. The opinion relative to this question was, in my judgment, erroneous. But the court is controlled by the law of the case, and cannot, in this case, reverse the former decision.

The only question left open, in my judgment, by the former decision was whether the sexual intercourse between the parties in this case was licit or illicit. If it was had in pursuance of the present consent, it was licit; if not, it was illicit. I can find no evidence in the record that this intercourse was disconnected from the contract, and not in pursuance of it. I will add that in considering this point the contract must be regarded as genuine, in obedience to the former decision. It is argued that the decision herein is against law; but the evidence, as we have seen, establishes the facts as they are found, and the court on the former appeal held that the plaintiff was entitled to have judgment entered on them in her favor. It may be said, then, that on the same facts the court has held that the decision is not against law, for it affirmed a judgment entered on them. The opinion on the former appeal compels an adverse ruling on the contention that the decision is against law.

On the question of the illegality of the marriage contract by reason of the clause of secrecy, I cannot perceive that the question is changed on this appeal from what it was on the former appeal. In fact, the same point was made and argued on the former appeal as now, and determined adversely to the contention of appellant. The court there held that the marriage contract was not rendered void by the clause of secrecy, and to that ruling this court must defer.

I concur in the opinion of Justice WORKS as to the decree of the circuit court of the United States in Sharon v. Terry, and in what is said as to the ruling in regard to the admission of the testimony of Martha Wilson, and the exclusion of that of the attorney, Hornblower. As regards the question put to the witness Mrs. Samson, I am inclined to think that the court had a right in its discretion to allow the question to be put; the witness having the privilege of refusing to answer it. In saying this I do not intend to say that People v. Hamblin, 68 Cal. 102, 8 Pac. Rep. 687, is not properly decided. The decision there may be sustained on the principle which ruled People v. Crapo, 76 N. Y. 288. As the order is reversed, and the cause cannot be tried again, it is not necessary that I should express a decided opinion upon the point, (the question put to Mrs. Samson.) I prefer to reserve the question for further examination and consideration when the same or a like question shall come before this court.

I rest my concurrence in the reversal of the order upon the exclusion of the testimony of the witness Hornblower. This testimony was relevant to the main issue in the cause, viz., the genuineness of the marriage contract. The defendant was clearly injured by its exclusion, and therefore I am for reversing the order denying the motion for a new trial.

PATERSON, J., (*concurring*.) It is manifest that so long as the decree of the United States circuit court (the execution of which is not stayed by appeal or writ of error,—Slaughter House Cases, 10 Wall. 273) remains in force and effect, a prosecution of plaintiff's cause of action in any proceeding in the state courts can result only in great expense and annoyance to all the parties, and a conflict of authority in which the paramount decree of the circuit court is bound to prevail. We know as well now as we shall ever know the scope and effect of the decree referred to, and the construction given to it by the federal judges in their decisions. Sharon v. Hill, 11 Sawy. 290, 26 Fed. Rep. 337; Sharon v. Terry, 36 Fed. Rep. 337, 9 Sup. Ct. Rep. 705. These decisions are official acts of the judicial department of the United States. The matters therein decided are matters of notoriety. The verity of such matters is not disputed, and we are as much bound to notice them as we are the laws of nature or the acts of the legislature. Section 1875, subd. 3, Code Civil Proc.; Romero v. U. S., 1 Wall. 742; "Matters Requiring Judicial Notice," 28 Amer. Law Reg. (N. S.) 193. It has seemed to me, therefore, that this court ought not to now reverse the order denying a new trial in the court below; but on the ground of public policy, of comity, and to prevent vexation and expense to the parties, and an unseemly conflict between the state courts and a federal court, claiming concurrent jurisdiction and a priority of right to enforce its decree, all proceedings should be stayed until it be finally determined by the supreme court of the United States whether the prohibitory injunction of the circuit court should be made perpetual. But, as a majority of the court are of opinion that this is not the proper time and place to consider the effect of the decree referred to, but that a decision should be rendered on the matters contained in the record herein, without regard to the decisions of the national courts, I feel in duty bound to support my associates in their judgment of reversal by saying that in my opinion no other conclusion could have been reached on the questions presented by the record without a violation of well-established principles of law.

Unless we are prepared to say that in actions tried without a jury the findings of the court ought not to be disturbed on account of errors in the admission and exclusion of testimony, there are two or three errors in this case which would of themselves necessitate a reversal of the order. The main contention in the case was upon the question whether defendant and plaintiff were husband and wife,—whether there had been a consent to marry, followed by a mutual assumption of marital rights, duties, or obligations, as required by the Code to constitute marriage. The testimony of Hornblower, which was excluded, was most material on this issue, and, as shown in the leading opinion, was clearly admissible. If admitted, it would have tended to show, at least, that there never was a mutual assumption of marital rights, duties, or obligations by the parties. If it be true that plaintiff expressed the intention of commencing an action against defendant for breach of promise to marry, that fact would show that plaintiff did not at that time regard herself as his wife, and there is no pretense that a marriage occurred after the time of the conversation with Hornblower. Nothing could have been more pertinent to the question the court had to determine, and, being the declaration of the party against her interest, it is impossible to tell, in view of the state of the evidence, what effect it might have had on the mind of the judge if he had admitted and considered it. The evidence upon the question whether the marriage contract was genuine or not was conflicting. The evidence of Hornblower was material on that issue. The court below found that the parties to the marriage had "lived together in the way usual with married people," and that there had been "a mutual assumption of marital rights, duties, or obligations." This court has found that these findings are not supported by the evidence; that they never lived together as married people usually do; and that there was no mutual assumption of marital rights, duties, or obligations. If it be conceded that there was material evidence tending to support these findings of the court, it must be admitted that the declaration sought to be shown by the witness Hornblower—and we cannot say the court would not have believed him—would have tended strongly to show that she had never in good faith assumed any marital rights, duties, or obligations. I agree that if there be a consent to marry, and any mutual marital duty performed in good faith in pursuance of the contract to marry, the marriage is complete. One act of coition is sufficient evidence of consummation, but it must be an act performed in good faith, and in pursuance of the contract, by the party claiming the existence of the marriage; at least, in order to consummate the marriage. It was not decided in the former decision herein that consent alone would constitute a marriage under the laws of this state, or that copulation was conclusive evidence of consummation. The only question was whether the findings supported the judgment. The contentions were that the secrecy clause invalidated the contract, and that the finding that the defendant had never introduced plaintiff as his wife, and that they had never been reputed to be husband and wife, showed there could not have been a living together in the way usual with married people, or any mutual assumption of marital rights, duties, or obligations. The opinions rendered on the appeal from the judgment must be read in the light of the facts found in the findings of the court. I do not see how there can be any misapprehension as to what was decided on the former hearing. It was held—*First*, that the contract to marry was valid, notwithstanding the stipulation as to secrecy; and, *second*, that the finding of a mutual assumption of marital rights, duties, and obligations was not nullified by the finding that the defendant had not introduced plaintiff as his wife, and that they were not reputed to be husband and wife. The court held—and its conclusion has never been effectively assailed, in my opinion, by the arguments made herein, except in so far as they dealt in sentiment, and were clothed in phrases which tickle the ears, and please the hearts of those who do not like the law, and which would be better directed if addressed to the legislature—that under the law of this state, when parties competent to marry enter into a contract to marry, and in pursuance thereof perform any marital right, duty, or obligation, the marriage is consummated; and that it would not lie in the mouth of one of the parties, after he or she had enjoyed the person of the other, who had performed his or her part in good faith in the consummation of the marriage, to say that the marriage was not complete because by mutual agreement it had not yet become known to their friends that they had entered into the contract, and had been enjoying the same bed. As Mr. Justice McKinstry well said: "It is incredible the legislature intended that copulation may take place before the marriage is complete, or to put it in the power of the man, after he has enjoyed the person of the woman, to say: 'I will proceed no further.' Yet it is the duty of the woman, after mutual consent to present marriage, to live with the man, and their cohabitation must from the nature of things create the presumption of copulation, which reduces the statute to an absurdity." The combined wisdom of all who have attacked the reasoning upon which the judgment was affirmed on the findings has been unable, in my judgment, to offer even a plausible explanation of the "logical *felo de se*," in their construction of the statute thus pointed out by Justice McKinstry. But the questions before us now are whether the contract was made, and whether the evidence shows that there was a consummation of the marriage, a mutual assumption of marital rights, duties, and obligations. On both of these questions the evidence of Hornblower was most material, and it was prejudicial error to exclude it.

The rulings of the court on the cross-examination of certain witnesses are as clearly erroneous. Nothing is better settled in this state than that the character of a witness cannot be impeached by evidence of particular wrongful acts.

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79 Cal. 449

SPAULDING v. BRADLEY. (No. 11,996.)

(*Supreme Court of California.* June 13, 1889.)

DEED—DESCRIPTION—DEDICATION.

1. Grants of two lots from the alcalde of San Francisco described them as 100 *varas* square, and numbered 15 and 25, as "marked on page 4, District Record B." Such record was referred to as containing a "plan" or "plat," and showed the location of the premises described in the grants. The petitions for the grants contained a description of the land, which was referred to in the grants. Lot 25 was described as "bounded on the west by lot 15 of said plat," and lot 15 as bounded on the north by lot "numbered 1 on page 4 of District Record, on the west by lot number 11 of the same plan, and south and east by land yet unsurveyed; said land lying in the western vicinity of San Francisco, and near the road to the Presidio, and numbered 15 on the plan referred to in the petition." *Held*, that it could not be said, as matter of law, that the land was not sufficiently identified.

2. In an action to enforce an assessment for grading U. street, done in 1878, it appeared that the grading in question was done on land included in two lots numbered 15 and 25, granted by the alcalde of San Francisco, and which defendant acquired through mesne conveyances. Plaintiff claimed that the land occupied by U. street had been dedicated to the city. One of the mediate grantors of defendant had brought ejectment in 1860 for lot 15, and the property sued for was described in the complaint and notice of *lis pendens* as "commencing near the north-east corner of U. and P. streets." But the lots were assessed *in solido* to defendant's grantors from 1862 to 1878, no deed in the chain of title referred to U. street, and it appeared that there were fences around the lots in 1877, and that such fences had existed for more than 20 years at the time of the grading. There was testimony that there was no passage way on the line of U. street until the grading was done. The contractor testified that he obtained permission from defendant's grantor to take down the fence across U. street. *Held*, that a finding that there had been no dedication as claimed was supported by the evidence.

3. An alcalde grant of a laguna survey lot conveyed the absolute title, and no portion of the land so conveyed can be appropriated for a street without the award of proper compensation.

4. A quitclaim deed conveys the title in fee-simple, if the grantor has such title, and does not imply any precedent interest or easement in the releasee.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Wm. H. H. *Hart* and *J. M. Wood*, for appellant. *Wallace & Hastings*, for respondent.

VAN CLIEF, C. This is an action to foreclose a street assessment lien for $707, upon lot No. 17, south-east corner of Union and Polk streets, San Francisco, for grading Union street from Larkin street to the westerly line of Franklin street, by order of the board of supervisors made August 13, 1877. The work of grading was done by J. S. Dyer under contract dated October 4, 1877, and was commenced on or about the 9th day of October following, and completed prior to May 26, 1880, and the assessment therefor was levied on the 27th day of May, 1880. The plaintiff sued as the assignee of J. S. Dyer. The trial court gave judgment for the defendant, and the plaintiff appealed from the judgment, and also from an order denying his motion for a new trial made on his bill of exceptions. Counsel for appellant makes no point on the appeal from the judgment, unless he claims, by implication, that the findings of fact do not support the judgment.

The principal grounds upon which appellant's counsel asked for a reversal and new trial are that the evidence is insufficient to justify the first, third, and fourth findings of fact by the trial court, which are as follows: *First.* "That at all the times between the 1st day of January, 1850, and the 1st day of January, 1880, none of that portion of what is now Union street, upon which front the premises described in the complaint in this action, was a public street, but such portions of what is now Union street was within the exterior boundaries, and was part and parcel of a valid grant, made to a private person by the alcalde of the town of San Francisco prior to 1850, to which title by grant the defendant in this action has succeeded, and was at all times, between said 1st day of January, 1850, and said 1st day of January, 1880, held in private ownership, and had not been conveyed to the city of San Francisco, or to the city and county of San Francisco, nor dedicated to public use." *Third.* "That the superintendent of public streets, squares, and highways did not recommend to said board that said work be done, and did not make any recommendation in regard thereto." *Fourth.* "That the board of supervisors of the city and county of San Francisco never had nor acquired jurisdiction to order the said work of grading mentioned in the complaint in this action."

If the first of these findings is justified by the evidence, the third will not be necessary to the support of the judgment, and the fourth is merely a conclusion of law, and as such is repeated in its appropriate place.

In support of the first finding it appears that defendant put in evidence two grants from Alcalde T. M. Leavenworth, one to Nelson Taylor of 100-*vara* lot "numbered 25 on page 4, District Records B, and bounded on the west by lot 15 of said plat," dated December 23, 1848; and the other to Stephen A. Harris of 100-*vara* lot, numbered 15, "lying and being situated outside the limits of the town survey, and in the western vicinity of San Francisco, on or near a road to the Presidio, and numbered (15) fifteen on the plan referred to in the petition aforesaid," and dated September 25, 1848. To these grants are attached the petitions to the alcalde therefor, and each containing a description of the land applied for, which is referred to in the grant, and thereby connected with the description in the grant. No objection was made to the introduction of these alcalde grants or the petitions thereto attached, or to the form thereof, except that it was objected to each "that the lands purported to be granted are not described with sufficient certainty to identify the same, and that the petition is ambiguous, because it does not designate any specific property." We think the court properly overruled this objection. There is no patent ambiguity in the description, and no evidence tending to discover latent ambiguity. The description is of lots 100 *varas* square, and numbered 15 and 25, as "marked on page 4, District Record B." The grants refer to this "District Record B" as containing a "plan" or "plat;" and it appears that the book "District Record B" was produced by the recorder of the city and county of San Francisco from his office, and was introduced in evidence in connection with each of the alcalde grants, and that "said book showed the location of the premises described in said grants, and a certificate in due form of the issuance of each grant." Besides, lot 25 is described as "bounded on the west by lot 15 of said plat," so that the two lots in question adjoin each other; and then lot 15 is described as bounded "on the north by the southern line of boundary of lot granted by George Hyde, and numbered one (1) on page four (4) of District Record; on the west by lot number eleven (11) of the same plan; and south and east by land yet unsurveyed,—said land lying in the western vicinity of San Francisco, and near the road to the Presidio, and numbered fifteen (15) on the plan referred to in the petition" attached to the grant. Nothing in the evidence tended to show that the things or objects mentioned in these descriptions did not exist, or that they may not be located and identified; or that, by them, and the plan or plat contained in the book "District Records B," in the recorder's office, the two lots in question may not be completely identified. Surely it cannot be said "as matter of law that on the face of the deed [grant] the description was so vague as not sufficiently to identify the land." Thompson v. Thompson, 52 Cal. 157. "It was admitted by the plaintiff that the premises described in this action, and all that portion of what is now Union street, upon which front the premises described in the complaint in this action, are included in and are a part and parcel of the lands described in and granted by the two alcalde grants heretofore [in the record] set out; and that at the dates of the alcalde grants hereinbefore [in the record] set out T. M. Leavenworth was the alcalde of San Francisco, and in the actual and unquestioned exercise of his authority as such alcalde. It was admitted that 100-*vara* lots Nos. 15 and 25, described in said alcalde grants, lie within the limits of the lands confirmed to the city of San Francisco by the final decree of the circuit court of the United States confirming to said city its pueblo lands." The defendant also proved that on the 23d day of December, 1881, he acquired through mesne conveyances all the title granted to Nelson Taylor and Stephen Harris by Alcalde Leavenworth, as aforesaid, in and to said lot No. 25, and all that portion of lot No. 15 lying east of the center line of Polk street, and further proved that the premises described in the complaint upon which the assessment was levied, and all that portion of Union street upon which it fronts, are included in the land to which the defendant acquired title on the 3d day of December, 1881, as above stated.

There is no evidence or pretense of a grant, or any kind of conveyance by the defendant or his predecessors, to the city or city and county of San Francisco, of any interest or easement in any part of the land occupied by Union street; but it is claimed by counsel for appellant that a dedication was proved, and that that part of the first finding to the contrary is not justified by the evidence. To constitute a dedication there must have been a manifestation of the owner's intention to dedicate to a public use, and also an acceptance and use by the public for the purpose intended and manifested by the owner. Harding v. Jasper, 14 Cal. 647; San Francisco v. Canavan, 42 Cal. 542; Quinn v Anderson, 70 Cal. 454, 11 Pac. Rep. 746; Hope v. Barnett, 20 Pac. Rep. 245; People v. Reed, Id. 708. As to the intention to dedicate there was, at least, a substantial conflict of evidence, if not a preponderance against it; and that there was no user by the public until after the grading, for which the assessment in question was levied, seems to have been proved. The following is the substance of the principal parts, if not of all, of the evidence bearing upon the issue as to dedication:

A judgment roll and notice of *lis pendens* in case of H. P. Gallagher v. Stivers et al., which was an action of ejectment for the recovery of lot No. 15, commenced in April, 1860, were put in evidence by the plaintiff, (Gallagher having been one of the mediate grantors of defendant,) by which it appeared that the property sued for was described in the complaint and notice of *lis pendens* as "commencing near the northeast corner of Union and Polk streets, * * * being all of laguna survey, lot No. 15." The complaint was not verified, and the plaintiff recovered judgment for the whole lot 15. This indicated that Gallagher then understood that there was a street called "Union Street," near the commencement point of his description. What was its condition, whether it was used or was passable for travel or not at that time, does not appear from the description nor from the judgment roll. For aught that appears, a portion of what is now used as Union street, but not extending to the grading for which the assessment in question was levied, may have been dedicated to and then used by the public to a point (say Larkin street) which Gallagher considered "near" the starting point of his description, but which starting point cannot be identified by anything in the record; but, however this may be, we think no intent of Gallagher to dedicate his own land to be used as a public street can be properly inferred from this description alone, and there is no other evidence tending to prove it. Michael Reese acquired the title to all the land in question by deed from H. P. Gallagher dated June 1, 1862, and continued to own the same until December 23, 1881, when his executors conveyed the same to the defendant; and continuously from 1862 to 1878 lot 25 and that part of lot 15 lying east of the center line of Polk street were each assessed to him *in solido*, and the taxes were paid thereon. On the 28th day of May, 1880, said executors—Jacob Rosenberg, Charles Lux, and Joseph Rosenberg—remised, released, and quitclaimed to the city and county of San Francisco "all lands reserved under the Van Ness ordinance." It is claimed by counsel that "a part of the land so reserved was that part of Union street crossing the 100-*vara* lot involved in part here," but this does not seem to be shown by the record. It will be seen that this quitclaim conveyance was executed after the completion of the work for which the assessment in question was levied. Yet counsel for appellant contends that this form of conveyance implied an admission that the release (the city and county) had a precedent estate in the land, and that such "admission is an estoppel upon, not only the grantors of defendant, but upon the defendant himself, who took with notice of such admission as evidenced by the prior record of the quitclaim deed." In all this we think counsel is mistaken, as it has been often decided by this court that a quitclaim deed conveys the absolute fee-simple title if the party executing it had such title, (Sullivan v. Davis, 4 Cal. 292; Graff v. Middleton, 43 Cal. 344; Rego v. Van Pelt, 65 Cal. 255;) and therefore such deed does not imply any precedent interest or easement in the releasee, or any admission of the releasor to that effect. The defendant proved that on October 17, 1879, the executors of Michael Reese gave to J. S. Dyer, the contractor, written permission to deposit earth upon lot No. 25, then the property of the Reese estate, provided that he should not thereby raise the lot above the official grade of the adjacent streets, and that he should at all times keep the surface level, make no charge for making such deposits of earth, and replace and repair the fences upon said lot. In consideration of this license Dyer then promised in writing to comply with its conditions, and to discontinue making such deposits whenever requested by the executors. C. V. Gillespie, a searcher of records, testified, in substance, that he had examined upon the records the deeds constituting defendant's chain of title, from the alcalde grants until 1884, for the purpose of ascertaining whether or not any of those deeds mentioned or referred to Union street, and found that they did not. J. N. E. Wilson, an attorney of San Francisco, testified, in substance, that he had resided near that part of Union street in question since March, 1858, and knew the condition of Union street west of Larkin up to the time of the grading in 1878, and that there was nothing like a thoroughfare on it; that there was a little pathway on the top of the hill about where Union and Larkin now are, that ran diagonally down Union street from Larkin to the north-east corner of Mr. Burr's lot, but not coincident with Union street. E. W. Burr testified that he had resided in San Francisco since November, 1852, and then resided on lot 12 or 13 of the laguna survey; that the lots 15 and 25 were fenced as early as 1852; that there were no streets out there in 1852; that there was no passage-way or street on the line of what is now Union street until the grading was done; and that the fence around lot 25 had existed more than 20 years when the grading in suit was commenced. It was admitted by plaintiff that Michael Reese had a fence across Union street in 1877. James M. Taylor testified that he was attorney for Michael Reese, (who died in August, 1878,) and had charge of the land in question from June 1, 1876, until June 1, 1877; that from written memoranda, made by himself, he had no doubt that on or about June 29, 1877, he went before the street committee for Mr. Reese to stop grading Union street from Larkin to west side of Franklin. That he knew the premises described in the complaint, and that they were refenced by Mr. Reese in 1876,—the refencing including Union street from Polk to Larkin. The fence that crossed the street had no opening to permit passage through in 1876. Mr. Reese always expressed himself as unwilling to have the street go through there. During the time he had charge of the property he did not permit any act tending to open the street. Mr. Dyer got no permission from him to remove the fence. James S. Dyer testified, among other things, that he was the contractor and did the grading in question. Commenced the work four or five days after signing the contract, and was engaged in the grading about three years. No objections were made to the grading, to his knowledge. When he came to the fence across Union street, he went to see Mr. Reese in the latter part of 1878, but did not meet him. Saw his clerk, who directed him to Mr. Rosenberg. Thinks Mr. Reese was then in Europe, or he might have been dead. Called on Mr. Rosenberg, and told him that the fence was across the street in his way, and he wanted to know what to do with it. Rosenberg referred him to Mr. Taylor. Saw Mr. Taylor, who said he would look into the matter, and see Mr. Rosenberg, and asked him (witness) to call again in a day or two. About two days afterwards saw Mr. Rosenberg again, "and he said they were not going to contest the opening of the street, but if I took down the fence to take care of the lumber, and put it where it would be safe, so that they could use it again in putting the fence upon the line of the street. I had the fence taken down, and piled it up on Mr. Reese's lot. When I began the work of grading this street, I believed that it was an open public street dedicated to public use, and had no reason to doubt that. I knew there were parties claiming it as private property all along, through what was called the 'Laguna Survey' of the 100-*vara* lots. Parts of Union street were fenced in within the laguna survey. I did not know they were fenced in, as being parts of their lots." Plaintiff then read in evidence sundry deeds made by defendant since 1882, conveying lots to various persons fronting on that part of Union street in question.

From the foregoing we conclude that all parts of the "first" finding are sustained by the evidence, and that this finding and the others not objected to support the judgment without aid from the third finding, as to which we express no opinion. The plaintiff also put in evidence the patent of the United States to the city of San Francisco, dated June 20, 1884, granting the pueblo lands of the city with certain reservations; and thereupon, and upon acts of congress and of the legislature of California, and the decisions of our courts, state and federal, counsel for appellant constructed a lengthy and ingenious argument to show that alcalde grants did not convey the absolute title, and did not deprive the pueblo or its successor, the city of San Francisco, of the right to open streets through the lands granted without compensation. This conclusion seems to be squarely in conflict with the decision of this court in Scott v. Dyer, 54 Cal. 430, in which the effect of an alcalde grant of 100-*vara* lot No. 11 of the laguna survey, made by Alcalde Leavenworth in September, 1848, and in all respects apparently similar to those in question here, was considered, and in which the former cases bearing upon the effect of such grants were reviewed. The decision of the court was that the alcalde grant conveyed the absolute title in fee, MCKINSTRY, J., saying: "The plaintiff being the absolute owner of the lands described in the complaint, [lot No. 11,] they cannot be entered upon without her consent; nor can any portion of them be appropriated to the use of the public as a street, except upon due compensation paid or secured, in pursuance of proceedings prosecuted for that purpose." We think the judgment and order should be affirmed, and so advise.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(79 Cal. 613)

GOLDTREE *et al.* v. THOMPSON *et al.* (No. 11,749.)

(*Supreme Court of California.* July 2, 1889.)

WILLS—CONSTRUCTION—PERPETUITIES—ACCUMULATIONS.

1. A bequest of property in trust to divide and pay the income to testator's nephews and nieces during their respective lives, and after their deaths in trust for their children who shall attain the age of 21 years or marry, vests the *corpus* of the fund in the children of the legatees, upon the attainment of their majority or their marriage.

2. Such a bequest is not void under Civil Code Cal. § 716, and other sections, which limit restraint upon alienation to a period not exceeding the continuance of lives in being at the creation of the estate.

3. As no accumulation is provided for by such a bequest until after the death of the parties entitled to the income, which accumulation is for the benefit of their children during their minority, the provision is valid, within section 724, restricting accumulations of income to provisions for the benefit of minors in being at the creation of the fund, and requiring such accumulation to terminate with the minority of the beneficiary.

4. The birth of a child to one of testator's nephews after the death of testator, which child died single and a minor, during its father's life-time, would not affect the validity of the bequest.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

Action by Isaac Goldtree and others, trustees under the will of Jonathan Thompson, deceased, against William Thompson and others, legatees in said will, to obtain a construction thereof. Defendants appeal. For former report, see 20 Pac. Rep. 414.

Ernest & William Graves and *J. N. Turner*, for appellants. *J. M. Wilcoxon* and *W. H. Spencer*, for trustees, (plaintiffs.) *Wm. Shipsey*, for minor defendants, (respondents.)

THORNTON, J. This action was brought by the plaintiffs as trustees appointed by the will of Jonathan Thompson, to obtain for their direction a construction of certain clauses in it. The property had been distributed to the trustees by a decree of the proper court, and they apply to this court for the purpose above stated. The legatees and devisees under the will are made parties to the action, and all desire a construction of the clauses asked for. The clauses of the will referred to relate to the disposition of the residuary estate, which is done by the following words: "The residue of my personal estate (subject to the payment of my just debts, funeral and testamentary expenses) I give to my said trustees, upon trust to invest the same, (after converting such parts thereof into money that require conversion,) and all accumulations thereof, as hereinafter named, and divide and pay the income thereof, as it becomes due and received in manner following, namely, as to one-fourth part thereof, to my niece Jane Allison during her life, and after her death then in trust for her children in equal shares (if more than one) who shall attain twenty-one years of age or marry. As to one other fourth part thereof, to my niece Margaret Chappelhow, during her life, and after her decease then to her husband, John Chappelhow, (if he be living,) during such time as he shall remain a bachelor, and, after that event, then in trust for her child or children in equal shares (if more than one) who shall attain twenty-one years of age or marry. As to one other fourth part thereof, to my nephew James Thompson (now in California) during his life, and after his deceased then to his present wife (if she be then living) during such time as she shall remain his widow, and after that event then in trust for his child or children by her in equal shares (if more than one) who shall attain the age of twenty-one years or marry; and as to the remaining fourth part thereof, to my aforesaid nephew John Thompson during his life, and after his decease then to his present wife (if she be then living) during her widowhood, and after that event, then in trust for his child or children by her in equal shares (if more than one) who shall attain twenty-one years of age or marry." Jane Allison and Margaret Chappelhow, the devisees named in the will, are the nieces of the testator, and the other devisees named, James Thompson and John Thompson, were his nephews. They were all living at the death of the testator, as were the children, except one born subsequently mentioned hereinafter.

There is no doubt that one-fourth of the income derived from the residuary estate is to be paid to Jane Allison during her life, and a like proportion each to Margaret Chappelhow, James Thompson, and John Thompson during their several lives, and after their death to the surviving husbands of Jane Allison and Margaret Chappelhow, and to the surviving widows of James and John Thompson, during the period mentioned in the will. That is to say, it is clear that the income only, in the proportions mentioned, is to be paid to the surviving husbands and widows of the nephews and nieces above named during the periods of their widowerhood or widowhood, and they get no portion of the *corpus* of the residuary estate.

The question debated and to be decided is whether the children of the parties mentioned above, and referred to in the will, take the *corpus* of the property left in trust, or the revenue only. We are of opinion that the direction of the testator was that the *corpus* of the trust property was to pass to the children above named, and to be paid over to them in the proportions above stated, when they attain the age of 21 years or marry. This, in our judgment, is what is declared in the will. It is evident that the testator intended to distribute by will all the residuary estate. The whole residuum is bequeathed to the trustees in trust—*First*, to pay over the income to the parties mentioned during the periods prescribed, and, whenever such proportions cease, then, *second*, "in trust [not to pay over] for his or her children;" that is, that the residuum, in the proportions aforesaid, is to be held in trust for the children referred to. The bequests to children are expressed in precise terms, and have the same meaning which is indicated above. We think this clearly appears from the clause in the will in which he empowers the trustees, "during the minority of any legatee, to apply the income of their respective shares towards his or her support or advancement in the world."

The respective shares here must mean shares of the residuary estate itself. If the respective shares only meant their respective shares in the income, then the authority conferred on the trustees would be to apply the revenue derived from their shares of the income towards his or her support and advancement. This would be too small a sum to be of any advantage as an advancement in the world. We cannot think that such could be the meaning or intent of the testator. This authority was intended to empower the trustees, after the death of the nephews and nieces mentioned in the will, and the contingency had occurred when they no longer had to pay over the income, or any portion of it, to a surviving husband or wife of the nephews or nieces, to use the income for the support or advancement of the children named during their minority, or until they had married, having regard in each case to the proportions in which the property was bequeathed,—that is, one-fourth of the residuary estate to the children, respectively, of each of the nephews and nieces deceased. This conclusion is sustained by the fact, patent on the face of the will, that no provision is made for the continuance of the trust, after the children mentioned marry or attain 21 years of age. We think the provision in the will for compensation of 15 pounds per annum to each trustee during the continuance of the trust named in the will clearly shows that the intent of the testator was that the trust should last no longer than the period above indicated by the will, and that its continuance should not be for an undefined period. The trust then coming to an end, the *corpus* of the residuary estate is to be held for the *cestuis que trustent* in the proportions above referred to. The above is in accordance with decided cases. See on this subject the following cases cited in brief on behalf of the minor respondents: Earl v. Grim, 1 Johns. Ch. 494; Reed v. Reed, 9 Mass. 372; Paterson v. Ellis, 11 Wend. 259, 298; Fox v. Phelps, 17 Wend. 393, 402; Earp's Appeal, 75 Pa. St. 119; Ogden's Appeal, 70 Pa. St. 501; Anderson v. Greble, 1 Ashm. 136; Andrews v. Boyd, 5 Greenl. 199; 4 Kent, Comm. 563; Parks v. Parks, 9 Paige, 107; Smith v. Post, 2 Edw. Ch. 523; Cooke v. Husbands, 11 Md. 492; Craig v. Craig, 3 Barb. Ch. 76.

A point is made that these trusts as to the children create a perpetuity, and are in violation of the statute, and are void. It is not clearly pointed out by counsel how this result is brought about. "The rule against perpetuities," says Mr. Perry in his work on Trusts, "has been gradually established by judicial decisions, and affords a most notable instance of the nice adoption of the principles of the common law to the decision of a question which requires at once a due regard for the rights of persons and property, and a careful consideration of these larger principles of public policy so essential to the welfare of communities and states. For public policy is opposed to the perpetual settlement of property in families in such manner that it is forever inalienable, or inalienable so long as there may be a person to take answering the designation of some testator who died generations before." The same writer proceeds to point out the various steps or stages of adjudication by which the rule was settled. They are thus stated: "The first stand of the judges was to allow only those limitations which would take effect at the end of one life from the death of the testator. This was afterwards modified to include two or more lives in being, and running at the same time, 'or where the candles are all burning at once;' for it is plain that such a space of time is only one life in being, that of the longest liver. The next step was much debated, but it was finally settled that an executory devise might be made to vest at the end of lives in being and 21 years after, to allow for the infancy of the next taker, who by reason of infancy could not alienate the estate. The statute of 10 & 11 Wm. III. c. 16, having provided that children *en ventre sa mere*, born after their father's death, should for the purposes of the limitations of estates be deemed to have been born in his life-time, a further extension of nine or ten months was allowed for the period of gestation. The next step was to allow a period of nine months for gestation at the beginning of the term, as the life in being during which the term would run might be that of a child *en ventre sa mere*. * * * It was finally determined that twenty-one years might be allowed as a term in gross, without reference to the infancy of any person, but that the period of nine months for gestation should be allowed in cases only where the gestation had commenced of some persons who, if born, would take an interest in the estate. By such steps, by imperceptible degrees, and after two centuries of doubt and litigation, and unaided by legislation, the judges framed and completed the great rule against perpetuities. Thus all future legal estates which arise by way of executory devise, conditional limitation, or shifting or springing uses must vest within a life or lives in being at the death of the testator, and twenty-one years; and, in case the person in whom the estate or interest should then vest is *en ventre sa mere*, nine months more will be allowed; and all estates created as aforesaid, and so limited that they may not vest within that time, are void." 1 Perry, Trusts, §§ 379, 380.

This rule, styled by Mr. Perry "the great rule" against perpetuities, was worked out on the principles of the common law. That system did not permit a grant of property in fee-simple to be made with an entire restraint of alienation. The right of alienation was incident to the estate, and the restriction was void as repugnant to the Code. 1 Washb. Real Prop. 85. But a restriction for a reasonable time was held valid, (Id.,) and the time fixed as a reasonable time was as stated above. The same rule was established by many cases as the common law in regard to estates so settled, the income to be invested whether for adults or infants. One of the most reasonable of these cases was that presented in the will of Peter Thellusson, who died in 1797. This came before the court of chancery in 1798. A brief reference will be made to the case in which the trusts of this will were presented for judicial consideration, (in Thellusson v. Woodford, 4 Ves. 227, and 11 Ves. 112.) In referring to the case (Thellusson v. Woodford) Chancellor Kent thus states it, and what was held in relation to it: "The devise in that case was that all the real and personal estate of the testator should be converted into one common fund, to be vested in trustees in fee for the rents and profits to accumulate during all the lives of all the testator's sons, and of all the testator's grandsons born in his life-time or living at his death, or then in *ventre sa mere*, and their issue, to receive the profits during all that time in trust, and to invest them from time to time in other real estates, and thus be adding income to principal. After the death of the last survivor of all the enumerated descendants, the estates were to be conveyed to those branches of the respective families of the sons who, at the end of the period, should answer the description of the heirs male of the respective bodies of the sons. The testator's object was to protract the power of alienation, by taking in lives of persons who were mere nominees, without any corresponding interest. The trusts created by the Thellusson will were held valid by the court of chancery, and the decree was affirmed in the house of lords. The property was thus tied up from alienation and from enjoyment for three generations, and when the period of distribution shall arrive the accumulated increase of the estate will be enormous." 4 Kent, Comm. 285. In a note to the text of Kent it is stated: "The testator died in 1797. He left three sons and three daughters, and half a million sterling, on an accumulating fund. If the limitation should extend to upwards of one hundred years, as it may, the property will have amounted to upwards of one hundred millions sterling."

The limitations of this will brought about the enactment of the statute 39 & 40 Geo. III. c. 98, usually known as the "Thellusson Act." On this act the statute of New York (1 Rev. St. 773) is founded, and the statute of California, hereafter to be referred to, followed the New York act. All of those acts allow accumulations of the income of property for the benefit of infants during their minority. See 4 Kent, Comm. 286, 287. The legislature of this state has embodied the rule as stated in the extract above given from Perry on Trusts, as will be seen by an examination of the provisions of the Code in reference to future interests. The absolute power of alienation cannot be suspended by any limitation or condition whatever for a longer period than during the continuance of the lives of persons in being at the creation of the limitation or condition, except in a single case mentioned in section 772, Civil Code, which is not material in this case. Id. § 715. The children here take a future interest, defined to be an interest which entitles the owner to the possession of the property only at a future period. Id. § 690. This interest is created by will, and in such case the death of the testator is to be deemed or taken as the time of the creation of the interest. Id. § 749. As a future interest it is declared by section 716, Id., that it "is void in its creation which by any possibility may suspend the absolute power of alienation for a longer period than is prescribed in this chapter," *i. e.*, for a longer time than during the continuance of the lives of persons in being at the creation of such interest. This power of alienation is suspended when there are no persons in being by whom an absolute interest in possession can be conveyed. Id. § 716.

The subject of the trust herein is the residuum of the personal estate. "The residuum of my personal estate," is given by the will in trust to the trustees. If there is any violation of the statute it must be in regard to the personal estate and the accumulations thereof. The power of alienation is not suspended for a period beyond that allowed by statute. All the persons beneficially interested in the will were living at the death of the testator. No reference is made here to the child of John Thompson, born after the death of the testator, and who died a minor and unmarried. As to such accumulations, the Code, after providing that "dispositions of the income of property to accrue and to be receieved at any time subsequent to the execution of the instrument creating such disposition" are governed by the rules prescribed in title 2, pt. 1, div. 2, Civil Code, § 722, provides that accumulations of the income are lawful and allowed by the Code which are in accordance with section 724 of the Civil Code, which is as follows: "An accumulation of the income of property, for the benefit of one or more persons, may be directed by any will or transfer in writing sufficient to pass the property out of which the fund is to arise, as follows: (1) If such accumulation is directed to commence on the creation of the interest out of which the income is to arise, it must be made for the benefit of one or more minors then in being, and terminate at the expiration of their minority; or, (2) if such accumulation is directed to commence at any time subsequent to the creation of the interest out of which the income is to arise, it must commence within the time in this title permitted for the vesting of future interests, and during the minority of the beneficiaries, and terminate at the expiration of such minority."

The accumulations are only for the benefit of minors who are in being at the death of the testator. One of the children of Margaret Chappelhow and John Chappelhow, viz., Esther Hannah, is an infant. Two of the children of Jane Allison and Giblum Allison are minors. John Thompson's children are minors. James Thompson had no children. The other children have reached their majority. On the death of the mother or father of the children, and the death or marrying of the surviving wife left a widow, or the surviving husband left a widower, each one of the children mentioned, who is married or of age, becomes entitled to his or her share. If there is any income of such share received afterwards, it goes to such married or adult child as accrued income on his share which has already vested in possession. It is clear from the will that all the income is to be paid over and not accumulated at all during the lives of the nephews and nieces, and during the lives of the surviving husbands and wives referred to in the will, as long as they remain unmarried. After the foregoing events have occurred the shares of the *corpus* of the fund have to be paid over to the married or adult children of the parents mentioned in the will, with the income accruing on their shares as a part of the share; such income, if any, being accrued on the share of such adult or minor child. The only accumulation is, then, for the minors, and such accumulation ends with their minority or marrying. When majority is reached, or marriage occurs before, each share vests, with its accumulation of the income, in such minor child.

It may be remarked that the accumulations of income on an invested fund are not forbidden because they tend to a perpetuity. That such accumulations were for adults did not create or tend to a perpetuity was held in Thellusson v. Woodford, above cited. See remarks of Lord ELDON on page 144, 11 Ves. The prohibition of accumulations longer than the minority of the takers of the interest was made to prevent an unfeeling and selfish testator from so devising his estate as to make persons rich in the distant future, to the detriment of those during the period of limitation who had better claims on his bounty. The latter had to live in poverty, in order that their children or grandchildren might be made rich at a distant future day.

As to the after-born child of John Thompson, she came into existence during her father's life, one of the lives in being at the creation of the interest. She would take an interest under the will, as she was one of the class mentioned in it, to-wit, the children of John Thompson, (Civil Code, § 1337,) vested in right when she was born, and in possession contingent on her attaining the required age or marrying. If this interest could ever vest in possession, it must have vested within 21 years after her father's death. Such an event did not render the interest devised void. No question is made as to the validity of the trust created by the will as a trust. The only objection made to it has been considered above. But clearly such a trust is valid. See sections 2221, 2222, Civil Code. The trust is definite in every respect required by statute, (see sections above cited,) and the trustees here have accepted the trust. The foregoing disposes of all the questions raised in which the judgment of this court is sought. We find no error in the judgment of the court below, and it is affirmed. So ordered.

We concur: MCFARLAND, J., WORKS, J., PATERSON, J., SHARPSTEIN, J.

(80 Cal. 114)

FRESNO CANAL & IRRIGATION CO. v. ROWELL. (No. 13,057.)

(*Supreme Court of California.* Aug. 2, 1889.)

COVENANTS RUNNING WITH THE LAND—NOTICE.

1. Plaintiff contracted in writing with E., the owner of certain land, to furnish water for a certain period at a certain price, which E. agreed to pay for himself and his successors in interest, annually, at stated times. He also covenanted, *inter alia*, that the contract and covenants therein contained on his part should "run with and bind the land." *Held*, that under Civil Code Cal. § 2884, which provides that a lien may be created by contract to take immediate effect, as security for the performance of obligations not then in existence, the contract was a lien upon the land of E., and bound it as against any successor of E. with notice thereof.

2. Where a grantee of the covenantor had notice of the water-right when he purchased the land, but did not know its terms, such knowledge was sufficient to put him upon inquiry, and a failure to do so will not relieve him of the obligation upon the land.

3. Such a contract only required to be acknowledged by the incumbrancer of the land to render it capable of recordation, and the record thereof was sufficient notice to subsequent purchasers of the land.

4. As plaintiff complied with the contract on his part by supplying the water, the fact that defendant did not use it is immaterial, and the land was bound whether the water was used or not.

5. Under Civil Code Cal. §§ 1460-1462, specifying what covenants run with the land, the covenants under the contract in question do not run with the land, not being contained in the grant of the estate, and no personal judgment can be had against defendant; but the lien must be foreclosed against the land, he not being a *bona fide* purchaser with out notice of the lien.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Action by the Fresno Canal & Irrigation Company against one Rowell, for certain payments due under a contract entered into with it by defendant's grantor, one Easton, for supplying water to be used on the land owned by him. Judgment for plaintiff. Defendant appeals. Civil Code Cal. § 2881, is as follows: "A lien is created (1) by contract of the parties, or (2) by operation of law. Sec. 2882. No lien arises by mere operation of law until the time at which the act to be secured thereby ought to be performed. Sec. 2883. An agreement may be made to create a lien upon property not yet acquired by the party agreeing to give the lien, or not yet in existence. In such case the lien agreed for attaches from the time when the party agreeing to give it acquires an interest in the thing, to the extent of such interest. Sec. 2884. A lien may be created by contract, to take immediate effect, as security for the performance of obligations not then in existence." Civil Code

Cal. § 1460, reads: "Certain covenants contained in grants of estates in real property are appurtenant to such estates, and pass with them, so as to bind the assigns of the covenantor, and to vest in the assigns of the covenantee, in the same manner as if they had personally entered into them. Such covenants are said to run with the land. Sec. 1461. The only covenants which run with the land are those specified in this title, and those which are incidental thereto. Sec. 1462. Every covenant contained in a grant of an estate in real property, which is made for the direct benefit of the property, or some part of it then in existence, runs with the land. Sec. 1463. The last section includes covenants 'of warranty' 'for quiet enjoyment,' or for further assurance on the part of a grantor, and covenants for the payment of rent, or of taxes or assessments upon the land, on the part of a grantee. Sec. 1464. A covenant for the addition of some new thing to real property, or for the direct benefit of some part of the property not then in existence, or annexed thereto, when contained in a grant of an estate in such property, and made by the covenantor expressly for his assigns, or to the assigns of the covenantee, runs with land so far only as the assigns thus mentioned are concerned. Sec. 1465. A covenant running with the land binds those only who acquire the whole estate of the covenantor in some part of the property. Sec. 1466. No one, merely by reason of having acquired an estate subject to a covenant running with the land, is liable for a breach of the covenant before he acquired the estate, or after he has parted with it, or ceased to enjoy its benefits."

George E. Church, for appellant. *Wharton & Short*, for respondent.

THORNTON, J. The contract binds Easton, but we cannot see it binds defendant personally. Rowell was no party to the contract, nor do we see that he ever agreed to bind himself personally for its performance. Easton owned certain lands, and, while owner, made a contract in writing with plaintiff to furnish water for a certain period for a certain price, which Easton agreed to pay, and that his successors in interest should pay annually, on certain days of the year. He also covenanted that the contract and the covenants therein contained on his part should "run with and bind the land." A lien may be created on property by contract. Civil Code, §§ 2881-2884. We think that there was a lien created by contract on Mr. Easton's land mentioned in the agreement. All the covenants in the agreement were agreed to bind the land. One covenant was to pay money afterwards to become due. The language above quoted shows an intent by Easton, the owner of the lands, to create a lien on them. This makes a contract of lien. This lien bound the land as against any person who succeeded to Easton's estate, with notice of it. It seems to be conceded that defendant is the grantee or successor of Easton as to part of the lands above referred to.

The evidence tends to show that defendant had actual notice of the water-right when he purchased the land. He testified that at that time he knew that there was a water-right of plaintiff's connected with the land, but did not know its terms. It seems to us that such knowledge was sufficient to put him on inquiry as to the water-right; that by pushing the inquiry he might have ascertained its exact condition; and that it was his duty to make the inquiry. Easton, or either of the officers of the plaintiff company, could have informed him of the right and its terms. He cannot, by failure to inquire, relieve himself of the obligation which inquiry would have shown bound the land. He cannot be allowed to shut his eyes, and say he did not see, when by opening them he might have seen. But, waiving the point of actual notice, we are of opinion that the notice by the record of the agreement was sufficient. The written paper was such a paper as could by law be recorded, and impart notice to subsequent purchasers. All that was required was that it should be properly acknowledged by Easton, the creator of the incumbrance on the land. The policy of the recording laws is that the record should impart notice to subsequent purchasers or mortgagees of the grantor. The plaintiff had no interest in the land, and created no incumbrance on it. There could be no subsequent purchasers or mortgagees of the land from it. It was no more necessary that it should be acknowledged by it than that a mortgage should be acknowledged by the mortgagee. The plaintiff accepted the incumbrance created on the land, but did not create it, or charge the land in any way. Spect v. Gregg, 51 Cal. 198, is a direct authority on the point. The execution of the power of attorney by one of the contestants made the appointee his attorney. The instrument, by its terms, read that the appointee should be the joint attorney of the four parties executing it, or severally of each. The acknowledgment by one of the contestants created the appointee his attorney, and his acknowledgment was sufficient to authorize its recordation, and make the record notice as to any subsequent purchaser from him. So here, as to Easton, who in fact was the only creator of the incumbrance, and the only one who charged the land.

The fact that the defendant did not use the water, if the plaintiff complied with the contract,—and this was found to be a fact,—is immaterial. The land was then bound whether the water was used or not.

It may be added that the covenants are not here regarded as covenants running with the land. They could not be such because they are not contained in grants of the estate. Such is the manifest meaning of the statute, and such, we think, was the common law. Civil Code, §§ 1460-1462, and the sections following in the title. There can be no judgment against defendant, personally, for money, but the lien can be enforced by foreclosure against the land, and every grantee who is not a *bona fide* purchaser without notice. Judgment and order reversed, and cause remanded for a new trial.

We concur: WORKS, J.; SHARPSTEIN, J.; PATERSON, J.

(83 Cal. 101)

CUCAMONGA FRUIT & LAND CO. v. MOIR. (No. 13,055.)

(*Supreme Court of California.* July 31, 1889.)

PUBLIC LANDS.

1. A party seeking to attack a patent must show that he is connected in some way with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent.

2. Under Pol. Code Cal. § 3500, providing that an application to purchase state lands must state "that there is no valid claim to such land other than that of the applicant; * * * that he has not entered any land in part satisfaction of the unsold portion of the 500,000-acre grant," etc.,—an application stating that there was no valid claim other than the applicant's, but failing to state that he had not "entered any land," etc., creates no such claim as will entitle the applicant to question the validity of a certificate of purchase issued to another.

3. A certificate of purchase from the state is not void though the application and affidavit are defective.

4. Such certificate is sufficient to maintain ejectment.

In bank. Appeal from superior court, San Bernardino county; JAMES A. GIBSON, Judge.

H. T. Hazard and *Chapman & Hendrick*, for appellant. *Curtis & Otis* and *J. C. Lynch*, for respondent.

PATERSON, J. Ejectment. The complaint is in the ordinary form. The answer specifically denies plaintiff's ownership, and that the defendant wrongfully or unlawfully entered into or withholds possession of the premises. Plaintiff claims title under a patent of the United States and a certificate of purchase from the state of California. Defendant contends that the patent is void because the United States had no title, the land having been listed to the state in 1870, and confirmed by congress; that the certificate of purchase issued to Mullan, defendant's grantor, is void because the state never had any title until the passage of what is known as the "Booth Bill," March 1, 1877, eight years after Mullan's certificate of purchase had been issued, and seven years after the act of March 24, 1870, had been passed. The defendant's answer does not allege, and the evidence does not show, that he occupies such a *status* as authorizes him to control the legal title, or to question the authority of the officers who issued the patent. A party seeking to attack a patent must show that he is connected in some way with the original source of title, so as to be able to aver that his rights are injuriously affected by the existence of the patent. Fletcher v. Mower, 56 Cal. 424; Dodge v. Perez, 2 Sawy. 653; Davidson v. Land Co., 20 Pac. Rep. 152; Kentfield v. Hayes, 57 Cal. 409.

Defendant's claim to the land in controversy rests upon an application to purchase from the state. Conceding that he might show, without pleading them, the facts upon which he relies, it is sufficient to say that he has failed to aver or to prove the conditions necessary to make his application valid. His application did not allege, nor does the evidence show, that he had not entered any land in part satisfaction of the unsold portion of the 500,000-acre grant, or of the grant in lieu of the sixteenth and thirty-sixth sections. At the time his application was filed the statute required the applicant to state, among other things, "that there is no valid claim to such land other than that of the applicant; * * * that he has not entered any land in part satisfaction of the unsold portion of the 500,000-acre grant, or of the grant in lieu of the sixteenth or thirty-sixth sections, which, together with that now sought to be purchased, exceeds 320 acres." Section 3500, Pol. Code. The application of Moir did state that there was no valid claim other than his own, but did not state that he had "not entered any land in part satisfaction," etc. At the time the application was filed the plaintiff and its grantors held a certificate of purchase from the state of California for the land, and it appears from the evidence that defendant and one —— were both living on the land, claiming adversely to each other at the time the application was filed. Having failed to establish a privity with the paramount source of title,—to show that he was duly qualified according to law to purchase the land in controversy, and had fully complied with the laws of the state of California regulating the sales of such lands,—he is not in a position to question the title of the plaintiff. Peabody v. Prince, 21 Pac. Rep. 123; Chapman v. Quinn, 56 Cal. 278; McKenzie v. Brandon, 71 Cal. 209, 12 Pac. Rep. 428; Plummer v. Woodruff, 72 Cal. 29, 11 Pac. Rep. 871, and 13 Pac. Rep. 51; Harbin v. Burghart, 18 Pac. Rep. 127. Mullan's certificate of purchase is not void, even though his application and affidavit were defective, (Rowell v. Perkins, 56 Cal. 220;) and a certificate is sufficient to maintain an action in ejectment, (Young v. Shinn, 48 Cal. 26; Laugenour v. Hennagin, 59 Cal. 625.) Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; WORKS, J.; THORNTON, J.

(80 Cal. 111)

McCOMBER v. MILLS. (No. 12,957.)

(*Supreme Court of California.* Aug. 2, 1889.)

FORECLOSURE OF MORTGAGE.

Defendant, after giving plaintiff a mortgage to secure three notes on certain lots, agreed with him for the release of any lot on payment of $250 for each lot, provided as many lots were sold from the east side of the block as from the west, and that the release of not less than two lots should be demanded at one time. After the payment of the first note defendant secured the release of eight lots, and failed to pay the other two notes, but demanded the release of ten other lots, and in foreclosure pleaded the failure to release said lots. *Held*, that it was no defense, as he was not entitled to such release, without paying the price therefor according to the contract, and making demand for specific lots.

In bank. Commissioners' decision. Appeal from superior court, San Diego county; E. PARKER, Judge.

Leovy & Humes, for appellant. *M. S. Babcock*, for respondent.

GIBSON, C. This is an appeal from a judgment foreclosing a mortgage against the defendant and from an order denying him a new trial. The only point urged upon this appeal is that a portion of the eleventh finding of the court below is not supported by the evidence. The defendant by his answer admits the execution and delivery of the notes and mortgage, and the non-payment of the two notes in suit. The only affirmative defense interposed other than one based on the alleged sale of the notes by the plaintiff to another person prior to bringing the suit, and that the third and last note had not matured, was that, pursuant to a contract made with and as a part of the mortgage, providing for the release of lots from the mortgage on payment of $250 for each lot, not less than two to be released at a time, and in equal numbers, on the east and west side of the blocks, he, the defendant, sold eighteen lots, and plaintiff, although requested to release such lots, released but eight, and refused to release the other ten lots. Upon this defense the court found, in the finding assailed by the appellant, that only four "east-side" lots, of the ten lots described in defendant's answer, in addition to those released prior to the commencement of the suit, should be released from the mortgage lien. The court also found that the mortgage was given by the defendant to plaintiff on the 8th day of July, 1887, to secure three promissory notes for the sum of $13,750 in the aggregate, with interest, the said amount being the remainder due on the purchase of a portion of the property covered by the mortgage. And at the time of the execution and delivery of the notes and mortgage, and as part of the same transaction, plaintiff and defendant made and reduced to writing, in a paper separate from the notes and mortgage, an agreement, whereby the plaintiff agreed to release from the lien of said mortgage any lots therein described whenever the defendant might desire to sell any of them, upon the defendant paying to plaintiff the sum of $250 for each lot released: provided as many lots were sold by defendant upon the east side as upon the west side of each block, and not less than the release of two lots demanded at a time; and also found that the first of the three notes was paid, leaving the two others unpaid, and $10,779.82 due thereon, including an attorney's fee, as provided for in said notes; that the plaintiff was the owner of the notes; and that the last note had matured at the commencement of the suit.

The only evidence in the statement on motion for a new trial, aside from that of the contract for the release of lots from the mortgage lien, and the testimony of two witnesses on the question of attorney's fees, is the testimony of the plaintiff and defendant. The defendant, in substance, testified that he executed the notes and mortgage, and in connection therewith, and as part thereof, he and plaintiff entered into the contract for the release of lots from the mortgage; that he sold eighteen of the lots covered by the mortgage, and requested plaintiff to release ten lots in addition to the eight previously released; and that the only money he ever paid plaintiff was the amount of the first note; never paid $250 or any other sum for the release of any particular lot, and did not tell plaintiff what particular lots he wished released under the contract. The plaintiff testified, in substance, that the contract was not entered into at the time of the execution of the notes and mortgage, and was not a part of the same transaction; that the defendant never paid him any money but the amount of the first note, after which he released from the mortgage lien eight lots, at the request of defendant, who did not ask for the release of any other lot or lots until long after the second note matured, and defendant had been asked several times to pay it; that the eight lots were released with the understanding between himself and defendant that the remaining sixty-two lots should remain as security until the full amount secured by the mortgage should be paid. Thus it appears from the defendant's own testimony that the finding assailed by him is not only supported by the evidence, but more favorable to him than he was entitled to. After he paid the amount of the first note, and obtained the release of eight lots, and rested apparently satisfied for some time without making any demand for the release of any other lots, he was not entitled to the release of any additional lots without paying the price therefor required by the contract, and making a demand for specific lots, not less than two in number, and an equal number on the east and west side of the blocks. We therefore advise that the judgment and order appealed from be affirmed.

We concur: Vanclief, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(80 Cal. 38)

Peterson v. Weissbein *et al.* (No. 13,051.)

(*Supreme Court of California.* July 27, 1889.)

Res Judicata.

Where, in a suit between plaintiff and defendant's grantor, it has been determined that a judgment, under which the latter has purchased the land in question, was valid, the question is *res judicata* in a suit between plaintiff and defendants.

In bank. Appeal from superior court, Nevada county; J. M. Walling, Judge.

For statement of facts and former opinion, see 16 Pac. Rep. 769.

P. F. Simonds and *F. Searls*, for appellant. *A. Burrows*, for respondents.

Works, J. On a former appeal this cause was reversed on the ground that the defendants, who relied upon a constable's deed to establish their title, had not made out their case, for the reason that they had failed to introduce in evidence the judgment and execution on which the deed was based. Peterson v. Weissbein, 75 Cal. 174, 16 Pac. Rep. 769. On a second trial this evidence was supplied, and judgment was again rendered for the defendants. The plaintiff objected to the introduction of the judgment and execution in evidence, on the ground that the judgment was invalid. But it was shown by the evidence that in an action between the plaintiff and the defendants' grantor, who was the purchaser at the constable's sale, it was determined by the judgment of the court that the judgment of the justice's court and the sale under it were valid. This adjudication was conclusive as to the validity of the judgment. Peterson v. Weissbein, supra. Therefore the court below did not err in admitting it in evidence. The judgment roll in the case between the plaintiff and the defendants' grantor was objected to, on the ground that the parties in that action were not the same as in this. But, the defendants having purchased from the party in the former action, the judgment inured to their benefit, and was competent evidence. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.; PATERSON, J.; THORNTON, J.

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80 Cal. 61

BELLEGARDE v. SAN FRANCISCO BRIDGE CO.

(No. 13,132.)

(*Supreme Court of California.* Aug. 1, 1889.)

APPEAL.

Where notice of an appeal was given January 7th, and no undertaking filed until January 28th, there is no appeal before the court to be considered or dismissed.

In bank. Appeal from superior court, city and county of San Francisco.

O'Brien, Morrison & Daingerfield, for appellant. *J. D. Sullivan* and *Henry McCrea*, for respondent.

McFARLAND, J. This cause is before us upon a motion of respondent to dismiss the appeal from the judgment for failure to file the transcript within the time prescribed by rule 2 of this court. But the certificate of the clerk shows that no appeal has ever been taken, the notice of appeal having been given January 7, 1889, and no undertaking on appeal having been filed until January 28, 1889. In such a case the rule heretofore seems to have been to refuse to hear the party who claims to have appealed, and to refuse to "dismiss;" there being really nothing to dismiss. Biagi v. Howes, 63 Cal. 384; Reed v. Kimball, 52 Cal. 325. The motion to dismiss is denied.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

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80 Cal. 90

KARNS v. OLNEY. (No. 12,864.)

(*Supreme Court of California.* July 31, 1889.)

VENDOR AND VENDEE—AGENTS—LACHES.

1. Where a contract for the sale of land was made by one acting as agent, in the immediate presence of the owners, and the sum paid on the purchase price was, by the direction of one of the owners, immediately paid by the agent to the other, and the owners subsequently directed the agent to execute a written contract for the land, the sale was in legal affect made by the owners, and the fact that the agent did not have written authority to make the sale was unimportant.

2. The purchaser having taken possession under his contract, and made valuable improvements on the land with the knowledge of the owners, they were estopped to assert the agent's want of authority.

3. The fact that the owners did not, at the time of the contract, know of the exact location of the land, and were mistaken as to its value, could not be taken advantage of to deny the validity of the sale.

4. Though the written contract was signed in the name of a corporation as principal, yet, it appearing that the owners had used that name in making sales of their land, and had instructed the agent to use it as he did, the contract could not be impeached on that ground.

5. The contract was not void for uncertainty because it was made "subject to the conditions in a formal contract as to clearing streets, improvements," etc., referring to a contract to be executed in the future.

6. Nor was it objectionable because it provided for its surrender "on delivery of formal contract or deed," it appearing that at the date of the contract the vendors had not themselves acquired the legal title.

7. The contract was made September 28, 1882, the last payment (which would entitle the purchaser to a deed) being due two years later. The purchaser was allowed to believe that the title had been transferred to the corporation in whose name the contract was made, which was not true. The owners conveyed the land without consideration, and with intent to keep it out of the purchaser's reach. Plaintiff, the assignee of the purchaser, did not discover the fact that the contract had been made in the presence of the owners, and the payment thereon received by them, until a short time before bringing this action for specific performance, which was bought December 10, 1886. *Held*, that there was no laches.

8. As affecting the question of laches, the fact that the corporation notified plaintiff that it repudiated the contract was immaterial, as it never had any title to the property.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

C. E. Sumner and *Chapman & Hendrick*, for appellant. *Olney, Chickering & Thomas*, for respondent.

WORKS, J. This is an action by the appellant for the specific performance of a contract to convey real estate. The findings of the court were in substance that one Mills and one Wicks, being in possession of the lot in controversy, and a large number of other lots in Pomona, in this state, under a contract of purchase, began the sale thereof, and, for the purpose of making such sales, appointed one F. H. Hall to be the manager and agent at Pomona, aforesaid; that Hall had not full authority to act for said Mills and Wicks in the sale of the lots and lands, but that the court was unable from the evidence to define with exactness the extent of his general authority; that the said Hall, under and in pursuance of his appointment and authority, acted as such manager and agent for the sale of said lots and lands, and was, by reason thereof, known and recognized as such manager and agent by the general public, and by the said Mills and Wicks, and by the purchasers mentioned; that on the 28th day of September, 1882, the said Mills and Wicks did, by their said agent, Hall, make and enter into a verbal agreement with one William Bayles, agreeing to sell, and he agreeing to purchase, the lot of land in controversy for the sum of $200; that when said agreement was made said Mills and Wicks were both personally present, and the agreement for them by Hall was made then and there, but not under the personal direction of Mills and Wicks; that Bayles then and there, in pursuance of said agreement, paid Hall the sum of $50 on the purchase price, and Hall, being such agent, paid said sum, as and being such part payment of said purchase price, over into the hands of said Wicks upon the request and direction of said Mills, and wrote and delivered to said Bayles the receipt therefor, in the words and figures following: "$50. Pomona, September 30, 1882. Recd. of W. M. Bayles fifty dollars on account for lot 6, block 32, for which a contract will be given on payment of balance of one-third of contract price of two hundred dollars. F. H. HALL, Agt. for Pomona Co." That within a few days thereafter, on the 30th day of October, 1882, in pursuance of their plan for the sale of said lots and lands, said Mills and Wicks formed with others a corporation by the name of the Pomona Land & Water Company, with its capital stock divided into 5,000 shares; that Mills and Wicks owned 4,180 of said shares, and the other three shareholders necessary to form a corporation represented 820 of said shares, and for the purpose of carrying out said enterprise for the sale of said lots and land they transferred the same to said corporation, excepting from the operation of said assignment all lots and land already conveyed to them by Louis Phillips, and that Hall continued to act as agent for the sale of said lots in the same manner as before said transfer; that said Hall made 39 sales of said lots and lands, including the sale of the lot in question to Bayles, as such manager and agent for Mills and Wicks; that before they assigned the same to said company, and afterwards, the said Mills and Wicks supplied said agent, Hall, with printed blanks, containing the name of the said Pomona Land & Water Company, printed thereon as vendor, and instructed the said agent, Hall, to use the same in making contracts for sales thereof to be made, and expressly directed and instructed said agent to fill out said blanks with the terms of sale, and deliver them to all purchasers, including said Bayles, to whom sales of lots had already been made by them in their individual capacity; and that Hall carried out said instructions, whereby Bayles was induced to believe that said agreement was adopted by said company; that on the 21st day of September, 1882, Bayles, under and in pursuance of his said agreement, paid to Hall, then acting as the manager and agent for the sale of said lots and lands, the further sum of $16, and that Hall, pursuant to said instructions given as aforesaid, filled out and delivered to Bayles one of the said printed blanks, supplied by Mills and Wicks for the purpose, in the words and figures following:

"POMONA LAND AND WATER COMPANY.

"Pomona, Los Angeles, September 28, 1882. Received of William Bayles, fifty dollars, deposit on contract for purchase of lot six, (6,) in block thirty-two, (32,) according to the map of Pomona. Contract duly recorded in book 3, pp. 90 and 91, of miscellaneous records of Los Angeles county, subject to the conditions in a formal contract as to cleaning streets, improvements, etc., said price being $200, and terms of payment, $16 to make the one-third on demand, $67 payable September 28, 1883, $67 payable September 28, 1884. Deferred payments to bear 8 per cent. interest, payable annually. And the said William Bayles, in consideration of the premises, hereby agrees to purchase said property for the same price and on the terms above set out; this to be surrendered on delivery of formal contract or deed. F. H. HALL, Manager of Pomona Land & Water Company." [Seal.]

—That on the 24th day of January, 1883, the said Bayles, for a good and valuable consideration, assigned and transferred to the plaintiff all his interest in said lot and said agreement, and the plaintiff thereupon entered into possession of said lot, with the knowledge and consent of Hall, agent as aforesaid, plowed the whole of said lot, and put substantial improvements thereon; that said Bayles and the plaintiff kept and performed all the conditions of said agreement to be kept by them, paid the sum of $66, the first payment of said purchase price, and tendered to the Pomona Land & Water Company the sum of $67, and interest thereon to date, according to the terms of said agreement; that on the 28th day of September, 1883, and on the 29th day of September, 1884, plaintiff tendered the said company the sum of $134, and interest thereon to date, being the whole balance of said purchase money, according to the terms of said agreement, and demanded the execution of a deed of conveyance; and the company refused to accept said payments and execute the deed, but made no objections to the terms thereof, or to said tenders; that on the 27th day of November, 1886, he tendered to the defendant the sum of $176.90, being the full amount of the purchase money remaining unpaid, and tendered a deed of bargain and sale for execution, and the defendant specified no objections to said tender, nor to the terms of said conveyance, but declined to receive said purchase money, and refused to execute said conveyance; that by a deed dated December 4, 1882, Louis Phillips conveyed said lot to said Mills and Wicks, and by a deed dated February 23, 1883, said Wicks conveyed his interest therein to said Mills, and by a deed dated September 21, 1883, while plaintiff was in possession of said lot under said agreement, Mills, knowing that plaintiff was so in possession, conveyed said lot to one Charles French, who had full knowledge of plaintiff's possession under said agreement, and the other facts herein set forth, and that French was in the employ of said Pomona Land & Water Company under said Mills and Wicks, and paid no consideration for said conveyance; that Mills died on the 20th day of April, 1884, and his wife was appointed his administratrix, and included this lot in the inventory of the property of said estate; that in May, 1883, the plaintiff had notice that the Pomona Land & Water Company repudiated the alleged agreement; that said French, from the time of his deed from Mills, asserted to plaintiff his ownership of the lot, and disputed the possession thereof; that French, some time in 1884, removed plaintiff's improvements, but plaintiff replaced them within two or three months, and for a short period of that year leased the premises; and that the house and fence erected by him remained on the property until removed by the defendant in October, 1886; and that French, for a short time just previous to his deed to defendant, leased the property; and that the defendant entered on the lot October 20, 1886, but did not oust plaintiff; that in February, 1883, said Wicks, as attorney for the Pomona Land & Water Company, wrote the plaintiff a letter, notifying him that Hall had acted without authority in making the contract, and that the same was repudiated, and offered him $100 if he would return the receipt for cancellation, but that Wicks had not been authorized by the company to write such a letter; that neither Wicks nor Mills knowingly or intentionally ratified or confirmed the contract, or voluntarily accepted any benefits or obligations thereof; that the said Mills and Wicks, by their acts and conversation aforesaid, induced the said Bayles to purchase said lot from them by their said agent, Hall; that said printed blank was used, and the agreement in the name of the Pomona Land & Water Company delivered as aforesaid by Hall, agent as aforesaid, and accepted by Bayles because Mills and Wicks instructed Hall to use the same for that purpose, and not by reason of any fault or neglect of said Bayles or the plaintiff, and the use thereof caused Bayles to believe that said agreement was adopted by said company, promoted by said Mills and Wicks as aforesaid; that the use of said printed blanks caused the plaintiff to believe that said sale was in fact originally made by said company, as therein specified; that Mills and Wicks never demanded payment of the balance of the purchase money of said lot, nor communicated to plaintiff the fact that said sale was made by them in their individual capacity, but, on the contrary, further gave the plaintiff cause to believe that said sale was made by said company, and denied that plaintiff had any interest in said lot, and attempted to disaffirm said sale, alleging as a ground that said Pomona Land & Water Company never acquired title to said lot, and that, therefore, said Hall never had authority to sell the same; that all the deeds of conveyance referred to above were recorded immediately after their respective dates, and the plaintiff had constructive notice thereof; and that about the time the defendant ousted plaintiff, as aforesaid, plaintiff first learned that said sale was made in the actual presence of said Mills and Wicks, under their direction, for them, in their individual capacity, by said agent, Hall, and that said Mills and Wicks had taken a conveyance of said lot from said Louis Phillips to themselves, and recorded the same on the day preceding said transfer of their said contract with Louis Phillips to said company, and thereby prevented said company from acquiring title to said lot; that the plaintiff's supposed cause of action is not barred by the statute of limitations. This suit was commenced December 10, 1886. On these findings the court concluded in favor of the defendant, and the plaintiff appeals.

It is contended by the plaintiff that he was entitled to judgment on these findings, and that the cause should be reversed on that ground. In this contention the appellant is clearly right. We do not know upon what ground the court below concluded that the plaintiff's case was not made out, but counsel for respondent attempt to justify the decision on four grounds: (1) That the original receipt given by Hall did not constitute a sufficient contract of sale. (2) That Hall had no authority to make the sale, not having been authorized in writing. (3) That the original receipt, and the contract subsequently given by Hall, were not executed by the then owners, Wicks and Mills, but by the Pomona Land & Water Company, in its name, and were otherwise indefinite and insufficient. (4) That the action was commenced too late. In discussing these questions counsel for respondent have not confined themselves to the findings, but have very ingeniously used the findings where they support their case, and where they are against them the findings are ignored, and the evidence in respondent's favor, and against said findings, is used instead. By thus combining the two, and holding fast only to that which seems to them to be good, they have convinced themselves that "the case is too plain for argument." This we cannot do, and perhaps for that reason we are unable to agree with counsel. Taking the facts as we have them in the findings we consider the points relied upon by the respondent:

1. As to the point that the original receipt given at the time the first payment of $50 was made was not sufficient, we agree with counsel; but this was not intended to constitute the contract, but simply as a memorandum showing the payment of the money, and it was stated therein that a contract would be given upon the payment of the balance of the one-third payment; and such a contract was afterwards executed. For this reason we regard this receipt as of no great importance.

We regard the question of Hall's authority to make the sale as of no greater consequence, in view of the other facts found. It may be conceded that an appointment in writing was necessary to authorize him to make a binding sale, (Civil Code, § 1624,) and that no subsequent parol ratification or acknowledgment by the principal is sufficient. Videau v. Griffin, 21 Cal. 390; Blum v. Robertson, 24 Cal. 142. But here the sale was in legal effect made by the principals. Videau v. Griffin, 21 Cal. 391, 392. It was made in their actual presence, and, at the request of one of them, the money paid was handed to the other immediately. It is true the court finds that the sale was not made under the personal direction of the owners, and that they did not knowingly or intentionally ratify or confirm the said contract of sale, nor voluntarily accept any of the obligations or benefits thereof, but these conclusions are clearly disputed by the facts found. They did voluntarily receive the cash payments at the time it was made, and the court finds that they afterwards instructed Hall to make a contract for the property. The facts show that the only reason for the finding that they did not knowingly or intentionally ratify or affirm the contract of sale was that they did not know the location of the lot, or, in other words, the lot was a better one than they supposed when they sold it and accepted the purchase money, and therefore they wanted to escape from the contract.

The findings further show that the purchaser took possession under his contract, and made valuable improvements on the property with the knowledge of these parties. Besides, the court finds, throughout these findings in various places, that Hall was the agent of these parties, and that they did the acts relied upon by the plaintiff through him. The court finds in one place that Hall did not have "full" authority; but what is meant by the word full in this connection is left to conjecture. The finding on the point is: "All allegations of the several paragraphs of the complaint, which are respectively numbered and marked 2, 3, 4, 5, and 6, are true, except that F. H. Hall did not, as alleged in paragraph 2, have full authority to act for the said Mills and Wicks in the sale of the lots and lands referred to therein; but, if it be essential, I am unable, from the evidence, to define with exactness the extent of his general authority." This finding as to authority relates, not to this sale particularly, but to an allegation in the complaint that Hall was appointed to be manager at Pomona, "with full authority to act for them" in the sale of all of the lands then held for sale by them at that place, and the following specific allegation of the complaint, relating to this particular sale, is found to be true: "That on the 28th day of September, 1882, the said Mills and Wicks were in possession of the said lot of land hereinabove particularly described, under said agreement for the purchase thereof from Louis Phillips, and did then at Pomona aforesaid, by their said agent, F. H. Hall, make and enter into a verbal agreement with one William Bayles, whereby the said Mills and Wicks agreed to sell, and the said William Bayles agreed to purchase, the said lot of land described as lot 6, as aforesaid, for the sum of $200, on the terms set out in the seventh paragraph of this complaint." And the court further finds in express terms that the allegation of the complaint is true that they instructed their said agent to make out this and the other contracts, where sales had been made, and how to make and execute them, and that in pursuance of these instructions he did execute the contract, and that the plaintiff, as the assignee of said contract, entered into possession and made improvements. This, it seems to us, was a sufficient finding of the agency; but, if not, the conduct of the vendors of the property was such as to estop them from denying it, or asserting any claim to the property on the ground of his want of authority. To permit the vendors of land to repudiate the acts of their supposed agent, under such circumstances, would be to sanction a clear and palpable fraud, and this cannot be done, even under the guise of the statute of frauds. Sedg. & W. Tr. Title Land, §§ 844–847; Fry, Spec. Perf. 259, 260; Bigelow, Estop. (3d Ed.) 470, 513. It is a well-settled rule of estoppel that one who with knowledge accepts the proceeds of an unauthorized sale of his property is estopped to dispute the validity of the sale. Goodman v. Winter, 64 Ala. 410, 433; France v. Haynes, 67 Iowa, 139, 25 N. W. Rep. 98; Schenck v. Sautter, 73 Mo. 46; Moore v. Hill, 85 N. C. 218; Field v. Doyon, 64 Wis. 560, 25 N. W. Rep. 653; Booth v. Wiley, 102 Ill. 84, 107. See, also, as bearing on this point, Escolle v. Franks, 67 Cal. 137, 7 Pac. Rep. 425. In this case the vendors stood by and saw the sale made, and accepted the purchase money, in the presence of the vendee, and the court finds that they, "by their acts and conversation aforesaid, induced the said Bayles to purchase said lot from them by their said agent, Hall," which, it seems to us, presents the strongest possible case against them. If they did not know the location of the lot that was being sold, as claimed, their want of knowledge must be attributed to their own want of care. They cannot, in view of these facts, be heard to deny such knowledge. It is contended that this was not the contract of Mills and Wicks, but of the Pomona Land & Water Company. It is true, the contract is signed by Hall as the manager of the company, but the findings show clearly that the contract was that of Mills and Wicks, and that they had, before the organization of the corporation, adopted and used the name afterwards given to the corporation, and that they instructed their agent, Hall, to prepare and sign the contract in that form. They had the right to adopt and contract in a name not their own, and, having contracted in that name and received the benefits thereof, they cannot be allowed to impeach it on that ground.

Again, it is urged that the contract was too uncertain and indefinite to authorize the relief sought. We do not think so. The land is accurately described; and the amount, and time of making the payments, are clearly stated. There are but two elements of uncertainty in the contract. It is made "subject to the conditions in a formal contract as to clearing streets, improvements," etc. This evidently refers to a "formal" contract that was expected to be made in the future, and, if it was too uncertain to uphold this clause or to bind the vendee to the condition attempted to be imposed, it can furnish no ground upon which the vendors could repudiate the contract. It is nowhere shown that the refusal to consummate the agreement was ever placed on any such ground, or that any question was ever made as to the conditions intended to be imposed by this clause in the contract. If such a "formal" contract existed, and the parties contracted with reference to it, the question might have been raised in respect to the form of the deed, when demanded, and, if a deed with the conditions relied upon had been refused, the vendors might have been justified in refusing to execute one without such conditions. But we do not regard this as such an element of uncertainty as will vitiate the whole contract. The court finds that no objection was made to the form of the deed tendered for execution when the purchase money was tendered. The further objection made to the contract is that it provides that it shall be surrendered "on delivery of formal contract or deed." The apparent reason for having drawn the contract in such form as to call for either a contract or a deed is that at the time the contract was executed the vendors had no deed, but were holding under a contract. It was the evident intention that if they procured a deed before the final payment of the purchase money a deed was to be executed; if not, a contract for a deed. But, whether this be so or not, it clearly appears from the contract itself that the vendee was to have their title to the property upon payment of the purchase money, and the time was definitely fixed by the time of the final payment of the purchase money, and surrender of the contract. We think the contract was sufficient to authorize the relief prayed for.

Lastly, it is claimed that the action was brought too late. Cases are cited by counsel in which shorter delays were held to be fatal, but each case must depend upon its own circumstances. There is no absolute bar short of the time fixed by the statute of limitations. There is nothing of unfairness or injustice in allowing the appellant his remedy in this case after the delay complained of. It is perfectly apparent from the findings and the evidence that there was a systematic and persistent effort all along on the part of Mills and Wicks to mislead the plaintiff and prevent his getting title to the property. It was not transferred to the corporation, but he was allowed to believe it was, if not led to that belief by these parties. Wicks conveyed to Mills, and Mills conveyed to one French, an employé, without consideration for the conveyance, and French, acting undoubtedly for Mills, endeavored to get possession of the property, and claimed that he was the owner, and tore down the appellant's improvements. That French held the title for Mills, and with the sole purpose of attempting to deprive the appellant of the property, is apparent from the fact that upon the death of Mills, although French held Mills' deed for the property, it was inventoried by the widow as a part of the estate. French conveyed the same to the respondent, who admits in his brief in this court that he holds it as a trustee for the widow. In other words, so far as it affects this question of delay in bringing the action, this property must be regarded as having been the property of the original vendors all along, and that they have been attempting to keep it out of the appellant's reach. Besides, one of the very material facts in the case, and one without which probably he could not have recovered, was that this contract was made in the actual presence of the owners, and the money paid to and received by them, and this was not discovered by the appellant until a very short time before bringing this suit. Without a knowledge of this fact, if there were no others tending to excuse his delay, he might well have hesitated about bringing the suit; and, taking this circumstance together with the conduct of the vendors, we are not inclined, on the mere ground of delay in bringing the action, to deny the appellant his rights. The court finds that the deeds bringing the title down to the respondent were recorded immediately after their execution, and were constructive notice to the appellant. Conceding this, it makes the effort to mislead the appellant only the more apparent; but the doctrine of constructive notice has application only to a subsequent purchaser or incumbrancer, and can have no bearing on the question presented here. The finding that the Pomona Land & Water Company notified the appellant that it repudiated the contract was immaterial, for the reason that that company never had any title to the property, and was not a party to the contract, or interested in it in any way. Judgment and order reversed, with instructions to the court below to conform its conclusions of law to this opinion, and render judgment on the findings in favor of the plaintiff.

We concur: PATERSON, J.; THORNTON, J.; MCFARLAND, J.; SHARPSTEIN, J.

(80 Cal. 82)

MARSHALL *et al.* v. HANCOCK *et al.* (No. 13,058.)

(*Supreme Court of California.* Aug. 2, 1889.)

APPEAL—PROOF OF HANDWRITING.

1. The refusal of a court to allow a question to be answered by a witness will not be considered on appeal, where there is nothing in the record to show what the proposed testimony was.

2. To show that a signature to a deed was that of one W., deceased, it was proven that he was a justice of the peace, and his docket was identified, and certain signatures shown to have been those of W. *Held*, that under Code Civil Proc. Cal. § 1944, providing that evidence respecting handwriting may be given by comparison with writings shown to be genuine, an expert could testify that the signatures on the record and the one on the deed were in the same handwriting.

3. The evidence of a deceased person, given in a suit between different parties and involving another subject-matter, is not competent, under Code Civil Proc. Cal. § 1870, subd. 8, rendering the testimony of a deceased person, given in a former action between the same parties, competent.

In bank. Appeal from superior court, San Bernardino county; E. PARKER, Judge.

Code Civil Proc. Cal. § 1870, subd. 8, provides that the testimony of a deceased witness, given in a former action between the same parties, relating to the same matter, shall be competent.

Paris, Goodcell & Fox, John McIntyre, and *J. J. De Puy*, for appellants. *Barclay, Wilson & Carpenter, Rowell & Rowell, H. C. Rolfe, Harris & Gregg,* and *M. T. Allen*, for respondents.

WORKS, J. Action to quiet title. Judgment for defendants. Motion for new trial overruled. Plaintiff appeals.

The controverted question in the court below was as to the genuineness of a deed from one Michael White and wife to Henry Hancock, under which the defendants claimed to be the owners of one-half of the real estate in controversy. The deed appeared upon its face to have been regularly executed and acknowledged. The plaintiffs claimed it to be a forgery, and that Michael White was out of the state at the time it purported to have been signed and acknowledged. The court below, after hearing testimony as to the execution of the deed, held the same to have been executed, and admitted it in evidence. The appellants assign several errors upon rulings made during the hearing, and claim that the decision of the court that the deed was genuine was not sustained by the evidence. A witness called by the plaintiff testified that he knew White; that he was at White's house, on the ranch, cultivated his land, and had a conversation with him. He was then asked what the conversation was. To this question the defendants objected, and the objection was sustained. This is assigned as error. We do not know from the record before us whether the court erred in this ruling or not. Where the question itself does not indicate whether the answer to it will be material evidence or not, the party seeking to introduce the evidence must, in order to present the question to this court, make an offer of what he proposes to prove, so that the court below and this court can determine whether the proposed proof is material or not. There is nothing in the record to show what the proposed testimony was. The question indicated nothing of the kind. The witness is asked for a conversation between White and himself. The conversation, if there was one, may have been about a matter entirely aside from the matter under investigation. Therefore the record fails to show any error in this ruling. In order to show the absence of White at the time the deed purported to have been executed, the plaintiffs proved by his wife that he left home, and that she accompanied him part of the way. She was then asked if, when she bid him good-bye, he told her where he was going. This was objected to, and the objection sustained. This question is like the one above referred to. There was no offer to prove any statement that would have tended to corroborate the testimony of other witnesses that he went to Lower California, nor did the question indicate that such would be her answer. We cannot assume error in order to reverse the case, nor can we, for the purpose of sustaining the appellants' position, presume what he fails to show, viz., that the answer of the witness would have been material if it had been allowed. The defendants, in order to prove that the name of White to the deed was in his handwriting, proved that White had, prior to that time, been a justice of the peace. A record from the clerk's office, shown to have been his docket, kept by him as such justice, was offered in evidence, and certain signatures of White appearing therein were shown by a witness to have been in White's handwriting. This was followed by expert evidence to the effect that the signatures in the record and the one to the deed were in the same handwriting. The appellants contend that the record admitted in evidence was not sufficiently authenticated or proved to be a public record kept by White. But this was entirely unnecessary. The evidence was not offered to prove the contents of the record, or to establish any fact. The name appearing therein was the only material thing. It could make no difference whether the name offered appeared in a public record, a private writing, or on a blank piece of paper. If admitted, or proved to the satisfaction of the judge, to be genuine, it could properly be compared with the handwriting in controversy, for the purpose of showing that the latter was genuine. Code Civil Proc. §§ 1943, 1944. Of course, the record introduced did not prove that the name of White, appearing therein, was his genuine signature; but there was positive evidence to that effect, which we must presume was proof to the satisfaction of the judge that it was genuine. The defendants were permitted to introduce in evidence the testimony of White, given in an action not shown to have been between the parties to this action, or to have involved the matter in controversy here. The object was to show declarations of White, who was deceased, tending to show that he executed the deed in controversy. The admission of this testimany was erroneous. 1 Greenl. Ev. §§ 125, 163; Code Civil Proc. § 1870. But we have examined the evidence carefully, and find nothing in it to prejudice the appellants. Therefore, the ruling of the court, although erroneous, was harmless, and we cannot reverse the case on that ground. Certain other items of evidence are objected to, on the ground of immateriality. The court seems to have given rather too wide a range to the evidence on the question as to the genuineness of this deed, but, upon a careful examination of the evidence, it does not appear to us that there was anything in the rulings or in the evidence admitted that could have worked the appellants any injury. The point is made that the decision of the court on this question was not sustained by the evidence, but we think otherwise. Judgment and order affirmed.

We concur: McFarland, J.; Paterson, J.; Sharpstein, J.

(80 Cal. 189)

HEILBRON *et al.* v. 76 LAND & WATER Co.

(No. 12,684.)

(*Supreme Court of California.* Aug. 5, 1889.)

RIPARIAN RIGHTS—INJUNCTION.

While an upper riparian owner cannot divert water for sale or use on non-riparian lands, or unreasonably use or divert the water to the injury of owners further down the stream, it is error, upon enjoining him from such unauthorized diversion, to require him to permit no water to flow into a canal constructed by him for the purpose of irrigating non-riparian land, but which, though not so intended, can be used to irrigate his riparian land, and compel him to close up his canal, as he may hereafter desire to use it legitimately, either to water riparian land, or to carry off surplus water in time of flood, when no one below him would be injured thereby.

In bank. Commissioners' decision. Appeal from superior court, Tulare county; William W. Cross, Judge.

August Heilbron and three co-tenants of land lying on Kings river brought this action against the 76 Land & Water Company, a corporation, to enjoin it from an illegal diversion of the water of said stream. Judgment for plaintiffs, and defendant appeals.

Wigginton & Hawes, for appellant. *D. S. Terry* and *Brown & Daggett*, for respondents.

Belcher, C. C. Action to enjoin the diversion of water. The complaint was filed November 18, 1884, and the facts alleged therein are, in substance, as follows: The plaintiffs are, and for more than two years have been, seised and possessed as tenants in common of a tract of land situate in the counties of Fresno and Tulare, known as the "Kings River Ranch," and containing about 54,000 acres. A natural water-course known as "Kings River," flows for a distance of over 30 miles along and forms one of the boundaries of the ranch. A branch of the river, called "Cole Slough," flows through the ranch for a distance of about 10 miles, and at ordinary stages carries the greater portion of the water of the river. In its course through and along the boundary of the land the water of the river moistens the soil, and causes the production and growth of valuable crops of grasses. Plaintiffs, in order to increase the fertility of their lands, and to afford an abundance of grass and water for their stock on the ranch, have constructed and maintained a dam on Cole slough, and have constructed canals and ditches, by means of which they have for more than two years conducted the waters of the river over and upon their lands, and have thereby irrigated a large portion thereof, causing the same to produce more abundant crops, and furnishing water for their live-stock on the land. For more than two years plaintiffs have had more than 13,000 head of live-stock grazing on their land, and the water of the river is necessary for the subsistence of such stock, and is the only water to which the stock on the ranch can have access. Plaintiffs are also cultivators, and have growing on the ranch about 3,000 acres of alfalfa, and the waters of the river are necessary for the growth of that crop. The defendant is a corporation organized for the purpose of diverting the waters of Kings river to be used in irrigating lands at a distance from the river. It has constructed a canal about 100 feet wide and 4 feet deep, with a grade of 18 inches to the mile, and since about the 1st of November, 1883, without the consent and against the will of plaintiffs, has thereby diverted from the river, at a point above plaintiffs' land, about 1,000 cubic feet of water per second. The water so diverted flows away from the river and plaintiffs' land, and no portion of it is or can be returned to the river, but the whole thereof is lost or dissipated by absorption and evaporation. By reason of this diversion the quantity of water flowing past and through plaintiffs' lands has been greatly diminished, and rendered insufficient for the purposes of the ranch. Defendant threatens to, and, unless restrained, will, continue the diversion. Its canal has sufficient capacity to divert all the water flowing in the river at low stages, and such continued diversion will cause to the plaintiffs irreparable damage, will greatly impair the value of their lands, and will destroy the crops of alfalfa growing thereon.

The answer denies, among other things, that defendant was or is organized as a corporation for the purpose of diverting the water of Kings river to be used in irrigating lands at a distance from the river, and alleges that it was organized for the purpose of diverting "the waters, or a portion of the waters, of said river to be used in irrigating lands near to and on the banks of said river, as well as at a distance therefrom." The answer further denies that defendant's canal has capacity to divert more than 750 feet of water; and it alleges that at the time of the commencement of this suit, and for more than three years prior thereto, defendant was and now is seised and possessed of certain lands situate in the counties of Fresno and Tulare, known as the "76 Lands," and containing about 30,000 acres; that Kings river flows for a distance of about nine miles along and forms one of the boundaries of said tract of land; that defendant constructed its canal for the purpose, among others, of irrigating said tract of land, and that such irrigation is feasible and necessary to make the lands produce crops of grain, hay, vegetables, and fruits, and will thereby greatly add to the value thereof; that it ever has been and now is the purpose and intention of defendant to make only a reasonable use of the waters of the river for irrigating its lands, and that it is not now, and never has been, the purpose or intention of defendant to make any use of the waters of the river to the injury of plaintiffs in any manner whatever.

The court found all the facts as to the plaintiffs' ranch; its possession, size, location along Kings river; use for the pasturage of stock and raising alfalfa; necessity for water to irrigate it, and supply the stock grazing thereon,—to be as alleged in the complaint. It further found that defendant was a corporation, and that in 1883 it constructed a large canal leading out of the channel of Kings river at a point on the south side thereof, about 25 miles above the place where Cole slough connects with and receives its water from the river; that in the month of January, 1884, defendant, without the consent of plaintiffs, commenced to divert, and has ever since continued to divert, from the channel of the river, by means of its canal, 750 cubic feet of water per second; that the water so diverted has been carried to lands located at a distance from the river, and used to irrigate lands which do not border on the channel of the river or touch the banks thereof, and that the canal is so constructed that the water diverted by it does not and cannot flow back into the river; that by reason of the said acts of defendant the quantity of water flowing to and through plaintiffs' lands has been materially diminished, so that their cattle have not had a sufficient quantity to drink, and they have not had sufficient to irrigate their alfalfa fields. The court also found that defendant is the owner of the lands mentioned in its answer, and that portions of these lands border on the south bank of Kings river, below where its canal is taken out; "that the irrigation of the larger portion of defendant's lands from its said canal is feasible, and irrigation is necessary to make said lands produce crops of grain, hay, vegetables, and fruits, which will thereby add greatly to the value of said lands;" "that one of the purposes for which the defendant constructed said canal was to irrigate said lands; * * * that said defendant has not at any time irrigated any of its said lands from or by means of said canal; * * * and said defendant does not intend to irrigate any of said lands by means of said canal." Judgment was entered that defendant, its officers, agents, etc., be forever enjoined and restrained from diverting any of the waters of Kings river into or through its canal, or from causing, or in any manner permitting, any portion of the waters of the river to flow into or down its canal; and the judgment further ordered and decreed that defendant forthwith fill up the head of its canal and close the same, so that no water can or will flow from the river into it. The appeal is from the judgment and an order denying a new trial

We have stated the case very fully, because, in our opinion, the judgment is not warranted by the findings, and must therefore be reversed. It clearly appears that defendant is a riparian proprietor above the plaintiffs. Its lands can be irrigated with water carried through its canal, and irrigation is necessary to make them productive. Being an upper riparian owner, defendant is entitled, as against the plaintiffs, to make a reasonable use of the water of the stream for the purpose of irrigating its riparian lands, and it is only for an unreasonable and unauthorized use that an action will lie. What is a reasonable use is a question of fact and depends upon the circumstances appearing in each particular case. Lux v. Haggin, 69 Cal. 394–409, 10 Pac. Rep. 674; Swift v. Goodrich, 70 Cal. 103, 11 Pac. Rep. 561; Stanford v. Felt, 71 Cal. 249, 16 Pac. Rep. 900. One of the purposes for which the defendant constructed its canal was to irrigate its lands; and the fact that it has not yet used the water upon its own lands cannot destroy or impair its right. Lux v. Haggin, 69 Cal. 390, 10 Pac. Rep. 753. So the fact, if it be a fact, that defendant does not intend to irrigate any of its lands by means of the canal does not affect its right. It may, at any time change its intentions in this respect. This being so, we are unable to see how the court could properly grant a perpetual injunction restraining the defendant from ever, at any time or for any purpose, causing or permitting any water from the river to flow into or down its canal. Besides, there may be times of flood or high water when no one below would be injured if defendant's canal should carry away from the river surplus water to its full capacity. Why should defendant be required to fill up the head of its canal so that no water at such times can flow into it? See Edgar v. Stevenson, 70 Cal. 286, 11 Pac. Rep. 704. From what has been said it is not to be understood that defendant has a right, as against riparian owners further down the stream, to divert water from the river for the purposes of sale, or for use on lands which are not riparian. We advise that the judgment and order be reversed, and the cause remanded, with directions to the court below to enter a decree in conformity with the views expressed in the foregoing opinion.

We concur: HAYNE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded, with directions to the court below to enter a decree in conformity with the views expressed above.

(80 Cal. 104)

DUNN v. MACKEY. (No. 12,915.)

(*Supreme Court of California.* Aug. 2, 1889.)

ATTACHMENT—WHEN LIES.

1. Defendant, by agreement in writing, bound himself absolutely to sell certain land belonging to plaintiff within a specified time, and to realize therefrom the sum of $12,500. He failed to sell, and plaintiff sued for $3,500 damages, alleging that the highest market value of the land between the date of the agreement and the commencement of the action was $9,000. To authorize attachment in an action for breach of contract, the statute (Code Civil Proc. Cal. §§ 537, 538) does not require that the amount due on the contract shall appear from the contract itself, but that the amount of the indebtedness shall be shown by affidavit. *Held* a proper case for attachment.

2. Defendant, after agreeing to sell for $12,000 within one year, agreed to account "for the proceeds of sale of said premises whenever, prior to the expiration of said twelve months, he may effect a sale of said premises." *Held*, that this was not an agreement to pay only on condition that a sale was made, but was an absolute promise to pay within the year, and to pay before the end of the year, if a sale should be sooner effected.

MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Wicks & Ward, for appellant. *Barclay, Wilson & Carpenter*, for respondent.

WORKS, J. This is an appeal from an order dissolving an attachment. The complaint is founded on the following agreement: "This agreement, made and entered into on the 28th day of July, 1887, by and between C. E. Mackey, of the city and county of Los Angeles and state of California, who will be hereinafter referred to as the party of the first part, and Poindexter Dunn, of the county of St. Francis, and state of Arkansas, who will be hereinafter mentioned as the party of the second part, witnesseth, that the said second party, having this day purchased from said party of the first part, as agent for George D. Rowan, the following described lots of land situated in the city and county of Los Angeles and state of California, to-wit, lots numbered nineteen (19) and twenty (20) of the Dana tract, as per map recorded in Book 5, at page 324, of Miscellaneous Records of Los Angeles County, for the sum and price of ten thousand dollars, (10,000,) the said first party, for and in consideration of the sum of $1 cash in hand to him paid by the said second party, the receipt of which is hereby acknowledged, and of the covenants and agreements hereinafter mentioned and set forth, hereby agrees to take charge of and sell said lots of land for said second party as follows, to-wit: The said first party agrees and binds himself to sell said lots for said second party within twelve months from the date hereof, and to guaranty, account for, and pay over to said second party at least $12,500 net therefor, except interest paid by said second party on the deferred payment for said lots. Said second party agrees that said first party may retain and have, and said first party agrees to accept, all excess over said $12,500 which he may receive for said lots for his compensation for his services as agent herein. Said first party agrees to account to said second party, or his authorized agent, for the proceeds of sale of said premises as above stated, whenever, prior to the expiration of said twelve months, he may effect a sale of said premises. It is agreed that said first party may sell said lots for not less than one-half cash and the balance within twelve months from date of sale, with interest at 10 per cent. per annum. In witness whereof said first and second parties have hereunto set their hands and seals." The complaint alleges that the defendant failed and refused to sell the property as agreed upon, or at all; that the plaintiff was induced to buy the same by the promise of the defendant to resell the property as agreed in the contract; that he tendered a deed to the defendant and demanded that he pay him the sum agreed to be paid, and execute his note for the deferred payments as mentioned in the contract, and to account for and pay the money provided for in said contract. It is further averred "that the highest market value of said property described in the foregoing agreement was, upon the 28th day of July, 1888, and has been ever since, and still is, the sum of $9,000, and no more; that by virtue of of defendant's failure to keep and perform the terms and conditions of said contract, and by virtue of his breach thereof, as hereinabove set forth, this plaintiff has suffered damage in the sum of $3,500." The prayer of the complaint is for judgment for "$3,500, and for costs of suit, and for such other and further relief as to this honorable court may seem meet and proper.". The attachment was founded on this complaint. The respondent defends the action of the court below in dissolving the attachment on two grounds: *First*, that the complaint did not state a cause of action; *second*, that the suit was to recover unliquidated damages, and for that reason no attachment could properly issue. The objection to the complaint is that "there is no sufficient allegation of a breach of contract; that the contract was to sell as the agent of the plaintiff, and pay over the proceeds of the sale; not to pay $3,500 damages, or any sum, in case of failure to sell," and that "plaintiff attempts to treat defendant as a purchaser, tenders a deed and demands $12,500, and alleges damages upon that theory." We give these objections in the language of counsel for the reason that we do not understand what is meant sufficiently to attempt to state their point. The complaint is one for damages for the breach of a contract, and is sufficient. The contract sued on was not one of agency for the sale of real estate simply. The defendant positively bound himself to realize to the plaintiff, out of the property, within one year, the sum of $12,500. We see no reason why he should not be held liable in damages for a breach of such a contract, as well as any other. Janin v. Browne, 59 Cal. 37, 44. As to the other point, the proper measure of damages is the difference between the actual value of the land at the end of the year and the amount the defendant bound himself to realize from it to the plaintiff. Therefore, the simple question is whether an attachment properly issued upon a complaint which upon its face showed precisely what the damages were; the affidavit in attachment showing that the defendant was indebted to the plaintiff in the sum of $3,500, upon an express contract for the direct payment of the money. There is no uncertainty appearing on the face of the proceedings as to the amount actually due. At the trial the only thing necessary to fix and determine the amount is to prove the value of the land. The amount agreed to be realized and paid over to the plaintiff is fixed by the contract. Our Code does not require that the amount due on the contract shall appear from the contract itself, (Code Civil Proc. § 537,) but that the amount of the indebtedness shall be shown by affidavit, (Id. § 538.)

Attachment may issue in an action for damages for the breach of a contract. Donnelly v. Strueven, 63 Cal. 182. And this where proof is necessary at the trial to show the amount of damages. Drake, Attachm. §§ 13-23. But there must exist a basis upon which the damages can be determined by proof. Thus it is said, "where the contract sued upon furnished a standard by which the amount due could be so clearly ascertained as to enable the plaintiff to aver it in his affidavit, or the jury by their verdict to find it, an attachment might issue." Id. § 15; Wilson v. Wilson, 8 Gill, 192. To the same effect see Wade, Attachm. § 11 et seq.; Saw-Mill Co. v. Fowler, 28 Conn. 103; Lawton v. Reil, 51 Barb. 30; Lawton v. Reil, 34 How. Pr. 465; Ferner v. Collins, 1 Mart. (N. S.) 369; Cross v. Richardson, 7 Mart. (La.) 166. The case of Donnelly v. Strueven, supra, is in point. The action was to recover damages for the breach of a contract to buy and pay for certain personal property, and this court held that it appeared from the complaint, as well as from the affidavit, that the plaintiff's action was founded in contract, and not in tort, and therefore defendant's ground of motion was not well taken. It is true that the question of uncertainty as to the amount of the debt was not directly determined, but it existed there as clearly as in the case before us, and it was held that the attachment was properly issued. Counsel for respondent rely upon Hathaway v. Davis, 33 Cal. 165, as supporting their position, but it is directly against them. It was held that an appeal-bond was a contract for the direct payment of money, although the amount to be paid was not fixed by the instrument itself, and that attachment would lie. The court recognized the well-established rule that it is only necessary that the contract be such as to furnish information from which the amount can be ascertained, and said: "We think a clew is afforded in the next section, (121,) where the plaintiff is required to make a certain affidavit in order to procure an attachment. He must be able to swear, among other things, that the defendant is indebted in a certain sum, specifying the amount. This language excludes all causes of action for unliquidated sums of money, for, until they have been liquidated by the verdict of a jury, it is impossible for the plaintiff to swear to the amount, and confines the right of the plaintiff to an attachment to cases of contract, where the liability of the defendant can be ascertained with certainty, and is not in doubt until after a trial, or, in other words, where the amount to be paid is fixed by the terms of the contract, or can be readily ascertained from the information which it affords. Every such case is clearly within the policy of the attachment law, which is designed for the benefit of acknowledged creditors, and not those who may or may not turn out to be such, according to the finding of a jury. In such cases, the payment which has been promised, in a certain sense, may be said to be direct. While this view is not very satisfactory, it is more so than any other which finds color in the ambiguous words of the statute. There is, certainly, no reason why an attachment should be allowed in an action upon a promissory note which is not equally persuasive in the present case. The plaintiff can swear to the amount due with equal accuracy, and his right to recover is as clear, and his claim upon the law for the advantages of this remedy no less reasonable and just. True, the contract does not specify the precise amount to be paid, but it points directly to the instrument or record which does, which is all that is required. To read 'direct' as the opposite to 'collateral' would be to create a distinction of very doubtful foundation, and certainly opposed to the general policy of the act. To so read it would be to exempt all collateral contracts from the operation of the act. Indorsers, guarantors, sureties, and all others who undertake to pay or become responsible for the debts of another, could not be reached by attachment; and yet, there can be no good reason why they should be excepted. We are of the opinion that the legislature intended no such distinction." There can be no doubt that the defendant bound himself to realize and pay to the plaintiff, within one year, a certain and fixed sum of money. The fact that he was, if possible, to realize the money by a sale of property to some one else does not affect the question, as he bound himself unqualifiedly to account for and pay over that sum of money at the end of the year, or before, if he made a sale of the property. The plaintiff might, perhaps, have treated this as a binding contract to pay the money, and upon tendering him the deed have demanded payment from him according to its terms, and upon failure to have maintained an action for the whole sum. But he was not bound to do so. Having brought his suit for damages, the only evidence necessary to fix the amount due him is as to the value of the land. This is as easily done as it would be to prove what the services were worth, in an action on an implied contract for work done or upon an express contract to pay what the services were reasonably worth; and, certainly, such contracts would uphold an attachment. Counsel contend that the defendant bound himself to pay only on condition that he made a sale of the property; but we do not so construe the contract. He bound himself absolutely to sell and pay over the money within a year, and to pay before the end of the year, if he made sale of the property. Order reversed.

We concur: PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

I dissent: MCFARLAND, J.

(80 Cal. 199)

PEOPLE v. GOODHUE *et al.* (No 13,039.)

(*Supreme Court of California.* Aug. 5, 1889.)

VACATING JUDGMENT.

A judgment rendered in 1865 cannot be vacated by motion in 1888, on the grounds of want of jurisdiction and payment of claim before suit, though Code Civil Proc. Cal. § 473, provides for such proceedings for certain causes within a limited time.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Davis & Allen, for appellant. *W. R. Jacobs*, (*Lamberson & Taylor*, of counsel,) for respondent.

WORKS, J. This is an appeal from an order denying a motion to vacate a judgment. The judgment was rendered October 30, 1865, and this motion was made December 31, 1888. We know of no provision of law which can be held to authorize the vacation of a judgment on a mere motion after so long a time. We have a provision authorizing such a proceeding within a limited time on certain grounds enumerated. Code Civil Proc. § 473; People v. Mullan, 65 Cal. 396, 4 Pac. Rep. 348. The motion here is made by the grantee of the judgment defendant, and is based on two grounds, viz., that the court rendering the judgment had not jurisdiction of the person of the defendant, and that he had, before the suit was brought, fully paid the sum of money which was the basis of the action. A judgment cannot be attacked in this informal way years after its rendition. Order affirmed.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

PATERSON, J. I concur in the judgment. If the judgment were void on its face, and the moving party had succeeded to the rights of the defendant, his motion would not be defeated by mere delay, however great, in seeking to have the judgment set aside, (People v. Mullan, 65 Cal. 396, 4 Pac. Rep. 348;) but neither of these things appears in this record. Goodhue, the moving party's grantor, was personally served with summons (including a copy of the complaint) five months prior to the entry of the judgment, and the evidence of assignment to appellant is incompetent and conflicting.

(80 Cal. 68)

ONTARIO STATE BANK v. TIBBITS *et al.* (No. 13,007.)

(*Supreme Court of California.* Aug. 2, 1889.)

CORPORATIONS—FORECLOSURE OF MORTGAGE.

1. Where a complaint by a corporation in foreclosure states a complete cause of action, but does not show that it filed its articles of incorporation in the county where the property to be foreclosed was situated, before suit, as provided by Civil Code Cal. § 299, its failure so to do is a matter of abatement to be specially pleaded, otherwise it is waived.

2. The allegations in the answer, that "plaintiff never was a corporation duly or otherwise organized under the laws of this state, nor a copartnership, nor an individual," do not raise that issue.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; B. T. WILLIAMS, Judge.

H. C. Rolfe, for appellant. *Rowell & Rowell*, for respondents.

VANCLIEF, C. This action was to foreclose a mortgage executed by the defendant Amelia Tibbits to secure her promissory note to the plaintiff, a corporation organized under the laws of this state. The court below found that the note and mortgage were made and executed as alleged in the complaint, and that no part of the debt had been paid; but dismissed the action solely upon the ground that the plaintiff had never filed in the office of the county clerk of San Bernardino, in which the mortgaged property was situated, a copy of the copy of its articles of incorporation, as required by section 299 of the Civil Code, which section, in effect, provides that no corporation organized under the laws of this state shall maintain or defend any action in relation to property, or its rents, issues, and profits, until it shall have filed in the office of the county clerk "of the county in which such property is situated," such copy of the copy of its articles of incorporation filed in the office of the secretary of state. Although the complaint did not show that plaintiff had complied with this law, it nevertheless stated a complete cause of action. Phillips v. Goldtree, 74 Cal. 151, 13 Pac. Rep. 313.

The failure of the plaintiff to file a copy of its articles of incorporation in the office of the county clerk, being mere matter of abatement, should have been specially pleaded by the defendants, otherwise it was waived; yet the answer tendered no such issues, (Sweeney v. Stanford, 67 Cal. 635, 8 Pac. Rep. 444; Phillips v. Goldtree, 74 Cal. 151, 13 Pac. Rep. 313; Railroad Co. v. Pursell, 18 Pac. Rep. 887;) and the pleading thereof should be strictly construed, (Tooms v. Randall, 3 Cal. 440; Thompson v. Lyon, 14 Cal. 42; Larco v. Clements, 36 Cal. 132.) The only affirmative matter contained in the answer is the following: "For a separate answer and defense this defendant avers that plaintiff has not, and at the commencement of this action had not, legal capacity to sue; that plaintiff never was a corporation duly or otherwise organized under the laws of this state, nor a copartnership, nor an individual." That the plaintiff had not legal capacity to sue is purely and only a conclusion of law, and of itself tendered no issue of fact. The only issues of fact tendered by this plea related to the nature of the plaintiff, viz., was the plaintiff a corporation, or a copartnership, or an individual person? Upon these issues the court found for the plaintiff, to the effect that the plaintiff, at all the times mentioned in the complaint, was, and still is, a corporation. We are of opinion that the judgment should be reversed, and that the court below should be directed to give judgment for plaintiff upon the findings of fact and the facts admitted by the pleadings.

We concur: **FOOTE, C.**; **HAYNE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed and cause remanded, with instruction to the court below to render judgment for the plaintiff on the findings.

WORKS, J. I concur in the judgment on the ground that the Code does not require the filing of a copy of the copy of the articles of incorporation in the county where the original is on file.

THORNTON, J. I concur in the judgment on the ground that, conceding that the note and mortgage involved in the cause to be such property as is referred to in section 299 of the Civil Code, the plaintiff has complied with the requirements of the section by filing with the county clerk of San Bernardino county, where the mortgaged property is situate, and where the plaintiff bank was doing business when the note and mortgage were executed, its original articles of incorporation.

(80 Cal. 46)

PEOPLE v. SWALM. (No. 20,497.)

(*Supreme Court of California.* Aug. 1, 1889.)

COMMUNITY PROPERTY—LARCENY.

1. Personal ornaments purchased by a wife on her husband's credit, but without his authority, for which he afterwards pays, and which he never gave to her as her own, though she took and retained possession of them, are community property, and her possession being that of her husband, her consent to the taking thereof by one knowing the facts would not prevent such taking from being larceny.

2. Defendant having taken the property with the consent of the wife, with whom he was on terms of criminal intimacy, and attempted, under an assumed name, to convey it out of the state, and having, when arrested, falsely stated the property to be that of another person, and attempted to escape by the bribery of an officer, the evidence sufficiently shows his felonious intent to warrant his conviction of larceny.

3. The fact of defendant's adultery with the wife is relevant to show that he knew the taking to be without the husband's consent, and that he intended to deprive the husband of the property.

4. The court having informed the jury in the general charge that the law presumes ornaments in a wife's possession to be her separate property until the contrary is shown, it is not error to refuse an instruction reiterating that principle.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

Seneca J. Swalm was indicted and convicted of the larceny of jewels alleged to be the property of Richard H. McDonald, Jr., and appeals.

Chas. B. Darwin, for appellant. *Atty. Gen. Geo. A. Johnson*, *Flournoy & Mhoon*, and *Sawyer & Burnett*, for the People.

FOOTE, C. The defendant was convicted of the crime of grand larceny, and from the judgment rendered upon the verdict of the jury and an order denying him a new trial he appeals. His first claim for the reversal of the judgment and order is that the property, consisting of certain valuable articles of jewelry, which he is alleged to have stolen, was not the property of the person alleged to be the owner thereof as charged, but was the separate property of his wife. There is evidence in the record which the jury evidently believed, and which it was their right so to do, which showed that the property in question was bought upon the credit of the husband, and was paid for by him; that the purchase of it by the wife was not authorized by him, but that he finally paid for it,—there being no evidence that either spouse purchased it with separate money. It also appears that the husband never gave the wife the property as her own, but made an effort to have it returned to the seller, but it was never returned, and it was afterwards given into the hands of the defendant by the wife, to be taken out of this state, after she had become connected with him. Swalm was arrested while endeavoring clandestinely, under an assumed name, to leave this state, and the property found in his possession. He endeavored to bribe the officer arresting him to allow him to proceed on his journey, without avail. His main defense is that the wife intrusted him with, or what at least he believed to be such, her separate property, to deposit for her in New York, and that he had no intent to steal any property from her husband. The property, as has been stated, when it came to the hands of the wife, was that which had been bought upon the husband's credit, billed to and paid for by him, costing several thousand dollars; it not appearing that the separate money of either spouse was used to pay for it. Being acquired after marriage, in this way, by either or both husband and wife, it became community property. Section 164, Civil Code. Thus acquired, it came to the possession of the wife from her husband, he having never given it to her as separate property. It remained common property when she handed it over to Swalm. The possession of the wife is that of the husband as to community property. Schuler v. Society, 64 Cal. 400, 1 Pac. Rep. 479. He had the title to it, and right of control over it. The wife's interest was a mere expectancy. Greiner v. Greiner, 58 Cal. 119.

The property being that of the husband, and in his possession, the sole question left for determination was, what was the intent of the defendant in taking and carrying it away? The evidence tended to show that he had seduced the wife, and had been handed the property by her to take away from the state; that he afterwards falsely declared it not to be her property, but that of a third party; that he was going away under an assumed name; that he tried to bribe the officer arresting him; and the other facts and circumstances in the case were, as we think, sufficient to warrant a belief in the minds of the jury either that the property was purchased by the wife, upon the husband's credit, at the instigation of the defendant, then having the intention, if he could, to steal it from both parties, and that the theft was afterwards consummated, or that he received the property from the wife, knowing it to be the husband's, and taken against his will, with a view to steal it. In either point of view, the larceny was complete; for it was the taking and carrying away with felonious intent the personal property of another.

The question of intent was a matter solely for the jury, and they have found against the defendant upon conflicting testimony, and, as we think, properly. Suppose the wife did consent to the taking away of the property of her husband, if the defendant took it with the felonious intent of depriving the husband of it, her consent when she had repudiated her relation of wife would not help him. 2 Bish. Crim. Law, §§ 873, 874, and cases cited. And the evidence tending to show adulterous intercourse between the defendant and the wife of the owner of the property was admissible and proper, as going to show that the defendant knew that the taking was against the will of the husband, and tending to show that the defendant took the same with intent to deprive the husband of it. The improper intercourse did not make the offense larceny, but it threw a clear light upon the intent of the taking, as showing that the wife's consent was without her husband's knowledge, against his will, and that the defendant knew the facts, and that his intention in taking it was to steal it from the husband. People v. Cole, 43 N. Y. 508.

There was no necessity, as the appellant contends, that the husband after the purchase should have reduced the property in dispute to manual possession; for, when acquired as it was, it became common property, and the wife's possession was the husband's.

The court instructed the jury that the exclusive possession of the wife of the property, being personal ornaments, would warrant the presumption that they were her separate property, and also that this presumption was liable to be rebutted. There was no evidence, as has been observed, that the jewelry had been purchased with the separate property of either spouse. There was the positive evidence of the husband that it had been acquired during the marriage; that he had never made a gift of it to her; and that it was not hers exclusively. This the jury believed, and that is sufficient.

The question as to the belief of the defendant when he took the jewels, as to the person to whom the property belonged, was for the jury. They found, as we think, properly, that he knew the property was that of the husband. There is nothing in the point that larceny in this state is different from what it is at the common law. Pol. Code, § 4468. The defendant was found guilty, not of "adulterous larceny," as he claims, of which crime there is no mention in our Penal Code, but of grand larceny, which is "the felonious stealing, taking, carrying, leading, or driving away the personal property of another," exceeding the value of $50. Pen. Code, §§ 484, 487.

It is contended by the appellant that it was error for the trial court to refuse an instruction that the possession of personal property by a wife creates a legal presumption that it belongs to her, which must be overcome by a party who would establish the contrary. The case was apparently tried in the court below, upon both sides, upon the theory claimed by the defendant here, that the possession of the wife of personal ornaments suitable to her condition, during the continuance of the community, creates a presumption of ownership in her, which is disputable. Conceding, without deciding, and for the purposes of this case only, notwithstanding what has been said by the appellate court in Meyer v. Kinzer, 12 Cal. 253, 254, that the appellant's view of the law as asked for in the refused instruction is correct, yet the court below in its charge to the jury had already said: "There are several presumptions of law which the Code says are disputable; that is to say, they may be controverted by other evidence, and which should control jurors in their action. And among these is that things which a person possesses are owned by him or her. And I charge you that the exclusive possession by a woman of personal ornaments, such as necklace, bracelets, and such articles as are usually worn by a woman in her condition of life, creates a legal presumption that they are hers, and the presumption increases in strength with the length of time that such possession continues." This was a full statement of the general principle involved in the instruction, and besides it was made applicable to the facts in evidence. A repetition of the general proposition of law, as claimed and asked for, was entirely unnecessary. Upon the whole record we perceive no prejudicial error, and advise that the judgment and order be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For reasons given in the foregoing opinion the judgment and order are affirmed.

(80 Cal. 81)

GREENBERG v. HOFF. (No. 12,870.)

(*Supreme Court of California.* Aug. 2, 1889.)

VERDICT.

Where answers to special interrogatories are not signed by the jury as a whole, nor by their foreman, as provided by Code Civil Proc. Cal. § 618, they are not effective for any purpose.

In bank. Appeal from superior court, San Luis Obispo county; D. S. GREGORY, Judge.

J. M. Wilcoxon, for appellant. *Graves, Turner & Graves*, for respondent.

WORKS, J. Action for money due on an account. Answer that the debt sued for was for money loaned by the plaintiff to the defendant for the purpose of engaging in the business of gaming and conducting the game of faro, the plaintiff to share in the profits to be realized from the game, and that the defendant had been discharged in insolvency. There was a general verdict for the plaintiff, and judgment was rendered accordingly. The appeal is from the judgment. A bill of exceptions shows that certain special interrogatories were submitted to the jury, and returned with the general verdict, with an answer to each appended thereto, but not signed by the jury or their foreman, and that the jury were polled, and answered that the verdict and these special answers were theirs. The only point made in the case is that the answers to these special interrogatories sustained the special defenses set up by the defendant, and entitled him to judgment, and that they should control the general verdict. But the answers to these special interrogatories must have been signed either by the jury as a whole, or by their foreman, to make them effective for any purpose. Code Civil Proc. § 618. There is no other way in which a general verdict or special findings can be authenticated. Counsel say that the failure to sign was a mere oversight, and the plaintiff made no objection to the answers being received without signing. If the jury had failed, by a mere oversight, to return any verdict at all, the oversight could not supply the omission. No more could it when the verdict was not signed. The fact that the plaintiff did not object cannot help the matter. It was the duty of the defendant, if he expected to rely upon the findings, to see that they were in proper form. Not having done so, he has no reason to complain. Judgment affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.; FOX, J.; PATERSON, J.

(80 Cal. 65)

DANGLARDE v. ELIAS *et al.* (No. 12,945.)

(*Supreme Court of California.* Aug. 2, 1889.)

WIFE'S DEED—SEPARATE ACKNOWLEDGMENT.

Civil Code Cal. §§ 1093, 1186, 1191, making a certificate of a married woman's separate examination and acknowledgment of a deed, and of the fact that it was explained to her, essential to its validity, does not except married women living separate from their husbands, and a conveyance by such a woman of land constituting her separate estate without such certificate is void, and this result is not affected by section 162, providing that a wife may convey her separate property without her husband's consent.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

W. T. Williams, for appellants. *H. H. Appel, C. C. Stephens*, and *G. Gordon Adam*, for respondent.

WORKS, J. This action is brought by the respondent against the appellants to set aside a deed from the appellant Jesus G. Elias to his co-defendant, who is his mother, on the ground that the deed was made without consideration and for the purpose of defrauding his creditors, including the respondent. Several grounds for reversal are urged by the appellants, but we need only notice one, as it is decisive of the case.

It appears from the evidence that the apparent title of the appellant Elias to the property he is charged with having fraudulently conveyed away was derived through a deed from his mother to him; that his mother was at the time of the conveyance a married woman; that her husband had abandoned her; that they had been living separate and apart for 40 years; that she had for many years assumed and been known by her maiden name; that the property was paid for by her own earnings; that her husband was still living; that she and her son continued to occupy the land together since the making of said deed; that the certificate of acknowledgment to the deed was not in the form required in the case of a conveyance by a married woman, but in the form of an ordinary certificate of acknowledgment by a *feme sole*; that she was in fact examined separate and apart from her husband, and the contents of the instrument made known to her; that the deed charged in this case to have been fraudulent was a reconveyance of the property to her by her son, and that both deeds were without consideration. It is insisted by the appellants that under this state of facts the appellant Elias was never the owner of the property in controversy, and for that reason the respondent had no cause of action. This depends entirely upon the question whether an acknowledgment in the form required by the statute, in case of a conveyance by a married woman, proved by the certificate of the officer in proper form, was necessary.

The respondent contends that as the appellant who made the conveyance was separated from her husband for a number of years and abandoned by him, had assumed her maiden name, and had paid for the property out of her earnings, the reason of the law had ceased to exist, and therefore the statute was not applicable. The statute applies to all married women without exception, whether living with or apart from their husbands, and to all property, whether it is owned by her as her separate property or otherwise. Civil Code, §§ 1186, 1191. And in the case of a married woman the acknowledgment in the manner required by the Code is a part of the deed itself, necessary and essential to its validity. Id. §§ 1093, 1186, 1191; Wedel v. Herman, 59 Cal. 507; Leonis v. Lazzarovich, 55 Cal. 55; 1 Amer. & Eng. Cyclop. Law, 164, and cases cited. If the acknowledgment is in due form, the certificate of the officer is not necessary to the validity of the deed, (Wedel v. Herman, supra,) but may be supplied at a later day; but where a certificate is attached it is *prima facie* evidence of the fact that the deed was acknowledged, as therein indicated, and if it fails to show the examination and acknowledgment separate and apart from the husband, or any other essential to a due and sufficient acknowledgment, it will be presumed that such necessary acts were not done. The certificate may, in an action brought for that purpose, be corrected to conform to the facts where no new rights have intervened. Wedel v. Herman, supra.

There has been no proceeding to correct the certificate in this case, if it be true that the acknowledgment was in the manner required by law. We must presume, therefore, that the acknowledgment was in the ordinary form, and not as required in the case of a conveyance by a married woman, and so presuming, the deed to the debtor in this case was void and vested no title in him. The respondent relies upon section 162 of the Civil Code, which provides: "The wife may, without the consent of her husband, convey her separate property." Conceding that this was the separate property of the appellant, the section cited has no bearing upon the question we are considering. That section provides that she may convey without the consent of her husband, but the question here is, how may she convey? and that is expressly answered by the other sections above cited. As the appellant Elias had no title to the property in controversy at the time he made the conveyance alleged to have been fraudulent, such conveyance did not injure the respondent, or give her any cause of action. Judgment and order reversed, and cause remanded for a new trial.

We concur: McFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

(80 Cal. 135)

YERIAN v. LINKLETTER. (No. 12,934.)

(Supreme Court of California. Aug. 5, 1889.)

PUNITIVE DAMAGES—GROSS CARELESSNESS.

Under Civil Code Cal. § 3294, authorizing the recovery of punitive damages "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed," it is error to charge that if the plaintiff was injured by defendant's act, and "in doing such act defendant was grossly careless," punitive damages might be awarded, as it cannot be said that an act of gross carelessness is always an act done through "oppression, fraud, or malice, actual or presumed." THORNTON and WORKS, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Action by John I. Yerian against John H. Linkletter for damages for personal injuries. Verdict and judgment for plaintiff, and defendant appeals.

M. J. Waldheimer and *Shaw & Damron*, for appellant. *B. M. Marble* and *J. G. McCallum*, for respondent.

FOOTE, C. Action for damages alleged to have been caused by the defendant driving his horse and vehicle on a street of the city of Los Angeles in such a negligent, careless, fast, and altogether reckless manner, and without ordinary care and caution, as to run over, knock down, and injure the plaintiff, etc. Judgment was given against the defendant, upon the verdict of a jury, in the sum of $800. From that and an order refusing a new trial the defendant appeals. The court instructed the jury in writing: "If the jury find from the testimony that the plaintiff was injured by the act of the defendant, as alleged in the complaint, and that in doing such an act the defendant was grossly careless, then the jury may give what is termed 'punitive,' 'vindictive,' or 'exemplary' damages; in other words, blend together the interests of society, and of the aggrieved individual, and give damages not only to recompense the sufferer, but to punish the offender, and not exceeding the amount claimed in the complaint."

From a bill of exceptions it appears that another instruction was embodied in the statement on motion for a new trial as originally prepared, as being erroneous, but the plaintiff moved as an amendment to the statement that it be struck out. The court granted the amendment, and the instruction was struck out. The defendant claims that the order striking it out is appealable, and may be reviewed in this proceeding. The statutory remedy for proving an exception, claimed to have been refused to be allowed by the judge, in accordance with the facts, has not been pursued, and the defendant's contention on the point is without force.

It is further claimed by him that the trial court erred in granting the instruction, supra. It may be said that there might be acts committed by an individual, resulting in the injury of another, of such altogether careless a character as to warrant the inference by a jury, from all the facts and circumstances surrounding the transaction, that the defendant, in an action where he was sued for damages for the injury inflicted, was guilty of "oppression, fraud, or malice, actual or presumed." But, while this is so, it does not follow that an instruction to the jury is proper under section 3294 of the Civil Code, which declares that "gross carelessness" of itself will warrant a verdict in vindictive or punitive damages. The language of that section is that such damages may be given "in any action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, actual or presumed." It cannot be said that an act of gross carelessness is always an act done through fraud, oppression, or malice, actual or presumed. The evidence showing the grossly careless act may reveal malice, actual or presumptive, oppression, or fraud, but it is not to be said that such malice or oppression or fraud necessarily exists where "gross carelessness" is shown. The instruction under consideration gave the jury to understand that, upon gross carelessness being shown to have resulted in the plaintiff's injury, exemplary damages could be given, but did not state, further, that the ingredient of oppression or fraud or malice, "actual or presumed," must be shown in evidence to have existed on the part of the defendant in the doing of the grossly careless act. The instruction was not, therefore, in accordance with the statute, supra. We advise that the judgment and order be reversed.

I concur: HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

PATERSON, J., (*concurring.*) I do not think it can be said, as a matter of law, that vindictive or exemplary damages may be given in every case where there has been gross carelessness. It is only where the act was the result of willful misconduct—that reckless indifference of the rights of others which is tantamount to an intentional violation of them—that exemplary damages can be recovered, under section 3294, Civil Code. Where the misconduct shows such an entire want of care as would justify the jury in believing the party charged with negligence has been guilty of a conscious indifference to consequences, it may be said that "the defendant has been guilty of oppression, fraud, or malice, actual or presumed," within the meaning of those words as used in section 3294, supra. Sedgw. Dam. (6th Ed.) 570.

THORNTON, J. I dissent. I think the instruction referred to in the opinion is correct. The reckless driving proves oppression. If the defendant desired an explanatory instruction, he should have asked it. There was no error in the instruction as given.

I dissent: WORKS, J.

(80 Cal. 78)

WHITING v. GARDNER *et al.* (No. 12,910.)

(*Supreme Court of California.* Aug. 2, 1889.)

DISCREPANCY IN BOUNDARIES.

Where the descriptions in a deed refer to a survey and a map based thereon, making both a part of the deed, and there is a discrepancy between the map and the survey, the latter will prevail.

In bank. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Williams & McKinley and *W. T. Williams*, for appellant. *Victor Montgomery* and *H. M. Smith*, for respondents.

WORKS, J. This is an action of ejectment, and involves the question as to the location of the dividing line between the adjoining lands of the plaintiff and defendants. Each of the parties derived title from the same source, and their lands are described by reference to certain numbered lots on a designated map of a larger tract containing the lands claimed by both parties. This issue of fact was found in favor of the defendants, and judgment was rendered accordingly. The sole point urged here is that the findings are not sustained by the evidence. It is somewhat difficult to understand the evidence, and arrive accurately at the facts, by an examination of the record; but it seems that, taking the map referred to in the respective deeds of the parties alone, the dividing line is located as claimed by the plaintiff, but the field-notes of the survey, upon which the map is based, and the evidence of surveyors with reference to them, show, or at least tend to show, a mistake in the map, and that the survey locates the line as contended for by the defendants. The contention of the appellant is that the map referred to, and thereby made part of the deeds, is conclusive as to the location of the line, even as against the field-notes of the survey upon which it is founded. The case of Chapman v. Polack, 70 Cal. 487, 11 Pac. Rep. 764, is relied upon, but it does not support the appellant's position. There the government survey, and the map founded upon it, agreed, and it was attempted to show by a private survey that both were wrong. It was very properly held that this could not be done, and that the map was conclusive. The proof here was not offered to show by subsequent surveys that the line was improperly located by the survey and map, but that the field-notes of the survey showed it at one place and the map at another. Therefore the question here is whether the field-notes of a survey upon which a map is founded can be used, as evidence to show that the map is incorrect. The descriptions in the deeds refer, not only to the map, but to the survey, which make both parts of the deeds. In the absence of evidence to the contrary, it will be presumed that the map correctly represents the survey, and the latter need not be looked to; but, if it be shown that a discrepancy exists between the map and the survey upon which it is based, the latter must prevail. O'Farrel v. Harney, 51 Cal. 125; Penry v. Richards, 52 Cal. 496; Jackson v. Cole, 16 Johns. 256; Jackson v. Freer, 17 Johns. 31. This being the case, there was at least a substantial conflict in the evidence, and the judgment of the court below cannot be disturbed. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.

(80 Cal. 144)

In re PEDRORENA. (No. 13,181.)

(*Supreme Court of California.* Aug. 1, 1889.)

DISTRIBUTION OF ESTATES—WRIT OF REVIEW.

1. The superior court in California may, within six months after the entry of a decree of distribution of an estate, set it aside on proper showing.

2. Where the notice of the motion to set the decree aside is defective, the order is not void on that account.

3. On an application for a writ of review of such order, the recitals in the order of the facts essential to jurisdiction are conclusive.

In bank. Application for writ of review to superior court, San Diego county; J. R. AITKEN, Judge.

J. E. Deakin, for petitioner. *Hunsaker, Britt & Lamme, Smith, Howard & Smith*, and *Trippet & Neale*, for respondent.

PATERSON, J. On the 23d day of June, 1888, after due proceedings had, a decree of distribution was made and entered in the superior court of San Diego county in the matter of the estate of Maria A. E. de Pedrorena, deceased. Within six months thereafter, to-wit, on December 20, 1888, the court, on motion of certain interested parties, vacated and set aside said decree of distribution. The petitioner herein now asks for a writ of review, claiming that the court exceeded its jurisdiction in making the order vacating the decree of distribution.

We think that the court had the power at any time within six months after the entry of the decree to set it aside on a proper showing. Estate of Hudson, 63 Cal. 454; Code Civil Proc. § 473. The applications were based on the grounds of mistake, inadvertence, and surprise, and fraud on the part of this petitioner. The order of the court is made a part of the petition herein, and it shows that affidavits of merit were presented to the court, and that all parties interested "were duly served with due notice of said motion," and that no one appearing to contest said motions, or either of them, the court proceeded to hear the same, and the respective petitions and affidavits in support thereof, and after due consideration, the court being convinced that justice required that said motions should be granted, the decree was set aside. Petitioner herein attempts to show that the notice was insufficient, but the most that can be said against its sufficiency is that it was defective merely, and the order is not void on that account. The recitals in the order of facts essential to jurisdiction are conclusive in this proceeding. The record cannot be amended or attacked, but must be taken as we find it, at least as to all matters of fact adjudicated therein. It is not a proper function of the writ of review to add to or modify the record with respect to jurisdictional facts determined therein, but to test the question of jurisdiction on the facts appearing on the face thereof. Freem. Judgm. §§ 126, 619; In re Grove St., 61 Cal. 453; Ex parte Sternes, 19 Pac. Rep. 275.

Other points are made against the validity of the order, but, conceding the facts alleged to be true, the remedy of petitioner, if any there be, is by motion in the court below to set aside the order. Application denied.

We concur: SHARPSTEIN, J.; McFARLAND, J.; WORKS, J.

(80 Cal. 139)

LEVERONE v. HILDRETH. (No. 12,970.)

(*Supreme Court of California.* Aug. 5, 1889.)

CONSIDERATION OF PROMISSORY NOTE.

Where defendant signed a note some months after its date and delivery by the original maker, and there was no extension of payment, nor promise of forbearance, she was not bound thereby.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Craig & Meredith, for appellant. *Tupper & Tupper*, for respondent.

BEATTY, C. J. Suit on promissory note. Defense, want of consideration. Judgment for plaintiff. Appeal by defendant from judgment and order denying a new trial. Appellant, in support of his appeal from the order, contends that the finding of the superior court of a sufficient consideration for the note is wholly unsupported by the evidence. The facts are that in 1883 Thomas Hildreth, the father of appellant, executed and delivered to the respondent his promissory note for $2,023. Subsequently, on August 1, 1885, having made a payment of $1,000 on account of this note, he executed and delivered the note in suit for the balance remaining unpaid, and the old note was thereupon surrendered. The new note was made payable one day after date; and some sixty days after its date and delivery, according to the admission of the respondent, or five months, as claimed by appellant, the appellant signed it. There is no material conflict of testimony as to the circumstances under which he added his signature to the note. Respondent was pressing his father for payment, and at the father's request the son signed. There was no extension of credit, no promise of forbearance, written or oral. Some attempt was made to show that the appellant had some advantage or share in the money loaned or advanced by the respondent at the date of the first note, but it amounted only to this: that the money was used in the business of a firm of which appellant and his father were members; but the evidence to this effect was hearsay and incompetent, and admitted over appellant's objection. Even if it had been proved by competent testimony that the money advanced at the date of the original note went into the firm, or was used in the business of a partnership of which appellant and his father were members, it would not follow that appellant was under any obligation to repay it or any part of it. It was loaned to his father upon his note, and, if he used it in the firm business, the presumption is he got credit for it in the partnership accounts. The authorities cited and relied upon by respondent are not in point. They are to the effect that, if the payee parts with his money on the faith of a promise by the borrower that he will procure the signature of a surety to his note, the surety is bound if he sign the note after the money is advanced; but such is not the case here. We think the findings of the superior court in the particulars indicated are against all the evidence, and the order denying a new trial is therefore reversed, and the cause remanded.

We concur: WORKS, J.; PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

(80 Cal. 141)

TURNER v. TURNER. (Nos. 12,672, 12,707.)

(*Supreme Court of California.* Aug. 5, 1889.)

ALIMONY PENDENTE LITE.

Civil Code Cal. § 137, empowering the court, in its discretion, to require the payment of alimony by a

husband to a wife, pending an action for a divorce, when necessary to the support of herself or children, or the prosecution or defense of the action, invests the court with nothing but a legal discretion, reviewable on appeal, and an order granting such alimony will be reversed when it appears that the wife occupies the homestead, which yields a good income; that she is in no immediate need of money; that the property enjoyed by her is more valuable and productive than that held by the husband; and that he is maintaining the greater number of their children.

In bank. Appeals from superior court, Inyo county; JOHN A. HANNAH, Judge.

P. W. Forbes, *Geo. M. Gill*, and *A. C. Ellish*, for appellant. *John W. P. Laird* and *A. R. Conklin*, for respondent.

BEATTY, C. J. These are appeals from orders granting the plaintiff alimony and counsel fees, pending a suit for divorce. Her action is upon the ground of cruelty, and there is a cross-action by the defendant upon grounds of cruelty and desertion. The motion for alimony was based upon the pleadings, and upon an affidavit of the plaintiff in which she alleges, in the most general terms, that she is in bad health, unable to labor and earn a living, in indigent circumstances, and without money or other means to support herself and carry on her suit. On information and belief she charges that the defendant is possessed of large means. All her allegations are so vague and general as to render it very doubtful if perjury could be assigned upon any one of them, however false they may be. In opposition to her motion the defendant filed his own affidavit, supported by those of seven witnesses,—apparently disinterested and well informed as to the matters in dispute,—from which and from the pleadings it is made to appear that the plaintiff is in good health; that there are six children of the marriage, the eldest being thirteen and the youngest three years of age; that before commencing her action for divorce she induced the defendant to convey to her the quarter section of land upon which they had their family residence; that she thereupon turned the defendant and four of the children out of doors, allowing only two of the younger ones to remain with her; that she has since been in receipt of an income of from $800 to $1,000 per annum rents of said quarter section, exclusive of the dwelling-house, which she retains for her own use. One of the affiants swears that he has recently purchased from plaintiff hay to the value of $324, of which sum $174 remain due, which he has been and is willing to pay, but the plaintiff has frequently told him she does not need it. The defendant sets out a list of all his personal property, consisting of stock of the value of $700, and farming implements of the value of $500, and $50 in money, all absolutely necessary to enable him to carry on his farm and support himself and the four children under his care. The affidavits of the other witnesses show that the land owned by defendant, and in his possession, is much less valuable and productive than the homestead quarter section which is in the possession of and claimed by the plaintiff. These affidavits filed by and on behalf of the defendant, including his cross-complaint, may be altogether false, but they contain many specific statements of fact which, if false, would sustain charges of perjury, and which, in the absence of any denial or rebutting evidence, must be accepted as true. So regarded they show that the defendant's burdens and necessities are greater, and his means and ability to sustain them less, than are the plaintiff's. The court, however, without any findings of fact, ordered the defendant to pay to the plaintiff $50 a month for her support pending the action, and made a further order that he pay to her attorneys $500 counsel fees within 10 days from the date thereof, and rendered judgment therefor. From this order the defendant appealed. Two days after service of his notice of appeal the court amended or modified the order so appealed from by directing payment of the $500 to the plaintiff, to enable her to prosecute the action. This amendment seems to have been made to meet the objection to a similar order in the case of Sharon v. Sharon, 75 Cal. 1, 16 Pac. Rep. 345. From the order so amended the defendant again appealed, and these are the two appeals which we are considering together.

A number of points are made and fully argued by appellant in support of his appeals. The respondent has offered no argument in reply. Under the circumstances we feel indisposed to discuss or to decide any point a decision of which is unnecessary, and, as the whole matter may be disposed of upon the ground that the showing on the part of the plaintiff was insufficient to justify the original order, we shall rest our decision upon that ground alone. It is provided by section 137 of the Civil Code that "when an action for divorce is pending the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself or her children, or to prosecute or defend the action." There is nothing new in this provision of the Code, and the discretion with which it invests the court is not an arbitrary power, but is the same legal discretion exercised by courts having jurisdiction of the action of divorce antecedent to, and independent of, express statutory authority. It is a discretion to be exercised in view of the circumstances of the parties, their several necessities, and the pecuniary ability of the husband. A sum absolutely small may be relatively excessive, and where, as in this case, the wife is plaintiff, where she has possession of the homestead, where she has burdened herself with but two out of six young children, where her property, or that which she enjoys the use of, is more valuable and productive than the husband's, and where, as above stated, it appears that his burdens and necessities are greater, and his means less, than hers, it is an excess of any discretionary power of the court to award temporary alimony. The orders appealed from are reversed.

We concur: WORKS, J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

80 Cal. 132

RODRIGUEZ DE CAZARA *v.* ORENA. (No. 12,933.)

(*Supreme Court of California.* Aug. 1, 1889.)

QUIETING TITLE.

1. Where land is conveyed by a deed absolute in form, to secure an indebtedness, the owner of the equitable title cannot have the same quieted without a payment of the debt, though it be barred by the statute of limitations.

2. In such case defendant, who had been in possession of the land or in receipt of the rents and profits, must account for the same, to be credited on the original debt.

In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

R. B. Canfield, for appellant. *W. C. Stratton*, for respondent.

BEATTY, C. J. This is a suit to quiet title. The complaint is in the usual form, unverified. The answer is a general denial of all the allegations of the complaint, except that defendant claims an interest in the property adverse to the plaintiff, followed by a plea of the statute of limitations. The finding of the superior court was against the defendant as to his claim under the statute, but the court found as follows concerning the title: On January 16, 1877, the lot in controversy was the property of Bernarda Rodriguez, who on that day mortgaged it to the defendant, Orena, to secure the payment of her promissory note of even date, payable in one year. On August 17, 1878, her note being unpaid, Bernarda Rodriguez executed, acknowledged, and delivered to Orena a deed in the form of an absolute conveyance of said lot, but this was only intended as security, it being orally agreed at the time that Orena might sell the lot, pay himself out of the proceeds, and that any balance over should be paid to the plaintiff in this action. Orena has never sold the lot, and no part of the note has been paid. He has no title to the lot except such as he may have acquired by said deed of Bernarda Rodriguez, and the plaintiff has succeeded to all the title remaining in Bernarda after her deed to Orena. Upon these findings the superior court decreed a reconveyance of the lot upon payment by plaintiff to defendant of the amount due him on account of said note of Bernarda Rodriguez. The plaintiff appeals from the judgment, contending that she is entitled to a reconveyance, and to have her title quieted without payment. She asks us to direct a modification of the decree in accordance with this contention. We do not think this case can be distinguished, on the facts found, from that of Booth v. Hoskins, 75 Cal. 271, 17 Pac. Rep. 225, where it was held that the plaintiff could not have his title quieted except upon condition of payment of the debt to secure which he had mortgaged the land, notwithstanding the debt was barred by the statute of limitations. The decree here follows that decision, the correctness of which we see no reason to question, but the facts found, and upon which this decree rests, are outside the issues made by the pleadings, and wholly unsupported by them. For this reason alone, and because the defendant, if he had been in possession of the lot or in reception of the rents and profits, is bound to account for them, or the value of the use and occupation, to be credited upon the amount of his note, the judgment must be reversed. It is therefore ordered that the judgment be reversed, and the cause remanded for further proceedings, with leave to the defendant to amend his answer or to file a cross-complaint, and with leave to plaintiff also to amend if she be so advised.

We concur: WORKS, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

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80 Cal. 57

CITY AND COUNTY OF SAN FRANCISCO *v.* ITSELL *et al.* (No. 12,952.)

(*Supreme Court of California.* Aug. 1, 1889.)

MUNICIPAL CORPORATIONS—DEEDS.

1. The city of San Francisco, to settle private land claims by ordinance passed in 1855, authorized the mayor to enter the land at the land-office, and to hold it in trust for those in actual possession. It was also provided that part of the land should be laid out as public squares, and this was done, one of the squares being called "Hamilton Square." Act Cal. March 11, 1858, ratified this ordinance, but no entry was ever made. Act Cong. July 1, 1864, relinquished to the city the land within its limits for the uses specified in the ordinance mentioned. T. had a claim to the land included in Hamilton square, and compromised with the city by conveying part of the land to it, and receiving in return a conveyance for another part thereof. These deeds were made in pursuance of an ordinance, and were ratified by an act of the legislature. *Held*, that the conveyance by the city was void, as it held the land in trust for the public.

2. A judgment in an action by T.'s grantee against the city, quieting plaintiff's title to the land in controversy, bars a recovery of the land in ejectment by the city against the grantees of said plaintiff; the city having no other title than that held by it before the judgment. Following San Francisco v. Holladay, 17 Pac. Rep. 942.

3. When a complaint by a city is unverified, the answer need not be verified, under Code Civil Proc. Cal. § 446, providing that an answer shall be sworn to when the complaint is verified, or the plaintiff is the state or any state officer suing officially.

4. Want of verification of an answer is waived by going to trial without objection.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Ejectment by the city and county of San Francisco against Andrew J. Itsell and others. In 1855 the city of San Francisco passed an ordinance intended to assist in the settlement of private land claims within its municipal limits. By it the mayor was directed to enter all the land in the city at the land-office, and the grant, when obtained, was to inure to the benefit of those in actual possession of the land. Certain public squares were to be laid out in the land so granted. No entry was made, but the council passed another ordinance, under which it proceeded to lay out squares, among which was Hamilton square, the land in controversy. March 11, 1858, the legislature ratified these two ordinances, reciting them literally. Act Cong. July 1, 1864, relinquished to the city all the land within its corporate limits, for the uses and purposes specified in the ordinance of 1855.

It was contended that more land was taken for Hamilton square than was authorized by the ordinance. One Edward Tompkins claimed land including that now in controversy, and he compromised with the city by conveying to it certain parts of the land, and receiving a conveyance of other parts; these conveyances being pursuant to an ordinance of the city. This ordinance, as stated in the opinion, was afterwards ratified by the legislature. Defendants claimed under Tompkins, and Tompkins under the deed from the city. Judgment for defendants, and plaintiff appeals.

Flournoy & Mhoon, and *Geo. Flournoy, Jr.*, for appellant. *Wm. & Geo. Leviston, Thos. D. Riordan, Geo. A. Knight, Jarboe, Harrison & Goodfellow, P. F. Dunne, A. H. Loughborough, H. A. Powell, Tobin & Tobin, Stanley, Stoney & Hayes, H. C. Campbell* and *Thos. F. Barry*, for respondents.

HAYNE, C. This was an action of ejectment brought by the city against numerous defendants for a tract of land known as "Hamilton Square." As to a number of the defendants, it was found that they "are not and were not, at the commencement of this action, in the occupation or possession of the premises described in the complaint, or any part thereof." No question is made as to the correctness of the judgment in favor of these defendants. Judgment passed in favor of the other defendants upon two grounds, which are set forth in the findings. The plaintiff does not bring up any of the evidence, but contends that the judgment should be reversed upon the findings.

1. In July, 1869, a compromise was agreed upon between the city and one Edward Tompkins, who claimed a tract including the premises in controversy. By this compromise the officers of the city, under an ordinance of the board of supervisors, executed to Tompkins a conveyance of the premises in controversy, and in consideration thereof Tompkins conveyed to the city the other portion of the tract claimed by him. The ordinance and deeds were subsequently ratified by act of the legislature. The defendants claim through Tompkins. We think that this defense cannot be sustained. The city held the square in trust for the public, and had no power to dispose of it by way of compromise or in any other manner; nor could the legislature ratify such a disposition of the trust property. In Hoadley v. San Francisco, 50 Cal. 275, the court said, with reference to this same square: "The title was granted to the city in trust for public use, and the city had no authority by virtue either of the statute of March 11, 1858, or of the act of congress of July 1, 1864, to alienate or in any manner dispose of it, but only to hold it for the purposes expressed in the statute. It was granted to the city for public use, and is held for that purpose only. It cannot be conveyed to private persons, and is effectually withdrawn from commerce; and, the city having no authority to convey the title, private persons are virtually precluded from acquiring it." This case was approved and followed in Sawyer v. San Francisco, Id. 375, and in Hoadley v. San Francisco, 70 Cal. 324, 12 Pac. Rep. 125, which was affirmed by the supreme court of the United States upon writ of error. 124 U. S. 646, 8 Sup. Ct. Rep. 659. The rule, therefore, that the city holds property like this in trust, and cannot convey it, must be considered as settled.

2. The defendants, however, pleaded and proved a judgment brought by their predecessor in interest against the city, and rely upon such judgment as a bar to the action. And this position must be sustained. It appears that Tompkins conveyed to one Edward F. Palmer, and it is found that on September 11, 1869, Palmer commenced an action against the city in the late Fifteenth district court to quiet his title; that the city appeared and contested said action, and that the issue was whether Palmer or the city had the title; that this issue was determined in favor of Palmer; and that judgment was thereupon entered, by which it was "ordered, adjudged, and decreed that the plaintiff, Edward F. Palmer, was at the commencement of said action, and still was, the lawful owner, in fee-simple absolute, of the premises described in the complaint therein, and that the said defendant, the city and county of San Francisco, had not any estate, right, title, or interest therein; and that said defendant, the city and county of San Francisco, be, and by said judgment was, forever thereafter enjoined, restrained, and debarred from asserting or claiming any estate, right, title, or interest in said premises, or any part thereof." It does not appear whether any appeal was taken from this judgment, but it is found that it "still remains in full force and effect, not reversed or otherwise vacated," and that the city "has no other or different title or claim of title to the premises in controversy than it had at the time of the commencement of said action of Edward F. Palmer." The defendants are successors in interest of Palmer. Upon these findings we think it clear that the Palmer judgment is a bar to the action. This precise question was decided in San Francisco v. Holladay, 76 Cal. 18, 17 Pac. Rep. 942, and that decision is conclusive of this branch of the case.

3. It is argued for the appellant, however, that the answers of the defendants herein were required to be verified, and, not having been so, should be disregarded. But, in the first place, the answers were not required to be verified. The only statute to which counsel for the city refer in support of their position is section 446 of the Code of Civil Procedure, which provides, among other things, that the answer must be verified "when the complaint is verified, or when the state, or any officer of the state, in his official capacity, is plaintiff." The complaint was not verified, and the city is not the state, or an officer thereof. The case of Stockton v. Dahl, 66 Cal. 378, 5 Pac. Rep. 682, is not in point. In that case there was a statute which expressly required the answer to be verified. In the second place, it appears from the findings that the case "was tried upon the issues raised by the complaint and the answers of the defendants," (specifying them;) and the plaintiff cannot go to trial without objection for the want of a verification, and raise the point for the first time after the decision has gone against him, (see Arrington v. Tupper, 10 Cal. 465; McCullough v. Clark, 41 Cal. 302.) We therefore advise that the judgment be affirmed.

We concur: **Foote, C.**; **Gibson, C.**

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

Thornton, J., took no part in the decision of the above cause.

(80 Cal. 86)

Dear v. Varnum. (No. 12,845.)

(*Supreme Court of California.* Aug. 2, 1889.)

Recovery of Taxes Paid.

1. A complaint in an action to recover taxes paid under protest, which alleges that the assessment did not show "the number, kind, amount, and quality" of the personal property assessed, is demurrable; it being sufficient if the assessment shows generally the character of the property, under Pol. Code Cal. § 3650, providing that a failure to enumerate personal property in detail shall not invalidate the assessment.

2. Such complaint does not show payment of the tax under duress or coercion, where there is an allegation that the delinquent list had been published, but none that there was seizure or threat of seizure of plaintiff's property, or that he had any real estate on which the judgment would be a lien; and a protest at the time of payment does not divest it of its voluntary character.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; J. R. Aitkin, Judge.

J. E. Deakin, for appellant. *J. L. Copeland*, for respondent.

Vanclief, C. This is an action to recover back certain taxes upon personal property paid by the plaintiff to the defendant as tax collector of San Diego county, under protest. The complaint alleges, in substance, that the assessment of plaintiff's personal property for taxes for the fiscal year ending June 30, 1887, was illegal and void, for the reason that it did not show the "number, kind, amount, and quality" of the personal property attempted to be assessed; that on or about the 16th day of February, 1888, the delinquent tax-list for the preceding fiscal year had come into the hands of the defendant as tax collector, and the publication thereof had been commenced; and that on said day plaintiff paid to the defendant the amount of personal taxes demanded of him, to-wit, the sum of $238.15, and 5 per cent. penalty and costs, and at the same time protested against the payment thereof, upon the ground that the assessment thereof was illegal and void for the reason above stated. An amendment to the original complaint averred, in substance, that prior to the assessment plaintiff furnished to the assessor, in conformity to section 3629 of the Political Code, a written statement under oath, setting forth specifically all the real and personal property owned by plaintiff, or in his possession, or under his control, at 12 o'clock M. on the first Monday in March, 1887, and that the assessment was made in an assessment book prepared by the assessor, with appropriate headings, alphabetically arranged. To the amended complaint the defendant interposed a general demurrer, which was sustained, and upon failure of plaintiff to further amend his complaint judgment was rendered for the defendant, from which the plaintiff brings this appeal. The complaint does not set forth a copy of the assessment, nor does it disclose the contents of the written statement furnished by plaintiff to the assessor, nor allege that the assessment did not conform, in its description of property, to the description contained in the statement furnished by plaintiff, nor show wherein it differed therefrom. Assuming the statement furnished to have been such as the law required, it must be presumed, in support of the assessment, unless the contrary is alleged, that the description in the assessment was identical with that contained in the statement. But whether the statement was correct or not, if the assessor adopted the description furnished by the plaintiff, the latter will not be heard to complain of its indefiniteness. San Francisco v. Flood, 64 Cal. 504, 2 Pac. Rep. 264; Cadwalader v. Nash, 73 Cal. 43, 14 Pac. Rep. 385.

The Political Code (section 3650) expressly provides that a failure to enumerate personal property in detail does not invalidate the assessment thereof. The complaint, without describing the assessment, merely alleges conjunctively that the assessment did not show "the number, kind, amount, and quality" of the personal property. This negative allegation is pregnant with the affirmative admission that the assessment did show at least three of these requisites, and is not a positive allegation that the assessment failed to show any particular one of the four; yet, under the provisions of the Code, the assessment is sufficient if it shows generally the kind or quality of personal property, so that the taxpayer may know for what property he is taxed. San Francisco v. Flood, supra.

The complaint is further insufficient, in that it fails to show that the payment of the personal taxes was made under duress or coercion. The complaint merely alleges that the delinquent list was being published, but does not allege that any real property was assessed to or owned by the plaintiff upon which the assessment of personal property became a lien. Therefore the allegation as to the publication of the delinquent list has no relevancy to the question of coercion. There is no allegation of any seizure of, or of any threat or attempt to seize, plaintiff's property. In the absence of acts amounting to duress or coercion, the payment of the tax was voluntary; and the mere protest made at the time of payment does not divest it of its voluntary character. Where there is no legal compulsion, the legal effect of the payment is not impaired by a protest. McMillan v. Richards, 9 Cal. 417; Bucknall v. Story, 46 Cal. 597; Bank v. Webber, 52 Cal. 73; Wills v. Austin, 53 Cal. 152; Brumagim v. Tillinghast, 18 Cal. 266. We think the judgment should be affirmed.

We concur: **Foote, C.**; **Hayne, C.**

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

(80 Cal. 181)

Lakeside Ditch Co. v. Crane *et al.* (No. 12,296.)

(*Supreme Court of California.* Aug. 5, 1889.)

Water-Courses—Diversion—Corporations.

1. In an action by a lower against upper appropriators to determine who has the superior right

to divert the water of the stream, a finding that plaintiff has adversely appropriated the waters of the stream, "the waters so diverted and used being sufficient to fill its ditch, whenever there was water in the stream to fill it, and when there was not sufficient water to fill the plaintiff's said ditch it took what water came down the creek in its natural flow," is indefinite and uncertain. If plaintiff diverted only the water that defendants allowed to pass plaintiff acquired no right as against defendants to a supply of water sufficient to fill its ditch.

2. As the defendants had no interest by virtue of prior appropriation, it was immaterial that plainiff had not obtained permission to construct its ditch from the water commissioners, in compliance with St. Cal. 18 8, p. 112, which provides that "no ditch shall hereafter be taken out of any stream in the waters of which different persons have an interest by virtue of prior appropriation, without leave of said commissioners." Nor does the fact that defendants had obtained the consent of the commissioners give them any right against plaintiff, the prior appropriator.

3. The defendants not having denied that they diverted the water, evidence of diversion by other ditches above defendant's, which other ditches were later in time of diversion than both plaintiff's and defendants', was properly excluded.

4. The findings should state the quantity of water the plaintiff is entitled to have flow past the defendant's ditch in inches or gallons, and not merely by fixing the width, depth, and grade of the ditch.

5. Where it appears that plaintiff was recognized in the community as a corporation, and its records show that it was acting as a corporation, and in all its dealings was styled as a corporation, and that it had held corporate meetings, and pursued corporate forms of action, sufficient is shown to bring it within the provisions of Civil Code Cal. § 358, which declares that "the due incorporation of any company claiming in good faith to be a corporation, and doing business as such, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party."

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge. *Brown & Daggett* and *Mich. Mullany*, for appellants. *Atwell & Bradley*, *M. S. Babcock*, and *Jarboe, Harrison & Goodfellow*, for respondent.

PATERSON, J. This is an action between rival appropriators to determine who has the superior right to divert water from Cross creek, a natural water-course flowing through Tulare county. Plaintiff claims that the defendants have no right to any water until its ditch has been first supplied to its full capacity, and the court so decided. The findings of the court are in several respects quite uncertain. It is found that on the 1st day of May, 1874, plaintiff took out and diverted through its ditch, under a claim of right, openly and adversely to the whole world, water "sufficient to fill its ditch, which was and is thirty feet wide on the bottom, and forty-six feet wide on top, and four feet deep, with a fall of one foot to the mile. And from the 1st day of May, 1874, so openly, peaceably, notoriously, and adversely continued to appropriate and use the waters of said stream, the waters so diverted and used being sufficient to fill its ditch whenever there was water in the stream [Cross creek] to fill it, and when there was not sufficient water to fill the plaintiff's said ditch it took what water came down the creek in its natural flow." In view of the fect that the defendants' ditches divert water at points higher on the stream than the plaintiff's, it may be true, as stated by the court, that the plaintiff has continuously, since 1874, diverted water sufficient to fill its ditch whenever there was water in the stream to fill it, and, when there was not sufficient water to fill it, that it took what water came down the creek in its natural flow, and yet plaintiff might not have acquired any right, as against defendants, to a supply of water sufficient to fill its ditch. If the plaintiff's ditch was simply diverting water which the defendants allowed to pass down the stream while the head-gate of their ditch was closed, the act of the plaintiff in diverting the water thus permitted to pass down the stream could not, in the nature of things, be adverse to the right of the defendants. The latter could not complain, and title by prescription cannot be acquired, unless the acts constituting the adverse use are of such a nature as to give a cause of action in favor of the person against whom those acts are performed. Title by prescription is created in such cases only where the conduct of the party who submits to the use by another cannot be accounted for on any other hypothesis than that which raises the presumption of the grant of an easement. The conduct of the party claiming the benefit of the presumption must in all cases have been such in itself as to give the other party the right to complain. The defendants having no right to complain in the first instance, "we are not driven to the presumption of the grant of an easement to account for why they did not complain." Hanson v. McCue, 42 Cal. 310. If this finding is material, therefore,—and perhaps it is not, because plaintiff's right seems to be based upon prior appropriation,—it should be made more definite.

The court found that "neither the defendants nor their ancestors or grantors have at any time prior to the construction of the ditch complained of, to-wit, the month of May, 1884, claimed or asserted any right to the waters of Cross creek adversely to the plaintiff," and that the defendants' ditch from the time of its construction in 1876 until May, 1884, "carried away no appreciable quantity of water," but these findings are not supported by the evidence. The evidence shows without substantial conflict that the Hyde ditch, owned by defendants, was finished and commenced to divert water in the spring of 1876, and that those who have owned and controlled it have ever since continuously, uninterruptedly, and under a claim of right, adverse to all the world, during the irrigating season of each year, diverted water through the same from Cross creek for the purposes of irrigation. There is evidence tending to show an interference with the Hyde ditch, but it is so slight that those who performed the acts of interruption may be regarded simply as trespassers, and the intrusions not long enough to raise a presumption that those in possession of the ditch knew of the trespass, or sufficient to show a break in the continuity of the adverse use. As between the parties hereto there is no question of riparian rights, and, in view of the evidence as to the uninterrupted use by defendants of their ditch, it is immaterial, so far as the quantity of water diverted by the Hyde ditch is concerned, that the plaintiff's original appropriation of the water was prior to that of the defendants. There is some evidence tending to show that the Hyde ditch was enlarged about the year 1882, and its carrying capacity greatly increased; but the defendants are entitled to a finding as to the quantity of water carried by their ditch during its uninterrupted use by them prior to 1882. It is clear that the ditch carried away an appreciable quantity of water. How much—what quantity—we do not pretend to say. It is for the trial court to determine that matter.

Appellants claim that the plaintiff shows no right whatever to divert water because it never obtained permission of the water commissioners of Tulare county to construct a ditch, or divert water. This contention is based upon section 3 of a statute appointing water commissioners for Tulare county. The section provides: "No ditch shall hereafter be taken out of any stream in the waters of which different persons have an interest, by virtue of prior appropriation, without leave of said commissioners." St. 1868, p. 112. The defendants have no interest in the waters of the stream "by virtue of prior appropriation." No prior appropriators are complaining of any act of the plaintiff. It is not claimed that there has been any appropriation of any of the waters of Cross creek below the ditch of plaintiff, and in the absence of such appropriation no one can be injured by the act of plaintiff. The fact that defendants obtained the permission of the water commissioners to build their ditch and divert water does not give them any right as against the plaintiff herein, who was a prior appropriator. The statute does not confer upon the board of water commissioners the right to take away the interest which a prior appropriator has in the waters of a stream.

We think that the evidence in support of the finding that the plaintiff was a corporation, acting in good faith as such, is sufficient. It was recognized in the community as a corporation, the record of its proceedings show that it was so acting, and in all its dealings it was styled as a corporation; it has pursued corporate forms of action, held corporate meetings, and, we think, comes within the provisions of section 358 of the Civil Code, which provides that "the due incorporation of any company claiming in good faith to be a corporation, and doing business as such, shall not be inquired into collaterally in any private suit to which such *de facto* corporation may be a party." Railroad Co. v. Plumas Co., 37 Cal. 361.

The defendants offered to prove that there were other ditches diverting water from the creek above defendants ditches, which other ditches were later in time of diversion than either plaintiff's or defendants' ditches. The court did not err in refusing to admit this proof. The defendants did not deny that they diverted the water. There was, therefore, no doubt as to who did divert the water. The fact that other persons may have invaded the plaintiff's right was immaterial.

The ruling of the court in admitting evidence as to who had the control and management of the Lakeside ditch is inconsistent with its ruling upon the same subject when evidence was offered in behalf of the defendants. We think the court erred in excluding the latter.

We have considered other assignments of error made by appellant, but see nothing prejudicial in any of them. As the case must go back for a new trial, it is proper to suggest that the findings of the court upon the question, what quantity of water the plaintiff was entitled to have flow past defendants' ditches, should, if possible, be made definite by naming the number of inches or gallons, instead of by fixing the width, depth, and grade of the ditch. A finding that plaintiff is entitled to have its ditch supplied to its full capacity may lead to future disputes and litigation. In view of the character of the soil the capacity of the ditch is likely to change rapidly.

Appellant complains that under the decision of the court as it stands "plaintiff would be relieved from all diligence and exertion in maintaining a dam, or securing the waters of the creek from running idly and wastefully past the head of the Lakeside ditch, and the defendants would be wantonly deprived of the water for their ditches, while all other ditches heading upon this creek might be amply supplied with water, and while abundance of water would be running waste." Of course, if the plaintiff does not use proper care to preserve the water which passes the head of the defendants' ditch to it, the plaintiff cannot complain that its ditch is not supplied with water. Judgment and order reversed, and cause remanded for a new trial.

We concur: McFARLAND, J.; SHARPSTEIN, J.

BEATTY, C. J., (*concurring*.) As I construe the findings of the superior court they show with sufficient clearness that, from the completion of plaintiff's ditch in 1874 down to the year 1884, it has continuously diverted water sufficient to fill said ditch, excepting only when the natural flow of the stream (Cross creek) was insufficient to fill it, and that at such times it diverted all of such natural flow; that the Hyde ditch of defendants, as originally constructed in 1876, diverted no appreciable quantity of water, but that after, and only after, the enlargement of the Hyde ditch in 1882, and the subsequent construction of the Manning ditch, the defendants have been diverting water included in plaintiff's appropriation. I should not therefore regard the findings as insufficient in this respect, even if the plaintiff's right was founded exclusively upon prescription. But the truth is plaintiff's right rests upon a prior appropriation, and does not need to be supported by proof of uninterrupted user, and if the findings require the construction placed upon them in the opinion of the court, the fault seems to me to be immaterial. The defendants, on the other hand, must rely upon prescription to justify a diversion of any water previously appropriated by the plaintiff, and upon that point I do not consider that the finding of the superior court against defendants' claim is so clearly unsupported by the evidence as to justify us in reversing it. The testimony seems to be entirely consistent with the view that from 1876 to 1884 the original, unenlarged Hyde ditch diverted no appreciable quantity of water, except when the stream was high and water abundant. As to the offer of the defendants to show that other persons, not parties to the action, had taken out water higher up the stream by means of ditches constructed later than any diversion by plaintiff or themselves, and that such more recent diversions of water were the real cause of the injury to plaintiff, I think the ruling of the court excluding the testimony was correct in the present state of the pleadings. To make such testimony material, defendants should set up in their answer the facts showing the necessity of making such third persons parties to the action in order to a complete determination of the rights of all in the waters of the stream. Upon a proper showing of the facts—which I think should be allowed by amendment, if requested—the court might direct other subsequent appropriators to be brought in. Differing in these particulars from the views expressed in the opinion of the court, I nevertheless concur in the judgment upon the ground that there should have been a more specific finding of the exact quantity of water, measured by some definite standard, (miner's inch, for example,) appropriated by plaintiff, and that the decree should have been equally specific in its injunction.

I concur: THORNTON, J.

WORKS, J. I concur in the judgment and in the views expressed by Chief Justice BEATTY.

(80 Cal. 71)

In re ARMSTRONG'S ESTATE. (No. 12,969.)

(*Supreme Court of California.* Aug. 2, 1889.)

HOMESTEADS.

1. Code Civil Proc. Cal. § 1465, authorizing a court to set apart for the benefit of the surviving wife or husband the homestead already selected, if any, or, if none, to designate a homestead for the use of the "surviving husband or wife and the minor children," when construed with section 1468, which provides that a homestead set apart shall be the property of the surviving wife or husband where there is no minor child, entitles a widow to such homestead, though her husband died childless.

2. Only such land as could have been selected during the marriage will be assigned by the court, and therefore the widow is not entitled to a tract 50 miles distant from that on which she and her husband resided, though the united value of the tracts is less than $5,000.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Justin Jacobs and *J. A. Burns*, for widow. *Lambertson & Taylor*, for heirs.

BELCHER, C. C. The deceased left surviving him a widow, Armilda Armstrong, but no children. His estate was all community property, and consisted of certain personal property and two tracts of land, one containing 80 and the other 160 acres. These tracts were situated about 50 miles apart, and the value of both of them was less than $5,000. Prior to his death the deceased resided with his wife on the 80-acre tract, and afterwards the widow continued to reside thereon. No homestead was ever selected by either husband or wife during the life-time of deceased. In due time the widow presented to the court having jurisdiction of the estate a petition asking to have both tracts set apart to her as a homestead, under the provisions of section 1465 of the Code of Civil Procedure. The application was opposed by nine relatives and heirs at law of deceased, on the grounds —*First*, that the petition did not show that any homestead was ever selected, designated or recorded during the life-time of deceased; and, *second*, that the petition did not show that there were any minor children of the petitioner or of the deceased. The court made an order setting apart as a homestead to the petitioner the 80-acre tract on which she resided, and refused to set apart to her the other tract. Both parties have appealed from the order.

It is urged on behalf of the opposing heirs that, since the amendment of section 1465 in 1880, the court has had no power, where no homestead was selected during the life-time of the decedent, to set apart a homestead to a surviving husband or wife, unless there were minor children. The section as amended reads as follows: "Upon the return of the inventory * * * the court may, on its own motion, or on petition therefor, set apart for the use of the surviving husband or wife * * * the homestead selected, designated, and recorded. * * * If none has been selected, * * * the court must select, designate and set apart, and cause to be recorded, a homestead for the use of the surviving husband or wife and the minor children," etc. It is claimed that the words "and the minor children" limit the power of the court so that it can make no order unless there are such children. But we think it clear that the words have no such meaning or effect. The sentence means only that a homestead is to be set apart for the use of the surviving husband or wife and the minor children when there are minor children, and is not to be construed as limiting the power of the court to set apart a homestead for the use of the surviving husband or wife, when there are no such children. That this is so is made evident by section 1468 of the same Code, which provides that "when property is set apart for the use of the family, in accordance with the provisions of this chapter, if the decedent left a widow or surviving husband, and no minor child, such property is the property of the widow or surviving husband." There was no error, therefore, in the ruling complained of by the heirs.

As to the ruling complained of by the widow. A homestead consists of a dwelling-house in which the claimant resides, and the land on which the same is situated. Civil Code, § 1237. In Re Noah, 73 Cal. 592, 15 Pac. Rep. 290, it is said: "It may be conceded that the real property set apart as a homestead to the surviving husband or wife, by order of the court, need not be actually occupied at the time when the order is made. But it would seem that it must be property which could have been selected as a homestead during the continuance of the marriage." Now, as the two tracts of land which the widow asked to have set apart to her were separated one from the other by a distance of some 50 miles, it is evident that they could not both have been selected as a homestead prior to the death of the decedent. If separate parcels of land are selected as a homestead,—and such a selection may perhaps be made,—they must at least be so near together that they can be occupied and used for the purposes of the homestead; and in this respect there is no difference between a homestead set apart by the court and one selected under the homestead law. We conclude, therefore, that the rulings of the court were proper, and that the order appealed from should be affirmed, but without costs to either side.

We concur: **Foote, C.**; **Hayne, C.**

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is affirmed, without costs to either side.

(80 Cal. 40)

In re THOMAS *et al.* (No. 13,016.)

(*Supreme Court of California.* July 31, 1889.)

Justices of the Peace—Jurisdiction.

A penalty imposed by statute for transacting an insurance business without obtaining a certificate of authority to do so from the insurance commissioner is recoverable before a justice, under Code Civil Proc. Cal. § 112, giving justices jurisdiction of actions for penalties less than $300, given by statute or by municipal ordinance, where no issue is made as to the legality of a "municipal fine," tax, assessment, or toll, as such a penalty does not come within the exception mentioned; and the jurisdiction thus given is authorized by Const. art. 6, § 11, limiting powers of justices to cases not within the jurisdiction of courts of record.

Commissioners' decision. In bank.

Application to prohibit J. D. Page, a justice of San Francisco, from entertaining an action by the commissioner of insurance against a relief association, to recover a penalty for unlawfully transacting business.

C. E. K. Royce, for petitioners. *Atty. Gen. Geo. A. Johnson* and *T. C. Coogan*, for respondent.

Hayne, C. This is an application for a writ of prohibition to the justice's court of San Francisco, to prohibit it from proceeding with the trial of an action now pending before it. The action was brought to recover the sum of $200 for a forfeiture alleged to have accrued by reason of the issuance of a certificate of relief without having obtained a certificate of authority from the insurance commissioner of the state, as prescribed by section 596 of the Political Code. The question which counsel have argued is whether such certificate of authority is required from an organization like the one here. But we think it clear that the justice's court has jurisdiction of the action. The constitution provides that the legislature shall "fix by law the powers, duties, and responsibilities of justices of the peace: provided such powers shall not in any case trench upon the jurisdiction of the several courts of record," etc. Article 6, § 11, Code Civil Proc., provides that justices' courts shall have jurisdiction "in actions for a fine, penalty, or forfeiture not amounting to $300, given by statute, or the ordinance of an incorporated city and county, city or town, where no issue is raised by the answer involving the legality of any tax, impost, assessment, toll, or municipal fine." Code Civil Proc. § 112, subd. 4. From this it will be perceived that the justices' courts have jurisdiction of all penalties "given by statute" which are under $300, whether the legality of the penalty is involved or not; but that, in case of "municipal fines," they have no jurisdiction if the legality is denied by the answer. This is a case of a penalty or forfeiture "given by statute," and is not a "municipal fine," or a tax, impost, toll, or assessment, within the meaning of section 5 of article 6 of the constitution. Consequently the jurisdiction does not trench upon that of the superior courts. The question, therefore, which the counsel present, is one which may be determined by the justice's court, and prohibition cannot issue. We therefore advise that the proceedings be dismissed.

We concur: **Belcher, C. C.**; **Gibson, C.**

Per Curiam. For the reasons given in the foregoing opinion, the writ is denied and the proceedings dismissed.

(80 Cal. 41)

PEOPLE v. MIZE *et al.* (No. 20,521.)

(*Supreme Court of California.* July 31, 1889.)

Assault with Intent to Kill.

1. Pen. Code Cal. § 217, provides that "every person who assaults another with intent to commit murder is punishable by imprisonment in the state-prison not less than one nor more than fourteen years." Defendants were tried for assault with intent to murder, and the court instructed the jury that, "if the testimony showed that, had the prosecuting witness been killed, one of the defendants would have been guilty of murder, then that one should be convicted." *Held*, that this was error, as in the crime of attempt to murder the intent is an essential ingredient, and must be proved.

2. In such case the question of intent is one of fact, and a charge which, in effect, withdraws that question from the consideration of the jury, is error.

In bank. Appeal from superior court, Sonoma county; John G. Pressley, Judge.

The defendants, Fred Mize and John Mize, were tried on an information charging them with an assault with intent to murder one Henry Coffey. The court charged the jury that if the testimony showed that the crime would have been murder, in case of the death of Coffey from the assault, then they must find a verdict of guilty. A verdict of guilty was found, and defendants appeal.

R. W. Swain and *John A. Barnham*, for appellants. *Geo. A. Johnson*, Atty. Gen., for the People.

Paterson, J. The court instructed the jury, among other things, as follows. "Gentlemen of the jury, these defendants are charged before you by this information with making an assault upon Henry Coffey, with intent to murder the said Coffey. They cannot be convicted of an assault to commit murder unless the evidence shows beyond a reasonable doubt that, had the prosecuting witness, Henry Coffey, been killed, defendants would have been guilty of murder. If the testimony shows that, had Henry Coffey been killed, one of the defendants would have been guilty of murder, then that one should be convicted. If there was an unlawful assault on Henry Coffey, and no intention to commit murder, the defendant making such assault may be convicted of a simple assault." We think that this instruction was erroneous. "To constitute murder the guilty person need not intend to take life, but to constitute an attempt to murder he must so intend." 1 Bish. Crim. Law, § 730. "The wrong-doer must specifically contemplate taking life; and though his act is such as, were it successful, would be murder, if in truth he does not mean to kill, he does not become guilty of attempt to commit murder." 2 Bish. Crim. Law, § 741.

It is claimed by the attorney general that inasmuch as the court in subsequent instructions carefully instructed the jury that to constitute the offense charged in the information it was necessary to prove the intent to kill beyond a reasonable doubt, and that it was incumbent upon the prosecution to prove such intent, the jury could not have been misled by the instruction which we have quoted above. In State v. Evans, 39 La. Ann. 912, 3 South. Rep. 63, which was a case of assault with intent to murder, the court charged the jury as follows: "Where the evidence shows that it would have been murder if death had ensued, that in itself will be sufficient ground for the jury to infer the existence of the intention to murder." In another part of its charge the court, at the request of the defendant, instructed the jury that "the jury must be satisfied that the prisoner had a positive intention to commit murder." It was claimed on appeal that the subsequent charge cured the vice of the first charge quoted, but the court well said: "The addition of these words to the original charge given did not, as contended, cure the defect or vice therein. Its force was left untouched. Its meaning was unchanged and unimpaired. Together they would in effect amount to this: 'The jury must be satisfied that the prisoner had a positive intention to commit murder; but, if the evidence shows that it would have been murder if death had ensued, that in itself will be sufficient ground for the jury to infer the existence of the intention to murder.'"

The following instruction, we think, also, was erroneous: "If the jury believe from the evidence, beyond a reasonable doubt, that both or either of the defendants unlawfully pointed a loaded pistol at said Henry Coffey, and discharged the same, either with deliberation and premeditation, or with a reckless disregard of human life, and that the use of said weapon, as used by the defendant or defendants, if so used, was likely to kill the said Henry Coffey, then the said defendant, so using said pistol, is guilty of an assault with intent to commit murder." Here, again, the element of a specific intent to kill is ignored. In a prosecution under section 217 of the Penal Code for an assault with an intent to commit murder, a positive intent to murder must be proved by the prosecution. It is a statutory offense, and the intent is the essential ingredient. It differs in this respect from the statutory offense of an assault upon the person of another with a deadly weapon, or other means likely to produce great bodily injury, in which no intent is necessary to be proved. People v. Keefer, 18 Cal. 636; People v. Turner, 65 Cal. 540, 4 Pac. Rep. 553. The court gave the following instruction: "The jury are instructed that the natural and probable consequences of every act deliberately done by a person of sound mind are presumed to have been intended by the author of said act. And if the jury believe from the evidence, beyond a reasonable doubt, that the defendants, or either of them, did shoot at said Henry Coffey, as charged in the information, and that the natural and ordinary consequences of such shooting would be the death of said Henry Coffey, then the presumption of law is that the defendant so shooting did shoot at said Henry Coffey with intent to kill him." It is doubtless true that, as a general rule, a man is presumed to have intended that which he has done, or that which is the immediate and natural consequence of his act; but, where an act becomes criminal only when it has been performed with a particular intent, that intent must be alleged and proved. It is for the jury, under all the circumstances of the case, to say whether the intent required by the statute to constitute the offense existed in the mind of the defendant. This charge withdrew from the jury the consideration of the question whether the defendants intended to kill Coffey. The defendants claimed that they were acting in self-defense, and upon real or apparent danger. One of the defendants was at his own home, and there was evidence tending to show that a few days before the shooting the prosecuting witness, Henry Coffey, had threatened to take his life, and on the night preceding the affray had assaulted and beaten said defendant at his own home. To tell the jury, therefore, that if they believed the defendants had shot at Coffey, and that the natural and ordinary consequences of the shooting would be the death of Coffey, the law would presume them guilty of an intent to kill him, was erroneous, because it entirely disregards the question whether the defendants acted in good faith, and to defend themselves against real or apparent danger. In homicide cases, where the killing is proved, it rests on the defendant to show justification, excuse, or circumstances of mitigation, subject to the qualification that the benefit of the doubt is to be given to the prisoner; but this is because the statute expressly shifts the burden of proving circumstances of mitigation upon the defendant in homicide cases. The rule is confined to murder trials. Section 1105, Pen. Code; People v. Cheong Foon Ark, 61 Cal. 527. Judgment and order reversed, and cause remanded for a new trial.

We concur: Sharpstein, J.; Works, J.; McFarland, J.

Thornton, J., (*concurring*.) I concur in the judgment on the ground of error in the two instructions last mentioned in the foregoing opinion. By those instructions the court invaded the province of the jury as to the weight and effect of evidence. I perceive no error in the first instruction, as I understand the instruction, which must be taken as an entirety, and its several clauses harmonized, as can be done without straining the meaning of the words used. It is a direction to the jury that they cannot convict either defendant unless Henry Coffey had been killed under such circumstances that his killing would have been murder, but, if there was no intent when the assault was made to commit murder, then the defendants could only have been convicted of a simple assault; or, in other words, if the assault had been made without intent to commit murder, that, even though a killing had resulted, the defendants could only have been convicted of simple assault. The reasoning of the foregoing opinion is in accordance with these propositions. The case cited in the foregoing opinion from Louisiana should not, I think, meet the approbation of this court as long as the rule laid down in People v. Doyell, 48 Cal. 85, and the cases which follow it, regarding the construction of directions, remain as the rule of this forum.

(80 Cal. 146)

GOLDMAN *et al.* v. BASHORE. (No. 12,988.)

(*Supreme Court of California.* Aug. 5, 1889.)

EVIDENCE—DOCUMENTARY.

1. Defendant agreed to sell certain wood to plaintiffs, to be delivered at a place mentioned within a specified time, payment to be made according to certain stipulations. Defendant sent an order to plaintiffs to receive a quantity of wood from one S. on her contract. Plaintiffs accepted the order, subject to certain reservations, but after S. had placed the wood at the agreed point, plaintiffs received an unsigned letter directing them not to take the wood. Believing that it came from S., plaintiffs did not take the wood. There was evidence tending to prove that the letter was written on behalf of S., and intended to have the effect that it had. *Held*, in an action in which damages for refusal to accept the wood were claimed by defendant, that the letter was admissible for plaintiffs as tending to excuse their refusal. Fox and THORNTON, JJ., dissenting.

2. It is harmless error in such case, if error at all, to refuse to allow defendant to testify as to the price for which she sold the wood, when she has already stated the amount of her loss, and that the sum was the difference between the contract price and the sum for which she was obliged to sell the wood.

3. A recital of an instruction alleged to have been given, in the specification of errors, is not sufficient to make the instruction part of the record, which should be done by bill of exceptions.

4. A pleading introducing matter of defense with the language: "And for a further and separate answer the defendant files her cross-complaint, and alleges", is not a cross-complaint, and need not be answered by plaintiff. Following Shain v. Belvin, 21 Pac. Rep. 747.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

Action by Goldman & Co. against Rachel D. Bashore, to recover for goods sold and money due plaintiffs. Judgment for plaintiffs, and defendant appeals.

Casper & Boller, for appellant. *Lamberson & Taylor*, for respondents.

FOOTE, C. The plaintiffs brought this action to recover from the defendant $1,639.07, due upon an account for goods, wares, and merchandise, sold by them to the defendant, and for money paid, laid out, and expended to her use, and for money advanced to her. She answered, alleging by way of defense that she had made a contract with the plaintiffs, by which they agreed to purchase from her, at a certain price per cord, not less than 2,000 nor more than 2,500 cords of wood, to be delivered at a certain place, within a certain time; that she agreed to receive as part pay for the same merchandise at the rate of $35 upon the $100 worth of wood delivered, and that she did receive such goods, wares, and merchandise in part pay for wood which she delivered, and not otherwise; and that, although she complied with her contract, and delivered 2,000 cords of wood subject to the plaintiffs' order, at the time and place agreed upon, that they refused to take the wood, or pay for it, or comply with the contract. She further claims that by reason of their failure to comply with the contract she has been damaged in the sum of $3,000, for which, and costs, she asks judgment against them. The plaintiffs had judgment for only a part of their claim, from which, and an order refusing a new trial, the defendant appeals.

Defendant claims, among other things, that the court erred in refusing to grant her motion for judgment on the pleadings on what she denominated a cross-complaint, which the plaintiffs did not answer. But the alleged cause of cross-complaint was not pleaded as such. It is couched in this language: "And for a further and separate answer the defendant files her cross-complaint, and alleges." A similar pleading was treated as an answer in Shain v. Belvin, 21 Pac. Rep. 747, (No. 9,995, decided May 25, 1889.) No error was therefore committed in denying the motion.

It is further urged that an instruction given by the court was erroneous. There is no bill of exceptions here to make it evident that any such instruction was ever given, nor does the statement show it. The fact that the specification of "errors of law" at the end of the body of the statement recites that "the court erred in instructing the jury as follows," setting out the language of the alleged instruction, is not sufficient. It cannot be considered as evidence that the court granted any such instruction.

An unsigned letter was allowed to go to the jury on the part of the plaintiffs, which is claimed to have been improperly admitted in evidence, because it had no signature, and did not indicate either the place or the person from whom it emanated. The proof was that the defendant had agreed by a written contract to deliver to the plaintiffs the amount of wood, and at the price and place, as set out in her answer, which the plaintiffs were to receive under certain conditions; she was to receive $35 of the price of each 100 cords of wood in merchandise as part payment therefor; and that the debt for which she was sued, was contracted by her under that contract; that she sent an order to plaintiffs to receive from another party, one Stokes, for her, by virtue and in fulfillment of her contract, 1,500 cords of wood; that the plaintiffs accepted the order, with the reservation that $800 cash, which had been already advanced by them to the defendant, should be deducted from the price of the wood first received on the order, and applied to her account. Afterwards this written letter, forbidding them to take any of that wood, was received by them, and, supposing it to be from Stokes, the owner of the 1,500 cords of wood, they did not take it. There was evidence which went to show that their view of the matter was correct, and that the letter was written by an attorney at law for Stokes, and was intended to have the effect it did. It is plain that this letter was, therefore, admissible as tending to show that the plaintiffs were not to blame for not taking the 1,500 cords of wood of Stokes as part of the defendant's delivery of wood under her contract, and that she could not claim any damage from their failure to receive such wood.

It is also urged as error that the defendant, when a witness, was not allowed to answer the question, "What were you obliged to take for the wood?" the object being to show that she had lost the difference between the agreed price of the wood and the amount she was compelled afterwards to sell it for, by reason of the plaintiffs' refusal to take it. But, even if this was erroneous, it was harmless, because she had already stated, without objection, that her loss was about $3,750, and that it was the difference between what she was to get for the wood from the plaintiffs and what she was at last obliged to take for it. And the offer made after that on her part again to prove by herself that as to which she had just testified, as above stated, was properly refused by the court, for the reason above stated. Perceiving no prejudicial error, we advise that the judgment and order be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

FOX, J., (*dissenting*.) There was no error in denying defendant's motion for judgment on the pleadings, for the reasons stated in the commissioner's opinion. There was no cross-complaint, within the meaning of the statute, requiring an answer thereto. But defendant had pleaded by way of new matter, constituting a defense to plaintiffs' claim, the same matter that was attempted to be set up in that portion of the answer which defendant denominates a cross-complaint, and, as so pleaded, she had a right to prove it. If sustained by proof, it constituted a perfect defense against plaintiffs' cause of action. Upon the trial it was proved by both plaintiffs and defendant that they had entered into such a contract as was set up in the answer, to-wit, a contract whereby the defendant agreed to sell and deliver to the plaintiffs at Tagus Switch a quantity of wood, not less than 2,000 cords, and not more than 2,500 cords, within 12 months from the date of said agreement, to-wit, February 21, 1885; and plaintiffs agreed to purchase the same of her, and to pay therefor at the rate of $4.30 a cord for each and every cord delivered. Thirty-five dollars on account of each 100 cords of wood she was to take in merchandise at the store of plaintiffs, and the balance was to be paid her in cash, one-half payable one day after the wood should have been received by the Southern Pacific Railroad Company from the plaintiffs, and the other half within thirty days thereafter. It is also proved by the testimony of both parties, and entirely uncontradicted, that the defendant did deliver this wood, to the extent of 2,500 cords, at Tagus Switch, within the time prescribed in the contract, and that the same was unobjectionable as to quality. She had, therefore, complied with the terms of the contract on her part, and it became the duty of the plaintiffs to receive said wood as so delivered. Their acceptance and receipt of the wood as delivered by her did not require them to pay for the same at the time of such acceptance, except as to the $35 per 100 cords which was to be paid in merchandise. By the terms of the agreement she could not demand of them anything on account of the cash payment until such time as, and so fast as, the said wood was received by the railroad company from the plaintiffs. The excuse made by plaintiffs for not receiving it was that the railroad company was only willing to accept it from them, and pay therefor, in lots of from 150 to 200 cords each, as they required it. This was not a valid excuse for their refusal to accept from defendant under the contract, but it was a sufficient excuse for the postponement of the making of cash payments for the same until accepted by the railroad company. Until such latter acceptance they were not bound to make any payment to the defendant, except to the extent of $35 on each 100 cords, payable in merchandise. If, however, she desired, and was permitted by them, to draw to a greater extent than this in merchandise from the store, it was manifestly to their advantage that she should do it, as they must be presumed to have been making their regular profit on the sale of their goods, and to the extent of such excess it reduced the balance which they would ultimately be called upon to pay plaintiffs in money. There is no conflict in the testimony to the effect that whatever she did get at that store was purchased by her on account of said contract. If they had paid her in merchandise faster than they were required to do I cannot see how that fact entitled them to judgment against her for or on account of such merchandise, so long as the balance of account under said contract remained, as it did, largely in her favor.

The court also erred in admitting in evidence the unsigned letter referred to in the opinion of the commissioners, and found in the record marked "Plaintiffs' Exhibit No. 4." There is no evidence in the record which does more than tend in some slight degree to show that Stokes at one time contemplated the propriety of sending such a letter, and that it was prepared pending consideration of that question. It was unsigned by any one. There is no evidence even tending to show that Stokes ever finally concluded to send it, or did send it, or authorized any person to do so. It was incompetent as evidence for any purpose in the cause, and its admission was prejudicial error affecting the rights of the defendant. In my opinion, the judgment and order appealed from should be reversed, and the cause remanded for further proceedings, with leave to defendant to file a proper cross-complaint if she shall be so advised.

I concur: Thornton, J.

(80 Cal. 195)

Bogart v. Crosby *et al.* (No. 12,889.)

(*Supreme Court of California.* Aug. 5, 1889.)

Real-Estate Agents—Estoppel.

1. Plaintiff agreed to purchase of defendants, real-estate agents, certain land, which they informed him they were selling for the owners. He paid defendants $300 of the purchase price, and they remitted the same to the owners. Subsequently plaintiff notified one of the owners that he would not complete the purchase because of delay in executing the deed. The owner said he did not care whether the sale was made or not, and thereupon paid the $300 back to defendants, telling plaintiff to settle with them. Defendants refused to return the money to plaintiff, claiming that he had forfeited it. In an action to recover it, *held*, that if any one was liable to plaintiff it was the owners, and not defendants.

2. Plaintiff can take nothing by the fact that defendants' appointment as agents to sell the land was verbal. The receipt of the $300 by the owners would estop them to deny the agency.

In bank. Appeal from superior court, San Diego county; E. Parker, Judge.

Harry L. Titus, for appellants. *J. E. Deakin*, for respondent.

Works, J. This action was brought by the respondent against the appellants, charging them with having received from the plaintiff, "as the agent of said plaintiff, the sum of $300 to the use of the said plaintiff." The court below did not find on the question of agency, but did find that the defendants "received the money to the use of said plaintiff," and rendered judgment for the amount and interest. The appellants contend that the findings that the defendants received the money for plaintiff's use, and that they thereby became indebted to him, are not sustained by the evidence. This point is supported by the record before us. There is an entire want of any evidence to support either the findings or the allegations of the complaint. The facts testified to by the respondent himself do not show that these parties were his agents, or that they received any money from him as such. His own testimony is, in substance, that the defendants were real-estate agents; that he agreed to purchase from them a certain piece of property for $6,000, and paid them $300 in cash, deed to be executed and balance of purchase money to be secured and paid thereafter; that he learned that these parties were not the owners of the land, by a statement from one of them that one of the owners was in the east, and would be gone for a week or 10 days. This was after he had paid them the $300 and made the contract, he says, but whether it was before or after is immaterial. The contract, which was in the nature of a receipt, was as follows: "San Diego, Cal., Sept. 23, 1887. Received this day of F. C. Bogart $300, as deposit on lot A, block 128, Horton's addition, together with two frame houses on said lot. Purchase price, $6,000; terms, $3,500 on delivery of deed, $2,500 in six months from date of deed; the deferred payment to bear 10 per cent. interest. We guaranty good title or no sale. Crosby & Van Haren." The absent owner did not return for a month, or near that time, and the plaintiff, in about three weeks, came to the conclusion that he would not take the property, and notified one of the owners (there being three of them) that he had bought other property "because of the long delay," and that he wanted his money back. In the mean time the money paid by him had been paid over by the defendants to their principals, the owners of the land. The owner referred to, when notified by plaintiff that he would not take the property, said he did not care whether he took it or not, but refused to pay him back his money, and told him that he would return it to the agents, and he could settle the matter with them. He did pay over to the defendants the said sum of $300. The plaintiff demanded the amount from the defendants, who refused to pay it, and tendered a performance of the contract by making the deed, the absent owner having returned. The plaintiff refusing to carry out his contract, they claimed that he had forfeited his deposit, and that they were entitled to retain the money for their commissions agreed to be paid by the owners.

It is quite clear that this shows no cause of action against the appellants. They were not the agents of the respondent, but of the owners of the property. They had paid the money over to their principals, who had received and accepted it. They had disclosed to the plaintiff that they were agents and who were their principals. If there was any liability to him, it was on the part of the principals, and not the agents. An agent may be held personally liable when he fails to make known his principal, or contracts in his own name, or where he exceeds his authority as such agent; otherwise it is the contract of his principal, upon which he cannot be held liable. Story, Ag. §§ 261, 263, 264, 267. Neither of the contingencies named, upon which the liability of an agent can rest, appear in this case. The fact that the principals returned the money to the agents, did not relieve them from liability, (Thomas v. Moody, 57 Cal. 215,) nor could it shift such liability to the appellants, nor could the fact that the appellants had, after the money came back into their hands, claimed the same to have been forfeited, have any such effect. Their claim that they were entitled to commissions was a question between them and their principals, and was one with which the respondent had no concern. Their claim that he had forfeited the money by a failure to complete the contract was a question between the respondent and the owners of the property, and one in which the appellants, as agents, were not concerned. The forfeiture would have been to the vendors, and not to their agents. The respondent was bound to look to the owners of the property for his money, and the appellants were bound to look to the same source for their commissions. As between the parties to this suit there was no liability either way.

It is contended by the respondent that as it appears from the evidence that the appellants were only authorized, verbally, to sell, they were not the agents of the owners of the property, and therefore he was bound to look to them individually. But the evidence of the owners themselves shows that they verbally authorized the appellants to sell the property; that they ratified their acts by accepting the cash payment, and were willing to carry out their part of the contract. This being the case, they would be estopped to deny the agency, as against the respondent's claim for the return of the money paid by him, and actually received by them, if he was entitled to recover the same. Whether the respondent forfeited the amount paid by him, by reason of his failure to accept and pay for the land, is, as we have said, a question between him and the owners of the land, and need not be determined in this action. Judgment and order appealed from reversed, and cause remanded.

We concur: McFarland, J.; Thornton, J.; Sharpstein, J.; Paterson, J.

(80 Cal. 62)

In re Skerrett's Estate. (No. 13,223.)

(*Supreme Court of California.* Aug. 1, 1889.)

Appeal-Bonds.

1. On appeal from an order of distribution to a legatee, an executor of a deceased heir of the estate cannot claim the benefits of Code Civil Proc. Cal. § 965, relating to appeals by an executor from orders made in proceedings upon the estate "of which he is executor," etc.

2. Code Civil Proc. Cal. § 946, provides that the trial court may, in its discretion, dispense with or limit the security on appeal, when the appellant is an executor, administrator, trustee, or other person acting in another's right. *Held* that, in order to save the appeal in such cases, the order dispensing with the security must be made within the time allowed for filing the bond; and an order subsequently made, with a direction that it be entered *nunc pro tunc* as of an earlier date, is unavailing.

3. If the order was actually made on the earlier date, the order directing it to be entered of record as of that date must recite the fact that it was so made. The question cannot be tried on affidavits in the supreme court.

In bank. Appeal from superior court, city and county of San Francisco; J. V. Coffey, Judge.

On motion to dismiss appeal.

John F. Burris, for appellants. *A. H. Loughborough*, for respondents.

Beatty, C. J. In this case several persons, claiming to be heirs of the decedent, have joined in appealing from an order distributing a portion of the estate to a legatee. He now moves to dismiss the appeal upon the ground, among others, that no undertaking was filed in time to render the appeal effectual. The notice of appeal was served January 30, 1889, and filed January 31, 1889. The undertaking was not filed until February 5th, which was one day too late to save the appeal. Code Civil Proc. § 940; Boyd v. Burrel, 60 Cal. 280. But one of the appellants is the executor of a deceased heir, and appeals in that character. He claims that his appeal is saved by operation of sections 946 and 965 of the Code of Civil Procedure. Section 965 cannot help him, because this is not an appeal from an order made in the proceeding for the settlement of the estate of which he is the executor. Conceding—without deciding—that section 946 applies to the $300 bond, (Mr. Hayne thinks it does not,—2 New Trials & App. § 220,) it is necessary to make that section available that there should have been an order of the superior court dispensing with the undertaking. We are furnished with a copy of such an order, dated and filed June, 1889, four months after the bond should have been filed, and two days after service of notice of this motion. At the end of this order there is a direction that it be entered *nunc pro tunc* as of date February 1, 1889, but it contains no recital that such an order was actually made at that date, or at any date previous to June 4, 1889. We think it clear that, in order to save the appeal in cases covered by section 946, the order dispensing with security must be made within the time allowed for filing the bond. After the appeal has lapsed, it cannot be restored by an order subsequently made; and a direction that such order be entered *nunc pro tunc* as of an earlier date is unavailing. Where all the conditions upon which the entry of a judgment or order depends exist, and the making or entry of the order is a mere ministerial duty or matter of course, and the performance of the duty is neglected or delayed, or where an order has actually been made and its entry omitted, we suppose it may be subsequently entered, and, if justice requires, may be made to take effect *nunc pro tunc*, as of the date when it was actually made, or at any time when existing conditions imposed upon the court or its officer the duty of entering it. But here the making of the order in question rested entirely in the discretion of the superior judge, and was never a matter of course. Therefore it could never have an existence until his discretion was exercised. And if it was actually made prior to February 5th, and its entry omitted, the fact that it was so made at the proper time should be shown by the record of the superior court. We cannot try the question on affidavits filed here. Moreover, the affidavits filed by appellant do not satisfactorily prove this essential fact, even if they could be considered. They do not show that the superior judge signed an order out of court, or directed the entry of an order in court. The affidavit of appellant's counsel shows that he discussed with the judge of the superior court the question of dispensing with the bond, and that he approved it, and that his clerk obtained a further order from said judge dispensing with the filing of said bond. We infer from this that appellant regards the verbal approval by the judge of a suggestion made in the course of a conversation out of court as an order, and that the "further order" obtained by the clerk was like its antecedent. We think the motion to dismiss must be granted, and is so ordered.

We concur: PATERSON, J.; THORNTON, J.; WORKS, J.; SHARPSTEIN, J.

(80 Cal. 166)

In re ROSE'S ESTATE. (No. 12,409.)

(*Supreme Court of California.* Aug. 5, 1889.)

ADMINISTRATORS—ACCOUNTING—APPEAL—RES ADJUDICATA.

1. Though an administrator is not authorized to carry on his intestate's business, and should not blend the expenses and disbursements connected therewith with the legitimate items of his accounts, where he charges himself with the gross profits of the business, and the court debits him with the amount thereof, he should be allowed money paid out in the course of the business.
2. Items of administration expenses less than $20 in amount, paid by the administrator, according to his uncontradicted testimony, should be allowed.
3. An administrator is entitled to his expenses incurred while traveling on business of the estate.
4. He should also be allowed counsel fees and expenses incurred in good faith and under the advice of counsel in resisting appeals by distributees from orders auditing his accounts.
5. Neither expenses incurred by the administrator in procuring the removal of the guardian of a minor heir, nor money advanced for the heir's benefit, are proper charges in the settlement of the administration account, though they may be allowed as credits upon the distributive share of the heir when a settlement with him is made.
6. Commissions should not be allowed the administrator until the final settlement of his accounts.
7. The dismissal of an appeal on the ground that no judgment had been entered on the findings complained of is no bar to an appeal when the record is properly made up.
8. An order allowing some and rejecting other items of an administrator's account, and reserving others for further consideration, is not a judgment which, under Code Civil Proc. Cal. § 577, is the final determination of the rights of the parties; and hence section 939, providing that an exception, on the ground that a decision is not supported by the evidence, will not be reviewed on appeal from a final judgment unless the appeal is taken from the rendition of the judgment, does not apply. Reversing 20 Pac. Rep. 712.

In bank. Appeal from superior court, Tulare county; WILLIAM W. CROSS, Judge.

On rehearing. For former opinion, see 20 Pac. Rep. 712.

Wal. J. Tuska and *W. W. Foote*, for appellant. *Stetson & Houghton* and *R. E. Houghton*, for respondent.

FOX, J. This is an appeal by the administrator from an order settling his account. The account was filed October 19, 1885. To this the guardian of minor heirs filed certain exceptions and objections, and on the 24th and 25th of November, 1885, a hearing was had. The bill of exceptions, bringing up the evidence and proceedings had on that hearing, covers 1146 folios of the original transcript, and additional exhibits therein referred to about 180 folios, found in a supplemental transcript. On the 12th of July, 1886, the judge signed and filed a written opinion announcing his conclusions therein, directing that the account be settled in accordance therewith, "and, if counsel on either side deem further papers necessary, let the papers be drafted settling the account as above indicated." Counsel for one or both the parties (manifestly for the contestants) evidently did deem further papers necessary, for on the 12th of March, 1887, a paper relating to such settlement, indorsed "Findings and Decree," was signed by the judge and filed, and on the 10th of June, 1887, the same was "recorded in Book 2, Probate Decrees, on page 1 et seq." From this "order and decree" the administrator appealed June 29, 1887. The proposed bill of exceptions was prepared and served on the 13th day of May, 1887, and is certified by the judge to have been "within the time allowed by law and the order of court and the stipulation of counsel." On the 18th of June, 1887, contestants' proposed amendments to said bill of exceptions were prepared and served, also certified by the judge to have been "within the time allowed by law and the order of court and the stipulation of counsel." Bill of exceptions finally settled and certified September 3, 1887.

The respondent contends that the question of the sufficiency of the evidence to sustain the findings cannot be considered on this appeal. This contention is based upon the provision of subdivision 1, § 939, Code Civil Proc., relating to appeals in general, where it is provided: "An appeal may be taken—*First.* From a final judgment in an action or special proceeding commenced in the court in which the same is rendered within one year after the entry of judgment. But an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." This appeal was taken within 60 days after the recording of the so-called "findings and decree" in the "Book of Probate Decrees," which must be taken as the date of the "entry of the judgment," if it be a judgment within the meaning of the section quoted. McLaughlin v. Doherty, 54 Cal. 519; Thomas v. Anderson, 55 Cal. 43; Lorenz v. Jacobs, 53 Cal. 24; Miller v. Sharpe, 54 Cal. 590; Estate of Rose, 72 Cal. 578, 14 Pac. Rep. 369. But it was not taken within 60 days after the signing and filing of said "findings and decree," which must be taken as the date of the "rendition of the judgment," if judgment it be. Gray v. Palmer, 28 Cal. 416; Peck v. Courtis, 31 Cal. 207; Genella v. Relyea, 32 Cal. 159; Wetherbee v. Dunn, 36 Cal. 252; McCourtney v. Fortune, 42 Cal. 389; McLaughlin v. Doherty, 54 Cal. 519.

Upon the first submission of this appeal the court was inclined to the opinion as contended for by respondent, but upon rehearing, and further consideration of the question, the majority of the court have reached the conclusion that the so-called "findings and decree," constituting the decision from which this appeal is taken, do not constitute a judgment or a "final judgment," within the meaning of the provisions of section 939, Code Civil Proc. If it is not a "final judgment" then it is (something less) a mere order. The learned counsel for respondent evidently did not think that an order settling the account of an administrator was a "judgment" within the meaning of section 939, until this appeal was taken; for the very account for the settlement of which this order was made was one rendered and filed upon an order of the court dated September 8, 1885, made upon his own motion, requiring the administrator to restate in detail his entire account from the commencement of his administration to date, notwithstanding the fact that before that time the great bulk of the same account had been presented and filed, contested by the same parties and before the same judge, and by him settled in an elaborately written review and order made and filed August 22, 1885, which order has never been formally vacated or set aside. But, whatever may be the contention of counsel, we think the question is settled by the Codes and the former adjudication of this court. "A judgment is the final determination of the rights of the parties in an action or proceeding." Code Civil Proc. § 577. The proceeding appealed from is not a "final determination of the rights of the parties in an [the] action or proceeding." At most it is but a settlement of one of many matters arising in a probate proceeding, preparatory to a "final settlement of the rights of the parties" in the whole proceeding. In this particular case the paper upon its face shows that it is not even a settlement of the particular matter under consideration, for by its very terms, at folio 285, the sum of more than $1,200, claimed to have been paid out by the administrator, is left unsettled and undetermined, the subject of further consideration in any new account which he may present. "Every direction of a court or judge made in writing, and not included in a judgment, is denominated an order." Id. § 1003. An order, as distinguished from a final judgment, is the judgment or conclusion of the court upon any motion or proceeding. Gilman v. Contra Costa Co., 8 Cal. 57. This is an appealable order, under subdivision 3, § 963, Code Civil Proc.; Dean v. Superior Court, 63 Cal. 477. It is not an order which discharges the administrator from his trust. McCrea v. Haraszthy, 51 Cal. 151. It is one which may be reopened, (Code Civil Proc. § 1637; Estate of Runyon, 53 Cal. 196;) or vacated or set aside; and, if so done, the latter order is not appealable, (Estate of Dunne, Id. 631.) It is not, therefore, a final judgment. We hold, therefore, that upon appeal from an order settling an administrator's account all the proceedings leading up to it, including the evidence upon which it is based, are open to review.

A former appeal from this same order was brought to this court, and dismissed on motion of respondent, on the ground, among others, that the appeal was prematurely taken. That appeal was taken on the 27th of April, 1887, after the signing and filing of the "findings and decree," and before the same was recorded. On authorities then cited the court held that the appeal was prematurely taken, and the same was dismissed. Estate of Rose, 72 Cal. 577, 14 Pac. Rep. 369. Respondent now moves to dismiss on the ground, among others, that the dismissal of the former appeal is a bar to this one. The bar of section 955, Code Civil Proc., will apply where the dismissal is for want of prosecution, (unless it be expressly made "without prejudice,") or where it is on the merits; but an appeal dismissed because there was nothing to appeal from will not preclude another appeal in the same case, when a record shall have been made up from which an appeal can be taken. Preferring, if possible, to dispose of the case upon its merits, in such form that the estate may be speedily closed, without considering the other grounds upon which it is made, the motion to dismiss the appeal is denied.

And looking into the merits of the case we find from the record that Allan E. Rose died intestate, in Kern county, on the 5th of October, 1880, leaving three minor children, and an estate which in December, 1880, inventoried and appraised at $6,066. This amount was increased by a supplemental inventory and appraisement, filed in September, 1881, amounting to $430, making the total estate $6,496, of which $1,555 was real property, all the balance being personal property. At the time of his death Rose was engaged in the cattle, sheep, and dairy business, and was heavily indebted. On the 18th of October, 1880, letters of administration upon his estate were granted to Herman Hirshfeld, appellant, by the superior court of Kern county. On April 20, 1885, the matter of said estate was transferred for further proceedings to Tulare county, a new judge having taken the bench in Kern county, who was disqualified to sit in the case. Claims against said estate were in due course presented and allowed to the amount of $4,805.77. On the 12th of December, 1880, the administrator made and filed his petition in due form, estimating the debts and expenses of administration, accrued and to accrue, at $6,000, and showing that the entire personal estate would be insufficient to pay this amount, and praying for an order of sale of the personal property, and of so much of the real property as should be necessary to raise the amount so estimated to be necessary to pay debts and expenses. This was followed by an order of January 10, 1881, under proceedings which appear to have been regular, authorizing the sale of all the real and personal property of the estate at private sale. It would seem that from the very first the administrator, instead of simply gathering up and taking care of the property of the estate, and in due course converting it into money under proper orders of the court, and out of the proceeds paying expenses of administration and family allowance, applying the balance to the payment of debts, so far as it would go, as he might have done in strict performance of his duty, commenced and continued to carry on the business in which the decedent had been engaged, accounting for the increase of stock and income thereof, and paying the expenses of the conduct of the business out of the same. Whether he has correctly accounted for the increase and income, and correctly reported the expenses, is the principal subject of the investigation, from the result of which this appeal is taken. It has evidently been the source of all his trouble and litigation as such administrator. The business was a hazardous one for an administrator to undertake, and one which the law did not require at his hands. Brenham v. Story, 39 Cal. 188. If it resulted in profit that profit belonged to the estate, and not to himself. It being a business which he was neither required nor authorized by law to conduct on behalf of the estate, if he did do it with the property and funds of the estate, and there was loss, the loss was his. Whenever an administrator undertakes to go beyond the strict line of his duty, he acts upon his own responsibility. He can derive no profit from the success of his venture, but must bear the loss of a failure. Estate of Knight, 12 Cal. 200. If he uses the real estate of the estate, he must account for the rental value thereof, and, if he makes a profit, account to the estate for that also. Walls v. Walker, 37 Cal. 424. To the same effect is Tompkins v. Weeks, 26 Cal. 51. If, as in this case, the administrator elects to assume the peril, and is permitted by the court and parties interested, without objection, to so conduct and manage the business, the liabilities growing out of the management are not claims which could be enforced against the estate by the holders thereof. They are his liabilities. He has a right to pay them out of the increase of the business; but if by so doing a loss is sustained to the estate, he must make the loss good. Protected from loss and from liability at all times, the estate is interested in the business only to the extent of its profits; and in them, not because it is the business of the estate, but because the administrator is using the property of the estate in a way he is not authorized to do, and, consequently, is required to account for all the profit made by its use. It follows from this that the expenses incurred in carrying on such business are not debts of or claims against the estate, nor are they "charges or expenses of administration," within the meaning of the probate law. The items of increase and items of expense of such business are not matters which come within the purview of the itemized account of an administrator, as such, subject to the rules of audit and allowance prescribed in sections 1631 and 1632, Code Civil Proc. He is bound to report to the court, as money or property coming into his hands as administrator, the true net gains or profits derived from the business, in money or kind; but the detailed account of the management or conduct of the business is no part of his accounts as administrator. If he reports them to the court at all it should be done in a separate paper, perhaps as an exhibit attached to his official report or account; and, when so done, it simply serves the purpose of showing his good faith in the premises, and is not a matter for audit by the court. The probate jurisdiction of the court is separate and distinct from its jurisdiction in ordinary civil actions. In re Allgier, 65 Cal. 228, 3 Pac. Rep. 849; Richard v. Wetmore, 66 Cal. 365, 5 Pac. Rep. 620. To the extent that the court, in the exercise of its probate jurisdiction, undertakes to audit the accounts and control the conduct of that business, to that extent, it, also, as well as the administrator, assumes to make a speculative and hazardous use of the property of the estates of deceased persons, not authorized by law. If the administrator fails to honestly account to the estate for the profits, or to make good the loss of his acts *ultra vires*, he is guilty of a fraud, for which he may be proceeded against in a civil action, as in any other case of fraud, and then, and in that proceeding, those accounts of the business which he conducted, with the property of the estate, without authority of law, will become the subject of investigation, item by item, and their investigation will be governed by the same rules of evidence as apply in the examination of other disputed accounts.

Applying these principles, we proceed to a further examination of the record. It further appears that on the 9th of December, 1881,—less than 14 months after his appointment,—the administrator filed his first, and what was intended to be his final, account, showing that he had received in cash $10,942.43, and paid out $9,145.92, leaving a balance in his hands of $1,796.51. From this account, and the report of sales of personal property filed 20 days later, it appears that of the receipts $5,807.08 was derived from the sale of personal property; the balance, $5,135.35, being the gross income derived from the business as carried on by him. His account of expenditure included the payment in full of all the claims which had been presented and allowed against the estate, ($4,805.77,) the payment of all the charges and expenses of administration, and of taxes; and the balance, comprising the majority in number of the several items, although placed regularly in the account of expenditures of administration, show upon their face that they were expenses of carrying on the business, from which the increase of $5,135.35 was derived. We have taken some pains to segregate these items from the other, and find that they amount to $3,174.63, showing that he gives the estate the benefit of a net gain growing out of the business up to that time of $1,960.72. The record also shows that on the 23d of December, 1881, the attorney of the minor heirs filed objections to this account, contesting it on the ground, among others, "that no sufficient vouchers for the expenses and charges of said estate have been filed by the administrator of above estate." We do not find that the present record shows the next succeeding history of this account, but counsel for respondent says in his brief that it was settled and allowed as filed by the superior court of Kern county on the 29th of December, 1881, from which order an appeal was taken to this court, the decision upon which will be found in 63 Cal. 349. Turning to the case as there reported, we find that the mass of items of which we have above spoken as constituting payments of expenses of the business conducted by the administrator were treated by both sides as expenses and charges of administration, and the distinction was not in any manner called to the attention of the court. As many of those items were unaccompanied by the kind of vouchers required for payments made on account of "charges and expenses of administration," the order settling and allowing the account was reversed, and the cause remanded for further proceedings. On the 17th of September, 1883, the account came on again for settlement in the superior court of Kern county, when the present contestant filed objections to the same. The court refused to hear the contestant on the ground that he had no standing in court. Contestant appealed. The decision on that appeal will be found in 66 Cal. 242, 5 Pac. Rep. 220. It will be seen that there the court does not discuss or pass upon the merits of the account at all, but holds that the court erred in refusing to give the contestant a hearing, and reversed the case. After the *remittitur* went down, the case was transferred to Tulare county, as above stated. There the same account and objection came up for hearing April 20-23, 1885. On that hearing the court, in a written decision, filed August 22, 1885, held, as we hold here, that "it is no part of the duty of an administrator to carry on any business for the benefit of an estate. If he does so he is liable for any loss that may be incurred, and can reap no benefit from the profits, if any." "That where an administrator elects to carry on a business for an estate, the person who is employed by him in such business is the employé of such administrator, and not the employé of such estate. Such employé must look to the administrator, and not to the estate, for his pay. The amount due such employé is not a 'charge,' 'debt,' or 'claim' on his behalf against said estate." But, on the other hand,—and, it seems to us, inconsistently with this,—the court holds that if the business pay a revenue to the estate, then the expenses of the business are items of expense under section 1631, Code Civil Proc., for which formal vouchers must be filed under section 1632. If it is not the business of the estate, why is the expense of it expense of the estate? Why either more or less expense of the estate if it results in revenue than if it results in loss? Acting upon the principles thus announced by the court, it takes up the account item by item, and disallows or retires from the expense account, for want of proper vouchers, with leave to bring them forward again in any further account, items aggregating about $850, and surcharges the administrator with about $150, making a difference against the administrator of about $1,000. Of this the appellant does not seem to have complained; but on the 8th of September following, the court, "upon the suggestion" of the respondent, made an order requiring the administrator within 30 days to restate his account in full from the commencement of his administration to date. In pursuance of that order, on the 19th of October, 1885, the restated account was filed. On the 24th of November, 1885, exceptions to the account, covering 46 folios of the record, were filed, contesting the account not only for want of proper vouchers for many of the items thereof, but also upon many other grounds, and notably upon the ground that the administrator had not truly or correctly reported all the moneys received by him, and never reported or filed an inventory of all the property of the estate which had come into his hands. Upon the same and the next succeeding day (November 24, 25, 1885) a hearing was had upon the restated account, and the issue raised or assumed to be raised by these exceptions, and on March 12, 1887, the "findings and decree" were filed, from which, after the document was recorded, this appeal was taken.

The case has been here in different forms many times, and the close of administration delayed beyond all precedent, considering the small estate to be disposed of, and it is desirable that it should be closed at the earliest possible moment. For this reason we have reviewed it at greater length than we otherwise would have done. Looking at the case upon the issues presented by the account and the objections thereto, and as disclosed by the bill of exceptions, we find that in settling the account the court has finally rejected and disallowed items amounting to $154.06, and retired for further consideration upon the coming in of another account, two items amounting to $357,—all of that class which are expenses, of carrying on the business as distinguished from "charges and expenses of administration." As the appellant claims to have debited himself, and the court debits him, with the gross gains of that business, we think that under the evidence and the principles here adopted he should be credited with those items, and the court below is directed accordingly. The court also rejected an item of $15, paid to Noble as appraiser. The record shows that Noble was duly appointed one of the appraisers, served as such three days, and claimed the fee. The administrator swears that he paid it, and we find no contradiction of that evidence. The amount is under $20, and we think should be allowed. The court also rejects an item of $75, expense of administrator to San Francisco. It does not very clearly appear from the record for what this expense was incurred; but the administrator is entitled to necessary traveling expenses when on business of the estate. If this expense is claimed to have been of that class, the bill should not be rejected *in toto*, but be placed in the list of those items retired, with leave to bring it forward with the proper proofs in a future account. The court allows $756, and rejects $540 paid by the administrator to his counsel for fees and professional services, and also rejects $251 traveling expenses of his counsel. This rejection is based on the proposition that much of the service rendered was unnecessary, not in the interest of the estate, to delay settlement, and was with a view to establish an account in which the administrator had knowingly not charged himself with all moneys and property of the estate which came into his hands. The findings do not show to what particular service the rejected items apply, and we cannot, therefore, say whether the rejection was correct or not. But if any part of it applies to the defense of the two appeals decided in 63 Cal. 346, 349, to that extent we think the rejection was error. An administrator is entitled to credit for payments made for the services and traveling expenses of his attorney, not exceeding a reasonable compensation for the labor actually performed, when the same were necessary to enable him to properly perform the duties of his trust. Estate of Moore, 72 Cal. 336, 13 Pac. Rep. 880. He was not at that time charged with having failed to account for all the property, and was simply in the one case insisting upon the allowance of his account for carrying on the business, and in the other he had acted under order of the court below, and was defending an appeal from such order. He acted under the advice of counsel, and we see nothing to show that such advice was not in good faith. He was not responsible for the mistakes of either counsel or court; and for the reasonable expenses incurred in that behalf, as well as for services in other proceedings in the settlement of the estate, we think he should be allowed. If any portion of these rejected items was for services in either this court or the court below in the matter of procuring the removal of the guardian of the minor heirs, for that portion he is clearly not entitled to be allowed. It was a matter with which he, as administrator, had nothing to do, and no part of the expense of it should be charged to this estate.

Several items of clerk's fees, printing bills, and of moneys paid to the attorneys for the minor heirs, were rejected. All the items of expenditures made in the matter of the estate and guardianship of these minors are properly rejected from this account. These expenses have no place in this account. If upon settlement between the two estates and distribution of this estate it be found that the administrator has made advances to the other estate, by paying, at the request of its representative, proper and necessary expenses therein, he may properly be allowed credit therefor as so much advanced to the minors on account of their distributive share, but he is not entitled to charge such advancement as expenses of this administration. The retiring of the item for administrator's commissions was proper, as he is not entitled to these commissions until the settlement of his final account. We are not disposed, under the evidence, to interfere with the action of the court in rejecting or retiring other items of this account, considered in findings 38 to 62 inclusive.

Turning to the other side of the account, appellant claims that there is absolutely no proof to sustain the findings of the court. In this, we think, he is mistaken. It is not a question whether this court would have found the same way on the same evidence, but (there being no conflict) whether there is any evidence to justify the findings. If there is, under the well-established rule of this court the findings cannot be disturbed. It is not necessary that the evidence should be introduced by the contestant if it is clearly found in the testimony of those called to support the account. It seems to us that there is in that testimony some evidence to support every finding and order of the court surcharging the administrator with amounts omitted from the debit side of that account, and as to many of the charges it is conclusive evidence. The findings and conclusions, 19 to 36, inclusive, will not be disturbed. The finding that no order was ever made by any court or judge thereof authorizing the sale of personal property belonging to said estate, made by said administrator in the year 1881, is in conflict with the record as produced in this court, and is erroneous. The findings of misappropriation or misuse of funds, of failure to report all the funds received, of failure to file an inventory of all the personal property of the estate, of careless loss of books, and generally the findings not herein specifically noticed, seem to be justified by the evidence, and will not be disturbed. The order appealed from is reversed, with instructions to the court below to allow in the account of the administrator the claim of $15 paid Noble for appraisers' fees, and all the items which the evidence shows to have been expenses of carrying on the business, as defined in the foregoing opinion, except such as are duplicated or withdrawn; also that the administrator be allowed to introduce any additional evidence he may have in support of any of the remaining items which have been rejected or retired from his account, and thereupon that the account be restated in accordance with this opinion.

We concur; Sharpstein, J.; McFarland, J.; Thornton, J. Works, J., concurs in the judgment of reversal.

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80 Cal. 52

People v. De Lay. (No. 20,519.)

(*Supreme Court of California.* Aug. 1, 1889.)

Embezzlement.

1. On trial of an information for embezzlement, it appeared that defendant was the assignee of an insolvent debtor, and that the assignment named the order in which creditors should be paid. A firm of which defendant was a member was second in the list of creditors, but defendant paid the debt of his own firm first, leaving little for payment of other debts. He also received $737 from sales of milk, and only accounted for $427. *Held*, that the evidence justified the verdict of guilty, as it was for the jury to say whether defendant intended fraudulently to appropriate the property.

2. In such case, under Pen. Code Cal. § 513, providing that if, prior to information laid charging embezzlement, the accused restore, or offer to restore, the property alleged to have been embezzled, such fact is not ground of defense, but goes only towards mitigation of the punishment, it could not avail that defendant offered to return the balance due from him as assignee.

3. Nor is it a defense that defendant has given an indemnity bond for the amount of property coming into his hands as assignee.

In bank. Appeal from superior court, city and county of San Francisco; D. J. Murphy, Judge.

Adair Welcker, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

Paterson, J. The defendant was charged with embezzlement, and convicted. The chief contention of the counsel for appellant is that the evidence is insufficient to justify the verdict. He obtained possession of the personal property of Mary Furlong under an assignment thereof to him for the benefit of her creditors. By the terms of the assignment defendant was required to apply the proceeds of all sales of property and the revenue received from the dairy and milk route to the payment of Mrs. Furlong's debts, which were classified in the written assignment, and payments thereof required as follows: "(1) In payment of any judgment that may be recovered by John Reis, plaintiff in an action instituted on the 14th day of July, A. D. 1886, wherein the said Reis is plaintiff, and I, the said Furlong, am defendant," etc. "(2) To pay to the said firm of De Lay Bros. whatever amount may be now due to them from me, or that may hereafter become due to them during the running of this agreement. (3) To pay to R. B. Mitchell such moneys as may be now due to the late firm of Mitchell & Ricketts, for fees and costs," etc. "(4) To pay all other unsecured debts that I may now owe, or which may become due from me during the running of this agreement; * * * so much of said book-accounts as may remain uncollected; and whatever personal property or book-accounts, notes, demands, * * * shall be turned over to the said Furlong at the termination thereof; * * * the attachment heretofore issued in the case of Reis v. Furlong to be released, the said De Lay indemnifying Matthew Nunan and Jeremiah Lowney, securities on the undertaking, for release of attachment this day executed against any loss by reason of their signing said undertaking as sureties."

The contract of assignment was executed by both parties on July 21, 1886. The defendant thereupon accepted the trust, took possession of all the property that could be found, and began to collect the book-accounts, sell the cows and other stock, and wind up the business. On November 15, 1886, nothing remained to be sold except a few heifers and calves and a grain wagon. At that time defendant had received about $3,000, and paid out about $2,900. Instead of applying the proceeds of the sales and of the business to the payment of the Reis judgment, which had been entered in the mean time against Mrs. Furlong for $1,600 and costs, he appropriated the whole thereof, except about $85, which he offered to pay over, to the payment of the debt due himself and partner and a few small claims. In a statement rendered November 15th he gave as the total amount received from sales of milk the sum of $427.15. At the trial it was admitted by his counsel that he had received up to November 5th, from sales of milk, at least $737.40. The balance, ($310.25,) not accounted for by him, is the amount charged in the indictment as having been embezzled. The driver of the milk wagon testified that there had been collected $120 for which no receipts could be found, in addition to the above-named sum of $737.40. Defendant testified that he did not understand from the agreement that he was to pay the Reis judgment first, and that he acted on the advice of his attorney in appropriating the proceeds to the payment of his own and other claims. But there is evidence that he knew the terms of the contract required him to pay the judgment first. If he acted on the advice of his attorney, Mr. Wood, it is a singular fact that he did not call the latter to testify in his behalf; although, of course, if the jury believed the testimony of the defendant, his evidence on that subject was sufficient to establish the fact in his favor. Evidently, however, the jury did not believe that he so understood the contract. At the time the contract of assignment was made defendant gave Nunan and Lowney a written indemnity, in which he recites that "whereas, said Mary Furlong has this day made an assignment to me of all her personal property, for the purpose of selling so much of the same as may be necessary to pay such judgment as may be recovered in the above-entitled action, as well as to pay off other indebtedness," and in which he promises to hold so much of the property assigned to him "by Mrs. Furlong, or the proceeds thereof, as may be necessary to satisfy any judgment that may be recovered by said Reis in said action, including all costs and interest." There is other evidence in the record tending to show that the defendant fully understood the obligation imposed upon him by the contract to pay the Reis judgment first out of the funds received from the sales and collections. The explanation given by the defendant as to the difference between the amount actually received from sales of milk and that reported is not very satisfactory. The court fully and fairly instructed the jury upon the law of embezzlement. They were told that "a person may receive property belonging to another, and appropriate it, and divert it from its true channel, and from the purpose for which he received it, but still he might not be guilty of embezzlement, and would not be, unless such diversion or such appropriation or conversion by him was of a fraudulent character and nature; that it is the fraudulent misappropriation of the property that constitutes the gist of the offense."

The question of the guilt or innocence of defendant does not depend upon the construction of the contract as to the order of payments to creditors. If it be conceded that he might lawfully have appropriated the proceeds to the payment of his own and other claims before any payment was made upon the judgment referred to, the fact still remains that, when called upon for an account, he reported that he had received only $427.15, when, in fact, he had received at least $737.40. The balance ($310.25) is the amount which he is charged to have embezzled. Under the contract he was bound to appropriate all the proceeds of sales and collections to the payment of Mrs. Furlong's debts, and return the balance, if any, to her. It was for the jury to say whether or not he intended fraudulently to appropriate the $310.25 retained by him. The fact that he afterwards offered to return or pay over this amount is no defense herein. Section 513, Pen. Code.

The error of the court in admitting the testimony of the witness Nunan was not prejudicial. The testimony elicited was simply a repetition of what had already been given. It was not contrary to the written instrument, nor did it in any manner add to its terms, but was in entire accord with the provisions thereof. The fact that Nunan and Lowney took a written indemnity from the defendant in no way affects the guilt or innocence of the defendant, who is charged with embezzling the property intrusted to him for certain purposes by Mrs. Furlong. Defendant claims that Mrs. Furlong did not turn over to him all the property called for by the assignment. Upon this question there is a conflict of testimony. Defendant, however, was not called upon to account for anything he did not receive. Mrs. Furlong testified that she gave him all the property that could be found, and that he might have had the heifers and calves if he had called for them. The defendant is not charged with embezzling money collected by Mrs. Furlong, or property retained by her. If he was dissatisfied with his agreement on the ground that she had retained a portion of the property, or had collected some of the book-accounts, he should have declined to proceed further with his trust until the whole of the property was turned over to him. So long as he retained any property under the contract, he was bound to use it as required by the provisions thereof. Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; WORKS, J.; MCFARLAND, J.

(80 Cal. 129)

People v. Stewart. (No. 20,512.)

(*Supreme Court of California.* Aug. 3, 1889.)

Larceny.

Prosecutor testified that while on a bed with money about his person defendant said he would put the money under his (prosecutor's) head, and raised the pillow as if doing so, and when he awoke in the afternoon the money was gone. Defendant testified that he told prosecutor that he would take care of the money, and prosecutor said "All right;" that he took the money, and deposited it with a friend, and drove to a village some miles distant, where he had previously been intending to go on that day, with a horse and buggy which he had engaged several days before. He told his friends that he would return that night or next morning. On receipt of a dispatch that he was accused of larceny, he immediately started to return, and on the way back met the constable and told him that he had deposited the money with a friend, went there with him, and paid it over. *Held*, that the evidence was not sufficient to prove a felonious taking of the money beyond a reasonable doubt.

In bank. Appeal from superior court, Colusa county; E. A. Bridgford, Judge.

Indictment for grand larceny. The defendant, Stewart, was convicted, and appeals.

T. J. Hart, for appellant. *George A. Johnson*, Atty. Gen., for the People.

Paterson, J. The defendant was convicted of grand larceny, and the only question presented for our consideration is whether the evidence is sufficient to support the verdict. The bill of exceptions (which is a model in form and conciseness) shows the following state of facts: On the 30th day of June, 1888, the prosecuting witness, Bryan, was lying on a bench in the shade of a porch at Orland. Some horses which were tied to the porch became frightened, and threw him out into the street. He was picked up by the defendant, and escorted to the latter's room, across the street. Bryan lay down upon the bed in the room, desiring to sleep. The defendant asked him if he had any money on his person. Bryan replied that he had the sum of $180. The defendant said that, as there was a circus in town that day, somebody might come along and take it. Bryan testified that the defendant said he would put the money under his (Bryan's) head, and raised the pillow as if he were putting it there. The defendant testified that he told Bryan that he would take care of his money, and Bryan said "All right;" that he took the money, and placed it on deposit with a friend. When Bryan awoke, about 3 o'clock in the afternoon, he discovered that his money was gone. He made inquiries for the defendant, and learned that he had gone to Germantown. He thereupon made complaint against defendant, and procured his arrest on a charge of grand larceny. As soon as the defendant had deposited the $180 for safe-keeping with his friend he borrowed $10 from one Maupin, and a like sum from Sweeney, and took a horse and buggy which he had engaged several days before and started for Germantown, a village 10 or 12 miles distant from Orland, telling the friends from whom he borrowed the money that he would return that night or the next morning. It appears without contradiction that the defendant had been intending for several days to go to Germantown that day. As soon as the friends of the defendant heard that Bryan was accusing him of larceny they sent him a dispatch, which he received at Germantown. Upon receipt of this telegram he immediately started to return to Orland. On his way back to Orland he met the constable, and told him that he had Bryan's money on deposit with a friend, and, if the latter would go with him, he would get the money and pay it over, which was done. It appears that the defendant and Bryan had been friends for some time, and that on one occasion Bryan said to the defendant that he had $3,000 on his person, and would like to have him (defendant) look out for him. It appears, also, that on one occasion Bryan had lent defendant a small sum of money.

The only conflict there is in the evidence is upon the question whether the defendant placed, or pretended to place, the money under the pillow, as claimed by Bryan, or whether he took it out of the room, without pretending to place it under the pillow, and deposited it, as claimed by defendant; and this portion of Bryan's testimony is the only evidence in the case which in any way tends to show a felonious taking of the money by defendant. Taken altogether, the evidence is entirely consistent with the claim of defendant, that he took it as the friend of Bryan, for safe-keeping, believing that, as the room was not locked, and as there were a great many strangers in town that day, some one might enter the room and take it away from Bryan while the latter was sleeping. Every act of the defendant, subsequent to the taking of the money from the person of Bryan, is indicative of fair and honest dealing. The fact that he went from Orland to Germantown immediately thereafter is explained by the fact that such visit had been contemplated for several days. It is not disputed that the money was placed in the hands of defendant's friend for safe-keeping. As soon as the defendant was notified that he was wanted in Orland he started to return, and when met by the constable immediately informed him where the money was, and promptly and voluntarily offered to return it. The evidence is not sufficient, we think, to produce a conviction in an unprejudiced mind that there was any felonious taking of the money by defendant, and the verdict must have been the result of passion and prejudice. Even in civil cases "that evidence is deemed satisfactory which ordinarily produces moral certainty or conviction in an unprejudiced mind. Such evidence, alone, will justify a verdict. Evidence less than this is denominated 'slight evidence.'" Section 1835, Code Civil Proc. As stated before, the only evidence tending in any way to show a felonious taking is that of the prosecuting witness, in which he says that the defendant pretended to place the money under his pillow. The most that can be said in support of the verdict is that the evidence tending to show guilt is "slight evidence." Judgment and order reversed.

We concur: BEATTY, C. J.; WORKS, J.; McFARLAND, J.; FOX, J.; SHARPSTEIN, J.; THORNTON, J.

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80 Cal. 122

PEOPLE v. OLSEN *et al.* (No. 20,528.)

(*Supreme Court of California.* Aug. 3, 1889.)

APPEAL—HOMICIDE—EVIDENCE—INSTRUCTIONS.

1. The action of the trial court in overruling an objection to evidence cannot be reviewed when the evidence is not before the appellate court; and the case will not be reversed when it appears that the jury were instructed not to consider the evidence, unless it is shown that the substantial rights of defendants were affected by its admission.

2. There was evidence that defendants had conspired to steal the property of deceased, and in carrying out the conspiracy one or more of defendants killed deceased. The evidence was not in the record. The jury were instructed that if defendants conspired to commit a felony, and killed deceased in prosecuting the design, it was murder in all, though only one may have inflicted the fatal blow, the others being present aiding and abetting, and that in such homicides the law superadds the intent to kill to the original felonious intent. *Held* that, though defendants were not being tried for grand larceny or conspiracy, the fact that the murder was the result of a conspiracy to commit another crime, and the attempt to carry it out, were material for the jury to consider, and the instruction stated the law correctly.

3. In order to show that the killing constituted murder under Pen. Code Cal. § 189, which enumerates the class of homicides to which the law "superadds the intent to kill," it was competent to show that it was done in the commission or attempt to commit a felony, whether such felony was committed or attempted as the result of a conspiracy or not; and in such case the law attaches the felonious intent accompanying the crime contemplated to the act of killing, and constitutes it murder, whether it be one of those enumerated in section 189 or not.

4. An instruction that if the jury find defendant guilty of murder in the first degree, and also find that there is some extenuating fact, it is within their discretion to pronounce such a sentence as will relieve defendant from the extreme penalty of the law,—the jury being invested with that discretion, which is not an arbitrary one, but is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed,—and that if the evidence shows any of the defendants to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, the jury must find such defendant simply guilty of murder in the first degree, and leave it to the law to affix the punishment, is not erroneous or misleading, though open to criticism.

5. Defendant cannot complain that the instruction was not sufficiently certain and specific when the attention of the court below has not been called to it, and no more specific instruction has been asked for.

In bank. Appeal from superior court, El Dorado county; GEORGE E. WILSON, Judge.

One Meyer, John Olsen, and William Drager were indicted for the murder of one John Lowell, a ranch-owner in El Dorado county, on March 24, 1888. The two latter, Olsen and Drager, were convicted, and sentenced to death. They moved for a new trial, which was denied, and an appeal was taken therefrom, but no bill of exceptions was settled. They also appealed from the judgment. The record on appeal contained the proposed bill of exceptions, but the appeal was considered on the judgment roll alone. Among others, the court below instructed the jury as follows: "If you find any of the defendants guilty of murder in the first degree, and you also find the further fact that there is some extenuating fact or circumstance in the case of such defendant, it is within your discretion to pronounce such a sentence as will relieve such defendant from the extreme penalty of the law. The Penal Code invests a jury in a criminal case for murder with that discretion, but the discretion is not an arbitrary one, and is limited to determining which of two punishments shall be inflicted, and is to be employed only when the jury is satisfied that the lighter penalty should be imposed. If the evidence shows any of the defendants to be guilty of murder in the first degree, but does not show some extenuating fact or circumstance, it is the duty of the jury to find as to such defendant a simple verdict of murder in the first degree, and leave with the law the responsibility of affixing the punishment."

Irwin & Irwin, J. G. Carpenter, and *Prentiss Carpenter*, for appellants. *George A. Johnson*, Atty. Gen., for the People.

WORKS, J. The appellants were convicted of the crime of murder, and sentenced to death. The evidence is not before us, the appeal being on the judgment roll. Counsel for appellants contend that certain evidence was improperly admitted, and claim that we can consider the action of the court in overruling their objection thereto, in the absence of the evidence, because it appears from the instructions of the court that the jury were thereby directed not to consider the same. But the fact that the court, in effect, acknowledged its error in admitting the testimony by thus instructing the jury cannot justify a reversal of the case. So far as we know, the court below may have been right in its first ruling and wrong in directing the jury not to consider the evidence. But, if this were not so, it is not enough for the appellants to show error. It must appear to have been an error affecting their substantial rights. It may be that the evidence was not only not harmful to them, but that it was beneficial. We may fairly assume this to be so as against an appellant who does not bring up the evidence for our inspection.

The court charged the jury as follows: "If a number of persons conspire together to commit a felony and take the life of another person in the prosecution of the common design, it is murder in all, although only one may have inflicted the fatal blow, the others being present aiding and abetting. In such homicides the law superadds the intent to kill to the original felonious intent, and estops the criminal from denying the further intent, thus imputed. The thing done having proceeded from a corrupt mind is to be viewed the same, whether the corruption is of one particular form or another." The appellants contend that this instruction was erroneous. It is stated in the instructions that evidence had been introduced for the purpose of showing that the defendants had entered into a conspiracy to commit the crime of grand larceny in stealing and driving away horses and mules claimed to have been in the possession of the deceased, and that in carrying out the conspiracy, for the purpose of accomplishing its object, one or more of the defendants killed the deceased. What the evidence was, or what it proved or tended to prove, we do not know, as the evidence is not in the record, and in the absence of such knowledge we do not know that the instruction was wrong, conceding that it would have been wrong in any state of the evidence. We do not clearly understand counsel's objection to the instruction, and for that reason give it in full: "The defendants were being tried for the crime of murder, and not for that of grand larceny, and the instruction was given for the purpose of showing their liability as conspirators, and in this respect it was erroneous. What the court intended to say was, that 'if a number of persons conspire together to commit a felony, and in the prosecution of the common design take the life of another person,' etc., and so it must read. In order to make one person liable as a conspirator for the acts done by another, the act done 'must be the ordinary and probable effect of the wrongful act especially agreed on, so that the connection between them may be reasonably apparent, and not a fresh and independent product of the mind of one of the confederates outside of or foreign to the common design.'" It is true, the defendants were not being tried for grand larceny or conspiracy, but the fact that the graver crime charged against them was the result of a conspiracy to commit another crime, and the attempt to carry it out, were material for the jury to consider. Conceding that the act must have been the "ordinary and probable effect of the wrongful act especially agreed on," the evidence on which this instruction was founded may have shown that to have been the case. But, whether it did or not, the instruction only goes to a case where the conspiracy to commit a felony, and the attempt to commit it, are shown, and the murder is committed in the prosecution of the common design, the blow being inflicted by one of the defendants, the others being present aiding and abetting. This conclusively shows that the court was not instructing the jury as to the presumption in the supposed case of counsel where the greater crime was or might have been "a fresh and independent product of the mind of one of the conspirators outside of and foreign to the common design." The instruction stated the law correctly. Pen. Code, § 192; 2 Thomp. Trials, § 2204; State v. Shelledy, 8 Iowa, 485, 495, 505.

Counsel claim that it is only the class of homicides enumerated in section 189 of the Penal Code to which the law superadds the intent to kill. In this counsel are mistaken. The section referred to provides what shall constitute murder in the first and second degrees. The instruction relates to the intent to kill. The mere act of killing, and the circumstances surrounding it, may be, and may have been in this case, sufficient to show that the killing was intentional and felonious; but, in order to show that the killing was such as to constitute the act murder, it was competent to show that it was done in the commission or attempt to commit a felony, whether such felony was committed or attempted as the result of a conspiracy or not. People v. Doyell, 48 Cal. 94; People v. Foren, 25 Cal. 364. And where the killing is the result of the commission or the attempt to commit a felony, whether it be one of those named in section 189 of the Code or not, the law attaches the felonious intent accompanying the crime contemplated to the act of killing, and constitutes it murder. Thus in People v. Foren, supra, it is said: "The common law measures an act which is *malum in se* substantially by the result produced, though not contemplated, holding the doer of the act guilty of the thing done in the same manner as if it were specially intended, though not always guilty of the crime committed in the same degree. Ruth. Inst. bk. 1, c. 18, § 11. On this principle, if one intending to murder a particular person attempts to shoot him, but, missing his mark, shoots another, or, in an attempt to poison one, another accidentally loses his life by means of it, it is murder in the first degree. 1 Bish. Crim. Law, §§ 255, 257." And in People v. Doyell, supra: "To establish the malice aforethought, however, the specific intent to kill need not be proved.

To constitute a crime there must be a joint operation of act and intention. But the common law measures an act which is *malum in se* substantially by the result produced, though not contemplated, holding the doer of the act guilty of the thing done in the same manner as if it were specially intended, though not always guilty of the crime committed in the same degree. People v. Foren, 25 Cal. 365. Whenever one, in doing an act with the design of committing a felony, takes the life of another, even accidentally, this is murder. Acts 1850, p. 231, § 25; 2 Bish. Crim. Law, 741. In such homicides the law superadds the intent to kill to the original felonious intent, and estops the criminal from denying the further intent thus imputed. The thing done, having proceeded from a corrupt mind, is to be viewed the same, whether the corruption is of one particular form or another. Ruth. Inst. c. 18, § 9; 1 Bish. Crim. Law, 411. The amendment (of 1856) of the act of 1850, 'concerning crimes and punishments,' did not change the law of murder done in the attempt to commit a felony. It only prescribes a severer punishment where the murder is committed in the attempt to perpetrate arson, rape, robbery, or burglary (on account of the enormity of those offenses) than where it is committed in carrying out any other felonious design. * * * But, besides those committed in the perpetration of felonies, a large number of homicides have been adjudged murder, where the specific intent to take life does not appear or does not exist. Thus, where the killing is involuntary, but happens in the commission of an unlawful act, which, in its consequences, naturally tends to destroy life, it is murder; so, if the intent to kill is not made apparent, but the killing is unlawful, and not done in the heat of passion, or the specific intent to take life not appearing, all the circumstances show an abandoned and malignant heart. In these, and in like cases, the malice aforethought is implied, the law attributing to the slayer the intent to kill, although such intent is not made manifest as a fact." Another branch of the instruction, containing substantially the same enunciation of the law relating to the subject of conspiracy, is objected to on similar grounds, but for the reasons above given the instruction was not erroneous.

The court also gave the instruction found in full in People v. Brick, 68 Cal. 191, 8 Pac. Rep. 858, and counsel contend that this was error. It was expressly held in the case referred to that there was no error in the instruction. But the objection now made is that the instruction was not sufficiently clear and specific in its announcement to the jury that if they found the defendant guilty of murder in the first degree it was within their province to relieve the defendant from the death penalty. The language used is: "It is within your discretion to pronounce such a sentence as will relieve such defendant from the extreme penalty of the law." The instruction is certainly open to criticism in this respect. In the trial of cases of this kind the court should carefully instruct the jury, not only that they have the discretion to relieve a defendant from the extreme penalty of the law, but they should be told in specific terms what verdict they are authorized to return, and the forms of the different kinds of verdicts should be stated, and such forms of verdicts prepared and sent out with the jury, allowing them to select the one agreed upon by them. But the jury were apprised of the fact here that they were not bound to return such a verdict as would result in the infliction of the death penalty. There was nothing in the instruction to mislead. If the counsel for defendant desired a more specific charge on the point they should have asked it, and if they did not do so the responsibility must rest with them. People v. Haun, 44 Cal. 96; People v. Ah Wee, 48 Cal. 237; People v. Collins, Id. 277; People v. Flynn, 73 Cal. 511, 15 Pac. Rep. 102. We do not wish to be understood as holding that an entire failure to instruct on this subject, in this class of cases, would not be error. But where the court does instruct and call to the attention of the jury that it is within their province to determine whether or not the extreme penalty shall be inflicted, and the instruction is not such as to mislead the jury, a defendant cannot be allowed to complain that the instruction was not sufficiently certain and specific, when the attention of the court below has not been called to it, and no more specific instruction has been asked for. Judgment affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

80 Cal. 160

PEOPLE v. BUSHTON. (No. 20,517.)

(*Supreme Court of California.* Aug. 1, 1889.)

EXAMINATION OF WITNESS—HOMICIDE—BURDEN OF PROOF.

1. Where a witness for the prosecution, in a trial for murder, testifies inconsistently with his testimony at the coroner's inquest, it is not error to call his attention to what he had testified to before the coroner, and, upon his denial thereof, to read such testimony to the jury.[1]

2. Where defendant claims to have killed deceased accidentally he is only bound under Pen. Code Cal. § 1105, which provides that, "upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable," to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged, and it was error to charge that "when the killing is proved beyond a reasonable doubt, the defendant must make out his case in mitigation to excuse or justify it by some stronger proof in some appreciable degree than the proof of the prosecution. The burden of proof changes, and the proof on the part of the defendant must be in some degree stronger than the proof on the other side."

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[1] Under the Indiana statute allowing the party producing a witness to contradict him by showing that he had made statements different from his testimony, the state, in a trial for homicide, may show that a witness called by it, and who testified that defendant did not strike the fatal blow, had stated that he did strike it. Conway v. State, 21 N. E. Rep. 285. As to how far a party may impeach his own witness, see Gardner v. Connelly, (Iowa,) 39 N. W. Rep. 650, and note; White v. State, (Ala.) 5 South. Rep. 674.

3. An instruction that, if the jury found "from the evidence, beyond a reasonable doubt, that the homicide was committed by defendant at the time and place mentioned in the indictment," he could not be excused unless they found "that such homicide was committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent, or that such homicide was committed by the defendant by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage was taken, or any dangerous weapon used, and when the killing is not done in a cruel and unusual manner," was in the language of Pen. Code Cal. § 195, and was proper.

In bank. Appeal from superior court, San Luis Obispo county; D. S. Gregory, Judge.

Indictment for murder in the first degree.

W. B. Dillard, for appellant. *George A. Johnson*, Atty. Gen., for the People.

Works, J. The defendant was charged with the crime of murder, and tried and convicted of manslaughter. His motion for a new trial was denied, and he appeals.

It is contended that the court below erred "in allowing purported testimony of the prosecuting witness, Hernandez, given at the coroner's inquest, to be read in the presence and hearing of the jury, and in allowing the coroner to give evidence of the purported testimony given before him by Hernandez on that occasion, and that it erred in not striking out such evidence as hearsay." The evidence referred to was introduced for the purpose of impeaching the witness Hernandez, who had been put upon the stand by the prosecution, and testified in such a way as to prejudice the people's case, and inconsistently with the testimony given by him at the coroner's inquest. It was proper for this purpose to call the attention of the witness to what he had testified before the coroner, and read the same in the presence of the jury, and, upon his denial of said testimony, to prove that he did so testify. Code Civil Proc. §§ 2049, 2052.

It is further contended that instructions 10, 11, 12, and 15, given by the court, were erroneous. The killing of the deceased by the defendant was admitted, but it was claimed at the trial that the killing was done accidentally. In its ninth instruction, which is not objected to, the court instructed the jury as follows: "(9) Upon a trial for murder the commission of a homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." The instructions complained of are as follows: "(10) Up to the moment when the killing is proved to have been committed by the defendant the prosecution must make out its case beyond any reasonable doubt. When the killing is so proved, it devolves upon the defendant to show any circumstances of mitigation to excuse or justify it by a preponderance of evidence on his part; that is, the killing being proved, the defendant must make out his case in mitigation to excuse or justify it by some stronger proof in some appreciable degree than the proof of the prosecution. The burden of proof changes, and the proof on the part of the defendant must be in some degree stronger than the proof on the other side. (11) Every person is presumed to intend what his acts indicate his intentions to have been, and if you find from the evidence, beyond a reasonable doubt, that the defendant fired a loaded pistol at the deceased, and killed him, the law presumes that the defendant intended to kill the deceased; and, unless it is shown by the evidence that his intention was other than his acts indicated, the law will not hold him guiltless. (12) Homicide is excusable in the following cases: *First*, when committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent; *second*, when committed by accident and misfortune in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage is taken, nor any dangerous weapon used, and when the killing is not done in a cruel or unusual manner; and, if you find from the evidence, beyond a reasonable doubt, that the homicide was committed by the defendant at the time and place mentioned in the indictment, you cannot by your verdict excuse him under the law, unless you find that such homicide was committed by accident and misfortune, in lawfully correcting a child or servant, or in doing any other lawful act, by lawful means, with usual and ordinary caution, and without any unlawful intent, or that such homicide was committed by the defendant by accident and misfortune, in the heat of passion, upon any sudden and sufficient provocation, or upon a sudden combat, when no undue advantage was taken, or any dangerous weapon used, and when the killing is not done in a cruel and unusual manner." "(15) The flight of a person immediately after the commission of a crime, or after a crime has been committed with which he is charged, is a circumstance to be weighed by the jury as tending in some degree to prove a consciousness of guilt, and entitled to more or less weight, according to the circumstances of the particular case. Evidence of flight is received, not as a part of the *res gestæ* of the criminal act itself, but as indicative of a guilty mind; and if you find from the evidence in this case that Louis Cupis was killed, as charged in the indictment, and that immediately after such killing the defendant left and escaped from the place and the vicinity of the killing, it is a circumstance to be weighed by you, gentlemen of the jury, as tending in some degree to prove a consciousness of guilt. It is not sufficient of itself to establish the guilt of the defendant, but the weight to which that circumstance is entitled is a matter for you to determine in connection with all the facts and circumstances called out in the case." The tenth instruction was erroneous. Section 1105 of the Penal Code provides: "Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." The section casts upon the defendant the burden of proving circumstances of mitigation, or that justify or excuse the commission of the homicide. This does not mean that he must prove such circumstances by a preponderance of the evidence, but that the presumption that the killing was felonious arises from the mere proof by the prosecution of the homicide, and the burden of proving circumstances of mitigation, etc., is thereby cast upon him. He is only bound, under this rule, to produce such evidence as will create in the minds of the jury a reasonable doubt of his guilt of the offense charged. People v. Flanagan, 60 Cal. 3; People v. Smith, 59 Cal. 607. It can make no difference whether this reasonable doubt is the result of evidence on the part of the defendant tending to show circumstances of mitigation, or that justify or excuse the killing, or from other evidence coming from him or the prosecution. The well-settled rule that a defendant shall not be convicted unless the evidence proves his guilt beyond a reasonable doubt applies to the whole and every material part of the case, no matter whether it is as to the act of killing, or the reason for or manner of its commission. The section under consideration was not intended to, and does not, change this rule as to the weight of the evidence. It simply provides that, certain facts being proved, the presumption of guilt shall follow, unless the defendant shall himself prove certain other facts. It does not attempt to provide the degree of proof required of him, but leaves the rule as to the degree of evidence necessary to convict as it was before. The jury should have been instructed that the burden of proving circumstances of mitigation, or that justified or excused the killing, devolved upon the defendant; but that if, upon the whole case, they entertained a reasonable doubt, from the evidence, as to his guilt, he should be acquitted. Any other rule as to the weight of the evidence makes one measure applicable to one part of the case, and a different one to another part, and leads to confusion.

In justice to the learned judge of the court below we must say that the instruction given is warranted by some of the decisions of this court, (People v. Hong Ah Duck, 61 Cal. 395; People v. Raten, 63 Cal. 422;) but on mature consideration we feel constrained to hold that they were based upon an erroneous construction of section 1105 of the Penal Code. The eleventh instruction stated the law correctly. People v. Langton, 67 Cal. 427, 7 Pac. Rep. 843. It is claimed that the twelfth instruction was erroneous, because it required both accident and misfortune to constitute a defense. The instruction used the language of the Code, and was proper. Pen. Code, § 195. It is urged that the fifteenth instruction assumed that the crime charged was committed, and was for that reason erroneous. We see nothing in the language of the instruction from which it could be inferred that the court assumed or intended to assume that the crime charged had been committed. For the error in giving the tenth instruction the judgment and order appealed from are reversed, and the cause remanded for a new trial.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; MCFARLAND, J.

(80 Cal. 153)

PEOPLE v. CARROLL. (No. 20,540.)

(*Supreme Court of California.* Aug. 5, 1889.)

GAMING—INDICTMENT—INSTRUCTIONS.

1. Pen. Code Cal. § 330, provides that every person who carries on and conducts any banking or percentage game, "played for money, checks, credit, or any other representative of value, is punishable," etc. *Held*, that an information that defendant did "willfully and unlawfully open, carry on, and conduct for money a certain banking game, * * * to-wit, a wheel marked with numbers and colors, * * * commonly known as a 'Wheel of Fortune,' " etc., charges no offense under said section, or any other, in that it fails to state that the game was "played for money, checks, credit, or any other representative of value."

2. It is not necessary in an indictment for a violation of Pen. Code Cal. § 330, to state the name of the game or the name of the device by which it is played, and where games may be known under different names the inclusion of such under the name "banking game" does not render the statute so indefinite as to be inoperative. MCFARLAND, J., dissenting.

3. Under Pen. Code Cal. § 1175, which provides that a bill of exceptions must contain so much of the evidence only as is necessary to present the questions of law upon which the exceptions were taken, "and the judge is required to strike out all other matters contained therein," the question whether the venue was proved on the trial or not cannot be raised on appeal when the transcript fails to show that it contains all the evidence, and the sufficiency of the proof of venue does not appear to have been questioned.

4. The question whether the game played was a banking game or not was one of law for the court, and as the court should have charged as to the meaning of the term "banking game" it was not error to permit a witness to define the term and then instruct the jury that it was a matter of fact for them to determine whether the game in question came within the term. MCFARLAND, J., dissenting.

5. One witness cannot describe the game and another testify that, from the description, the game was a banking game or any other, but a person who knows the game may testify in general terms what the game he witnessed was; if not familiar with the game he may describe it, and the court should instruct the jury as to what constitutes the game charged to have been played or conducted, leaving it for them to determine whether the game played was the one charged or not. MCFARLAND, J., dissenting.

In bank. Appeal from superior court, Fresno county; M. K. HARRIS, Judge.

J. P. Carroll was indicted for willfully and unlawfully carrying on and conducting a certain banking game commonly known as the "Wheel of Fortune." He was convicted, and appeals.

W. A. Anderson, for appellant. *George A. Johnson*, Atty. Gen., for the People.

WORKS, J. The information in this case charges as follows: "That said P. J. Carroll did, on the 7th day of October, 1887, at and in said county of Fresno, state of California, and prior to the filing of this information, willfully and unlawfully open, carry on, and conduct for money a certain banking game, played with a certain device, to-wit, a wheel marked with numbers and colors, said game being then and there a banking game, commonly known as the 'Wheel of Fortune,' contrary to the form, force, and effect of the statute in such cases made and provided, and against the peace and dignity of the state of California." The section of the Code under which the prosecution was instituted provides: "Every person who deals, plays, or carries on, opens, or causes to be opened, or who conducts, either as owner or employé, whether for hire or not, any game of faro, *monte*, *roulette*, lansquenet, *rouge et noire*, rondo, tan, fan-tan, stud-horse poker, seven and a half, twenty-one, or any banking or percentage game played with cards, dice, or any device, for money, checks, credit, or any other representative of value, is punishable by a fine of not less than two hundred dollars nor more than one thousand dollars, and shall be imprisoned in the county jail until such fine and costs of prosecution are paid, such imprisonment not to exceed one year; and every person who plays or bets at or against any of said prohibited game or games is guilty of a misdemeanor." Pen. Code, § 330. The information charges no offense under this section of the Code, or any other. To constitute it an offense to conduct the game it must be "played for money, checks, credit, or any other representative of value." The information does not charge that the game was played for money, but that defendant conducted it for money. It may be that those who were engaged in the game were playing for amusement, and paid the defendant a fixed sum, in no way dependent upon the result of the game, for conducting it. This would be within the allegations of the information, but it would not be a public offense or within the statute. It is contended by the appellant that there could be no conviction for playing or conducting a "banking game," if the information were sufficient in other respects, for the reason that the designation of the offense in the statute is too general and indefinite; and what constitutes a banking game is not generally known, and is not defined by the statute. The same might be said of the game of poker. Both games are no doubt known and understood by gamblers and by many who are not gamblers. The game of poker may be known by a greater number of people, but neither, fortunately, are familiar to the public generally. We can see no reason, therefore, why a statute making it an offense to play a banking game is not as valid and certain as a matter of legal certainty as one making it a public offense to play poker. Both may be said to be commonly known and understood. Section 666 of the Code of Criminal Procedure of Oregon, which provided that "all gambling devices of whatever name or nature adopted, devised, or designed for the purpose of playing any game of chance for money, * * * are prohibited from being set up, kept, used," etc., was held by the supreme court of that state not to include the "game of cards commonly called 'poker,'" because it was not specified by name as one of the devices prohibited by the statute. State v. Mann, 2 Or. 238. The appellant relies upon this case, but it is not in point. Our Code does specify a banking game by name. It may be that there are games known by different names which are included under the term "banking game," but this does not, in our judgment, render the statute so indefinite as to be inoperative. Such a construction would greatly facilitate the discovery of new games or old ones under assumed names, and embarrass the law-making power in a laudable effort to suppress a habit so pernicious and hurtful to society. But the case of State v. Mann, supra, was in effect overruled by the same court in a later decision, in which a statute very similar to our own was held to be sufficiently definite. State v. Gitt Lee, 6 Or. 426. In that case the court said: "We are of the opinion that it is not necessary in an indictment for a violation of this statute to state the name of the game, or the name of the device by which it is played. There is much force in the suggestion of the district attorney, that if it were essential, either in a statute defining the offense of gambling, or in an indictment for the violation of such statute, to give the name of the game or of the device by which it is played, it would always be easy to evade the statute by changing the name of either the device or the game. We think that part of section 1 which prohibits 'any banking or any other game played with cards, dice, or any other device, whether the same be played for money, checks, credits, or any other representative of value,' is sufficiently definite, and renders unlawful all games not previously enumerated in that section, and which are played for 'money, checks, credits, or any other representative of value,' with 'cards, dice, or other device.'" See, also, to the same effect, In re Lee Tong, 18 Fed. Rep. 253; Miller v. State, 48 Ala. 122; Smith v. State, 17 Tex. 191. We think the section of the Code under consideration is sufficiently definite in this respect, and that it includes the offense attempted to be charged in this case.

It is claimed by the appellant that the venue was not proven. But we think he has not put himself in a position to present the question to this court. The transcript does not show in terms that it contains all of the evidence given at the trial. It is only required that it contain "so much of the evidence as is necessary to present the questions of law upon which the exceptions were taken," and the judge is required to "strike out all other matter contained therein." Pen. Code, § 1175. No question appears to have been made in the court below as to the sufficiency of the evidence in this respect, and no such specification of insufficiency of the evidence is made. Therefore the record does not present for our consideration the point attempted to be raised. At the trial evidence was allowed on the part of the prosecution to show what constituted a banking game, and it is urged that this was error, because the witness by whom it was proved was not shown to have been an expert, or to have personal knowledge of the game. We find it unnecessary to determine whether the witness was competent to give an opinion on the subject or not. The question whether the game played was a banking game or not was one of law for the court, and we find that the definition given by the witness of a banking game was substantially correct, and such as the court should have given in its charge to the jury. He described the game as follows: "A banking game, as I understand it, is a game conducted by one or more persons where there is a fund against which everybody has a right to bet, the bank being responsible for the payment of all the funds, taking all that is won and paying out all that is lost. The fund which is provided for that purpose is generally called the 'bank,' and the person who conducts it the 'banker.'" We take this to be a sufficiently accurate definition of a banking game, and, as the court should have so charged the jury as matter of law, the fact that the court permitted the definition to be given by a witness and instructed the jury that it was a question of fact for them to determine could have done the appellant no harm. The court of appeals of Kentucky speaks of "banking games, such as faro, *roulette*, and other games, where there is a fund of money offered and ready to be staked on all bets others may choose to make against the banker on the game which he shall exhibit to entice bets." Ritte v. Com., 18 B. Mon. 40; Bish. St. Crimes, § 866. But if this were not so this court has held in a late case that the kind of game that was being played might be proved in the mode adopted and followed in this case. People v. Sam Lung, 70 Cal. 515.[1] We do not concur in the view, however, that one witness can describe the game and another can be allowed to testify that, from that description, the game was a banking game or any other. We think a person who knows the game may testify in general terms what the game he witnessed was. If not familiar with the game he may describe it, and the court should instruct the jury as to what constitutes the game charged to have been played or conducted, leaving the jury to determine whether the game played was the one charged or not. To leave the question open to be proved or disproved in every case by experts would lead to great uncertainty in the administration of justice. For the insufficiency of the information the judgment and order are reversed, and the cause remanded.

We concur: BEATTY, C. J.; SHARPSTEIN, J.

PATERSON, J. I concur in the judgment.

THORNTON, J. I concur in the judgment on the first point discussed in the opinion. I find no other error in the record.

MCFARLAND, J. I concur in the judgment on the first ground mentioned in the opinion of Mr. Justice WORKS, and I also concur in what is said in that opinion on the subject of venue. I do not concur, however, in the other parts of that opinion. I think that the testimony of Judge TERRY was not only erroneously admitted, but was also important and material in the case. The court evidently did not know what a banking game was, as appears from its instructions to the jury; and the witness, although not an expert, (except as to matters of law,) was called to inform the court and jury on that subject. But that was really informing the court what the law was, and if the provision of the statute in question was so indefinite that the court could not tell the jury what facts would constitute a crime under it—that is, what the law of the case was—without the aid of a witness to tell it, then no conviction could be had under it. How would it look for a court to allow witnesses to testify what constitutes "larceny" or "burglary" or "embezzlement?" Of course, there are many well-known games which are designated in the statute by specific names; but that the general term "banking game" has no definite meaning strikingly appeared on the trial of this case, because—*First*, the witnesses who were erroneously examined on the subject differed in their opinions; and, *second*, the court itself did not know what it meant. Can a man be held to answer a criminal charge upon such a vague accusation? And the evils suggested as likely to arise from this view can be easily remedied. If the legislature desires to make the playing of "a banking game" a crime, let it simply put into the statute what it means by that term, so that the court can tell the jury what constitutes the offense.

79 Cal. 633

SHARON *v.* SHARON. (No. 11,991.)

(*Supreme Court of California.* Aug. 20, 1889.)

MOTION FOR NEW TRIAL—DIVORCE—FINAL JUDGMENT.

1. A motion for a new trial, made after an order for judgment and decree of divorce, but before a referee appointed to ascertain the amount of community property has made a report, is not a premature proceeding, nor is the trial court without jurisdiction to hear the motion.

2. In an action for divorce and alimony, an order for judgment and decree is a final determination of the issues involved, from which an appeal will lie; and the appointment thereafter of a referee to ascertain the amount and character of the community property is a proceeding to carry the judgment into effect, and any orders in relation thereto are themselves the subjects of appeal.

In bank. On motion for rehearing.

For statement of case and former opinion, see ante, 26.

Wm. F. Herrin and *S. M. Wilson*, for appellant. *D. S. Terry*, *J. G. Maguire*, and *W. T. Baggett*, for respondent.

FOX, J. The petition for rehearing in this cause is denied. One of the points made in the petition is to the effect that the court ought to vacate the judgment made and given herein on the 17th day of July, 1889, on the ground that the appeal from the order denying the new trial ought not to have been entertained, because the steps taken in the lower court for a new trial were premature, having been taken before the coming in of the report of a referee appointed by the court to report upon the amount and character of the community property of the parties, and that the court below had no jurisdiction to hear the same. Before the argument of this case upon the appeal from the order denying motion for new trial, a formal motion was made to dismiss the appeal, upon several grounds, one of which was substantially the same as the ground of this objection. The motion was elaborately argued, orally and upon briefs, and upon due consideration was by the court denied. The court fully considered the question of jurisdiction to hear and determine the motion for new trial, and the appeal from the order denying the same, at the time, and we see no reason to change the conclusion then reached. The action is for divorce, and before any steps were taken in the matter of a motion for new trial, the cause had been tried upon its merits and the court had made and filed its decision and findings upon all the issues in the cause necessary to the entry of a judgment and decree for divorce, and had ordered judgment and decree accordingly. As ancillary to that decree the court found that the plaintiff was entitled to a division of the community property, but was at the time unadvised as to what was community property. It appointed a referee to take testimony and report to the court upon that question. But that question was not one necessary to be investigated prior to the entry of judgment for divorce. In practice, the settlement of alimony and the distribution of community property are matters which are frequently and properly done after judgment, (sometimes long after,) and so far as they relate to alimony are the subject of frequent change. Orders in this behalf are orders after judgment, and are themselves the subject of appeal. It is never held that motions for new trial must or can properly be delayed until the final settlement of all matters which may lawfully be the subject of consideration and order, or even of supplemental decree after judgment. The reference in this case was not one for the taking of an account, or for report upon any subject necessary to enable the court to render judgment upon the issues in the cause, but was one for the purpose of securing information necessary for carrying a judgment already ordered into effect. Code Civil Proc. § 639. A new trial is the re-examination of an issue of fact, in the same court, after a trial and decision by the court. Id. § 656. In this case all the issues necessary to final judgment had been tried and determined. All that remained was to carry the judgment into effect. The time had come when, if ever, a motion to vacate that decision, and for a new trial, must be made, under the provisions of the Code of Civil Procedure, § 657 et seq. It was regularly made, heard, and determined, and from the order denying such motion an appeal was regularly prosecuted to this court, and the court had full jurisdiction to hear and determine such appeal. Here all the issues in the case, necessary to determine whether or not the plaintiff was entitled to a decree for divorce, and also whether she was entitled to share in the community property, had been tried and determined by the court, and the court had determined the same, and filed its findings thereon, and judgment could be, and thereafter in due course was, entered thereon. All that remained was to carry that judgment into effect, by making division of the community property, as provided in the decision, and in the judgment that followed. The judgment of the court on the issues involved was a final judgment. Clark v. Dunnam, 46 Cal. 208. Within 10 days after notice of that decision it was the duty of the defendant to take the initiatory steps towards moving for a new trial, if he ever intended to make such motion, and thereafter to prosecute the same with diligence to a determination. He had the right to waive the notice, and take these steps without waiting for notice. Our conclusion is that the motion for new trial was not prematurely made, and that the court had full jurisdiction to entertain the same, and to hear and determine the motion. It follows that this court had full jurisdiction to hear and determine the appeal from the order denying such motion.

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[1] 11 Pac. Rep. 673.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; PATERSON, J.; MCFARLAND, J.; THORNTON, J.

(80 Cal. 216)

In re CHAMBERS. (No. 20,548.)

(*Supreme Court of California.* Aug. 27, 1889.)

ADOPTION OF MINORS.

Under act Cal. April 1, 1878, authorizing managers of orphan asylums to consent to the adoption of children under their care in the same manner that parents are authorized to consent to the adoption of minor children, under Civil Code Cal. c. 2, tit. 2, an order of the superior court, authorizing the adoption of a minor child in the care of an orphan asylum, is not sufficient without the consent of the managers of the asylum.

In bank. Application for *habeas corpus*.

Grove L. Johnson, for petitioner. *Taylor & Holl*, for respondents.

PER CURIAM. The writ in this case was sued out by a manager and director of the Protestant Orphan Asylum of Sacramento, a corporation duly organized under the laws of this state, and as such entitled to the care, custody, control, and management of orphans and abandoned children, and receives state aid for the support and maintenance of orphans under its care. Clara A. Chambers, in whose behalf the writ was sued out, is an orphan of the age of three years and six months, who for more than two years was under the exclusive care, custody, control, and management of said asylum, and supported entirely by said asylum. The way in which respondents acquired the custody of said Clara sufficiently appears in the following extract from their return to said writ: "Respondents further show to this honorable court that they are husband and wife, and now do, and for more than two years have, resided in the state of California. That they have no children. That, being desirous to adopt a child, the respondent Mrs. Bucklin applied to Mrs. Sarah A. Clayton, and from her received a letter to the matron of said orphan asylum. The result was that she visited the asylum, saw Clara A. Chambers, and by permission of the matron took the child home with her, with a view of adopting her. That she took the child from the asylum on the 4th of January of the present year, and from thence hitherto she has remained, and now does remain, with her in her family. That a few days before the first Tuesday in March of the present year the president of said asylum (who is now Mrs. Rideout) and one of the managers visited the respondent Mrs. Bucklin, and requested her to report to the board of managers of said asylum at their next meeting, to be held on the first Tuesday in March, 1889, if she and her husband elected to adopt said child. That she did so report at said meeting, and did inform them that she and her husband had concluded to adopt said child in pursuance of the provisions of the Civil Code of this state, and thereupon she was notified by the president, Mrs. Rideout, that she would inform respondent of the time when she would accompany them to court, and have entered the necessary order authorizing respondents to adopt said child. Subsequently the secretary of the board of managers informed the respondent Mrs. Bucklin that the matter of adopting said minor was by the president submitted to her, and that she would go with respondents before Van Fleet, one of the superior judges of said county of Sacramento, and have the necessary order made by said judge permitting these respondents to adopt said child. That said secretary delayed the matter for some days, and respondents, becoming anxious to have the matter finally consummated, did, on the 19th of March, 1889, take said minor in company with said Mrs. Sarah E. Clayton before John W. Armstrong, one of the superior judges of the court of said county, and after fully explaining the history of said child, their and Mrs. Clayton's relation to it, to said judge, were informed by him that no notice to or consent from the managers of said asylum was necessary, and such proceedings were had that the agreement required by law was executed, and an order was duly made and entered of record declaring that said Clara A. Chambers should thenceforth be regarded and treated in all respects as the child of said Walter M. and Ida B. Bucklin; a copy of which agreement and order is hereto attached, marked 'Exhibit A,' and made a part of this return. That upon the hearing of said matter the court found as a fact that the respondents were fit and proper persons to have the care, custody, and control of said child, and that the welfare of the child would be promoted by being adopted by these respondents. That the managers of said orphan asylum have never questioned or disputed the fact that these respondents were fit and proper persons to have the care of said child, nor that its welfare would be promoted by being adopted by them."

It does not appear, and is not claimed by respondents, that the act of April 1, 1878, entitled "An act to authorize the managers of orphan asylums to give their consent to the adoption of certain children under their care," was complied with. That reads as follows: "Section 1. The managers of the several orphan asylums in this state are hereby authorized and empowered to consent to the adoption of any orphan child, or child abandoned by its parents, in the same manner that parents are by law authorized to consent to the adoption of their children: provided, however, that such orphan child, or child abandoned by its parents, shall have been in the charge and under the management of the managers of such orphan aslyum for the period of one year prior to such adoption, and during that period supported wholly at the expense of said asylum. Sec. 2. This act shall take effect from the date of its passage." The principal contention of respondents' counsel is that this act does not repeal the provisions of chapter 2, tit. 2, of the Civil Code, entitled, "Adoption," and therefore said chapter is in force, and, when complied with, makes their adoption of this minor child legal. That the act of 1878 does not repeal any part of the Civil Code is, we think, apparent; nor is it amendatory of the Civil Code. It provides, in our opinion, for the adoption of a class of minor children, viz., those in orphan asylums, whose adoption is not provided for in the Civil Code. In no sense are its provisions repugnant to those of the Civil Code. The power to adopt minor children is a creation of the statute, which was unknown to the common law, and the mode must be held to be the measure of the power. It is therefore clear that there was no adoption in this case, and the orphan child, Clara A. Chambers, must be returned to the custody of the orphan asylum from which she was taken by the respondents. We will suggest, however, that if, as seems to be conceded, the only objection to her remaining with the respondents is their failure to adopt her according to law, that the objection be obviated by proceeding at once to have her adopted in the mode prescribed by the statute. Ordered that said Clara A. Chambers be returned to the custody of the Protestant Orphan Asylum of Sacramento.

(80 Cal. 205)

PEOPLE v. ANDERSON *et al.* (No. 20,526.)

(*Supreme Court of California.* Aug. 24, 1889.)

ROBBERY—VARIANCE.

1. Where an indictment for robbery charges the taking of a pistol, the property of one K., and on the trial K. and one V. claim the pistol, there is no variance, but a conflict of evidence which is properly left to the jury to determine.

2. In such case, under Pen. Code Cal. § 956, providing that when an offense involves the commission of a private injury, and is described with sufficient certainty to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material; a charge was proper, that it was not necessary, in order to find the defendants guilty as charged in the indictment, to prove that the pistol was that of K.

3. The felonious taking of the pistol from the possession of K. against his will, by means of force, was robbery whether the pistol belonged to K. or not, under Pen. Code Cal. § 211.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; J. L. CAMPBELL, Judge.

W. A. J. McDonald, for appellants. *G. A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendants appeal from a judgment of conviction of the crime of robbery, and from an order denying them a new trial. It is alleged that the court below erred in not granting their request that the jury be instructed to acquit them, because of the variance between the allegations of the information and the proof at the trial. The variance is claimed to consist in this: That while the information charges that a certain pistol taken from him feloniously and through force by the defendants was the personal property of one Kiesele, yet the evidence shows it to have been the property of one Voight. It is true that Kiesele swore as a witness that the pistol was his property, and Voight that it belonged to him, but this was a mere conflict in testimony as to the ownership of the property. It was the province of the jury, and not of the court, to settle such conflict, and the refusal of the court to interfere with the determination of the issue by the jury was proper. The further contention is made that error was committed in granting this instruction for the prosecution: "The court further instructs the jury that, in order to find the defendants guilty in the manner and form as charged in the information, it is not necessary that the property alleged to have been taken was the personal property of G. Kiesele; it is sufficient if the property belongs to a person other than the defendants." There was no question from the testimony but that the pistol was in the possession of Kiesele when violently taken by the defendants. The evidence throughout disclosed the fact that no robbery as charged could have taken place, unless it was a taking of that pistol violently and feloniously from him. The act of robbery charged against the defendants in the information was the same, whether the pistol was the property of Kiesele or of Voight.

The point seems to be determined by the provisions of section 956 of the Penal Code: "When an offense involves the commission of a private injury, and is described with sufficient certainty in other respects to identify the act, an erroneous allegation as to the person injured, or intended to be injured, is not material." People v. Watson, 72 Cal. 402, 14 Pac. Rep. 97. The felonious taking of the pistol in the possession of Kiesele from his person or immediate presence, and against his will, accomplished by means of force or fear, was robbery, whether the pistol was his property or that of another. Section 211, Pen. Code; People v. Vice, 21 Cal. 346. The identity of the act of robbery was the same, whether the injury inflicted by the felonious taking involved in the larceny of the property, included in the robbery, would come upon Kiesele or Voight. The argument that the larceny involved in the crime charged is proved to have had relation to personal property belonging to a person other than as alleged in the information is without force. The identity of the crime charged in the information is not affected by this circumstance, for it only goes to the question of the erroneous allegation as to the person upon whom injury was inflicted by the larceny of the pistol included in the robbery, and this is cured by the provisions of the statute supra. No error appearing in the record, we advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

80 Cal. 211

People v. Dunn, Comptroller. (No. 13,305.)

(*Supreme Court of California.* Aug. 26, 1889.)

Enactment of Statutes—Constitutional Law.

1. Const. Cal. art. 4, § 15, provides that no law shall be passed except by bill; that no bill shall be put on its final passage till it and the amendments thereto shall have been printed; and that no bill shall become a law unless the same be read on three several days in each house, except, in case of emergency, two-thirds shall vote to dispense with this provision. Respondent refused to issue his warrant, as comptroller of state, for certain money, on the ground that the bill making the appropriation had not been read on three several days in either the senate or assembly, as required by the constitution. *Held*, that it is not necessary that the legislative journals show affirmatively that a bill and its amendments were read as required by the constitution; and in the absence of a record, not required by the constitution to be kept, it will be presumed that in the passage of a bill the legislature complied with all constitutional requirements.

2. Act Cal. 1889, p. 69, creating a board of trustees, with authority to select a site for a public building, is not a law which delegates legislative powers and functions.

3. A law making an appropriation of money for the purchase of a building site, and for the erection of suitable buildings thereon as a home for feeble-minded children, is a general appropriation law, and contains only one item for one purpose, as provided in Const. Cal. art. 4, § 34.

In bank. On application for writ of *mandamus*.

Haggin, Van Ness & Dibble, for petitioner. *T. H. Laine*, for respondent.

Works, J. This is an application for a writ of *mandamus* to compel the respondent, as comptroller of state, to issue his warrant for certain moneys, which the relators claim should be paid out of the appropriation contained in the act of the legislature, entitled "An act to provide a permanent site for the 'California Home for the Care and Training of Feeble-Minded Children,' to erect suitable buildings thereon, and making an appropriation therefor." St. 1889, p. 69. The respondent resists the claim of the petitioners on the ground that the said statute is unconstitutional and void for five reasons set forth in his return to the alternative writ, as follows: "*First*. Said bill was not read on three several days in the senate, prior to its final passage, nor was it declared to be a case of urgency. *Second*. Said alleged law was introduced, known in its various stages, in the legislature, and passed as senate bill No. 194, which said bill was put upon its final passage in the assembly after it had been amended in its title and in all its sections save section 5, and before and without being printed with the amendments thereto for the use of the members, in violation of article 4, § 15, of the constitution of this state. *Third*. Said bill was not read at length upon its final passage, in violation of article 4, § 15, of the constitution of this state. *Fourth*. Said bill or law is void, as it delegates legislative powers and functions to a board of trustees, aided by two citizens; the two bodies forming a commission clothed with legislative powers and functions. *Fifth*. Said bill or law is void on its face. It is not a general appropriation bill, and does contain more than one item of appropriation, and that for more than one single and certain purpose; wherefore the respondent prays that the writ be discharged, and that he go hence with his cost."

The claim of the respondent is that the journals of the two houses of the legislature do not show affirmatively that the bill was read three several times in the senate; that it was printed with its amendments before its final passage; or that it was read at length upon its final passage,—as required by the constitution. Article 4, § 15. The point made and relied upon is that it must affirmatively appear from the journals of the two houses that every act required to be done in the enactment of a law has been done, and that in the absence of such a showing it must be presumed that such acts were not done. In support of this contention counsel cite: Const. art. 4, §§ 10, 15, 16, 28; article 18, § 1; Pol. Code, §§ 240, 256, 257; Gardner v. Collector, 6 Wall. 499; Santa Clara Railroad Tax Case, 9 Sawy. 226, 227, 18 Fed. Rep. 385; Spangler v. Jacoby, 14 Ill. 298; Weill v. Kenfield, 54 Cal. 111; Paving Co. v. Hilton, 69 Cal. 481, 11 Pac. Rep. 3; Railway Co. v. Potts, 7 Ind. 681; Madison Co. v. Baker, 80 Ind. 374.

The case does not present the question as to the power of this court to go behind the enrolled bill in order to determine from the journals of the two houses whether the bill was properly passed or not. The respondent does not stop with the contention that the journals may be looked to in order to determine this question. His position is that, as the two houses of the legislature are required to keep journals of their proceedings, every act not shown by such journals to have taken place must be presumed not to have been done. His position cannot be upheld by reason or authority. It is uniformly repudiated, even in those states in which it is held that the journals may be looked to as against the enrolled bill. Larrison v. Railroad Co., 77 Ill. 11; Cooley Const. Lim. 164; State v. City of Hastings, 24 Minn. 78; Miller v. State, 3 Ohio St. 476; State v. Railroad Co., 33 Fed. Rep. 760. For these reasons we think the objections to the law, on the ground that it was not legally passed, are not well taken.

Nor do we think there is any force in the objection that, by providing that certain persons should select the site for the building proposed to be constructed, the act attempted to delegate legislative functions and powers. To hold that such a power could not be vested in persons named in the act would be an unreasonably strict application of the rule that legislative functions cannot be delegated. The mere act of selecting a site to be purchased was not a legislative act. State v. Railway Co., 37 N. W. Rep. 786.

The last objection, viz., that the bill is not a general appropriation bill, and contains more than one item of appropriation, for more than one single purpose, is equally groundless. There is but one appropriation in the act, for one purpose. The object and purpose of the appropriation is to supply a permanent location for a home for feeble-minded children. It was not necessary that there should have been a separate appropriation for the purchase of the land, another for the erection of the building, another for the construction of fences, and another for each improvement necessary to the proper completion of the proposed work. Section 34, art. 4, of the constitution, which is relied upon to support this objection to the law, cannot be given any such unreasonable construction. The relators are entitled to a peremptory writ, as prayed for, and the same will be issued.

We concur: BEATTY, C. J.; FOX, J.; PATERSON, J.; MCFARLAND, J.

THORNTON, J. I concur. The first, second, and third reasons given to maintain the respondent's contention that the act of the legislature referred to in the foregoing opinion is unconstitutional are, in my judgment, correctly disposed of adversely to such contention in the case of Supervisors v. People, 25 Ill. 181. The case cited arose under the constitution of Illinois, which, as regards the matter under consideration, is similar to the constitution of this state. It was urged in that case that the senate journal did not show that the bill was read three times in that body before it was put on its final passage, and that hence the constitutional requirements to make it a law were not observed. On this point the court said: "The constitution does require that every bill shall be read three times in each branch of the general assembly before it shall be passed into a law, but the constitution does not say that these several readings shall be entered on the journals. Some acts performed in the passage of laws are required by the constitution to be entered on the journals in order to make them valid, and among these are the entries of the ayes and nays on the final passage of every bill; and we hold in the case of Spangler v. Jacoby, 14 Ill. 297, that where the journal did not show this, the act never became a law. But where the constitution is silent as to whether a particular act which is required to be performed shall be entered on the journals, it is then left to the discretion of either house to enter it or not, and the silence of the journal on the subject ought not to be held to afford evidence that the act was not done. In such a case we must presume it was done, unless the journal affirmatively shows that it was not done." The constitution of this state does not require that the three several readings of a bill to pass it into a law shall be entered on the journal of either house. From the silence of the journals in this matter we are not authorized to infer that the constitutional requirement was not observed. The only evidence that can be regarded to show that the requirement was disregarded should be an affirmative statement to that effect in the journal. In the absence of evidence of this character, we must presume that the duty imposed by the constitution was performed. The above rule applies to each of the three reasons for respondent's contention above referred to.

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80 Cal. 208

In re ACKERMAN'S ESTATE. (No. 13,066.)

(*Supreme Court of California.* Aug. 26, 1889.)

HOMESTEAD IN WIFE'S SEPARATE ESTATE.

Civil Code Cal. § 1265, provides that, if the selection of a homestead is made from community property, the land, on the death of either spouse, vests in the survivor. Section 1401 declares that on the death of the wife the entire community property, except such as has been set apart to her by judicial decree, belongs to the husband without administration. Code Civil Proc. Cal. § 1474, provides that the homestead of married persons, on the death of one of the spouses, goes to the survivor. Section 1475 makes it the duty of the superior court to set it apart to the survivor. Petitioner is the surviving husband of a wife who died without issue. During her life-time a homestead was selected from community property. After her death the petitioner sold the land, and now asks that a homestead be set apart to him from her separate estate. *Held*, that the land, which vested in petitioner absolutely on the death of his wife, was still a homestead, and, having disposed of it, he has exhausted his homestead right.

Department 1. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Nagle & Nagle, for petitioner. *Stonehill & Payson*, for contestants.

FOX, J. Application by the surviving husband for an order setting apart to him a homestead out of the separate property of the estate of his deceased wife. The application was opposed by the heirs of deceased, and upon hearing of the matter was denied. From the order denying such application appeal is taken to this court. From the findings it appears that the lot which the court was asked to set apart to the surviving husband as a homestead was the separate property of the deceased wife. It was so inventoried by the applicant, who administered the estate, was appraised at the sum of $2,100, and constitutes all the property of the estate; that no homestead had ever been declared thereon, and that no part of it had ever been occupied as a homestead or place of residence by the deceased or her husband during her life-time; that she died September 17, 1885, leaving no children, father or mother, but leaving her husband and a sister, Ysabel Morante, her next of kin and heirs at law. It further appeared that for 13 years before her death deceased and her husband had occupied as a homestead and residence a dwelling-house and lot situate in another part of the city, and which was the community property of applicant and his deceased wife; that on the 5th of May, 1873, the deceased had duly executed and recorded a homestead on the lot so occupied by herself and husband, and the same had never been abandoned; that since the death of his said wife the applicant had sold the said last-named lot (the homestead aforesaid) for $3,000, and appropriated the same to his own use, paying his debts existing at the time of the death of his said wife. After the death of Mrs. Ackerman her sister, Ysabel Morante, died, leaving a will, and leaving a husband and two children, her heirs at law, and devisees, who are the contestants here. Under this state of facts it is contended that under section 1401, Civil Code, immediately upon the death of the wife the entire community property, without administration, went to the surviving husband. That is true, but so much of it as was at the time impressed with the character of homestead went to the survivor, not merely as community property, but as a homestead, subject to no other liability than such as existed or had been created under the provisions of the title on homesteads. Id. § 1265. It was protected to the survivor of the family in the same manner that it had been to the whole family, and was still a homestead. See, also, Code Civil Proc. §§ 1474, 1475. The death of one of the spouses did not alter in any way the estate or character of the homestead. Tyrrell v. Baldwin, 21 Pac. Rep. 116. It required no action of the probate court to pass the homestead, protected as such. It passed immediately upon the death of one of the spouses by operation of law. Civil Code, § 1265. If there had been administration affecting the estate out of which the homestead was carved it would have become the duty of the probate court to set apart the recorded homestead to the survivor, but this setting apart would not have affected the right of the survivor. Such is not the purpose of the order in the case of a recorded homestead; its object and effect is simply to take the property out of administration. Code Civil Proc. § 1465; In re Orr, 29 Cal. 101; Rich v. Tubbs, 41 Cal. 34; Schadt v. Heppe, 45 Cal. 434; Estate of Burton, 63 Cal. 36; Bollinger v. Manning, 21 Pac. Rep. 375. Having been selected from community property, immediately upon the death of either spouse, it vested in the survivor. Mawson v. Mawson, 50 Cal. 539; Estate of Headen, 52 Cal. 295; Gagliardo v. Dumont, 54 Cal. 496; Herrold v. Reen, 58 Cal. 443. Under the statute no property can be set apart by the probate court as a homestead which might not have been dedicated as such under the homestead act immediately preceding the death of the deceased. Kingsley v. Kingsley, 39 Cal. 666; Estate of Noah, 73 Cal. 590, 15 Pac. Rep. 290. At and for a long time prior to the death of the decedent the parties had a duly dedicated and selected homestead, carved out of the community property. No other property could therefore have been dedicated by them, or either of them, to the purposes of a homestead immediately preceding the death of the wife. Upon her death the dedicated and recorded homestead vested, *eo instanti*, as such, in the surviving husband. He was not then entitled to select another, even out of the community property, much less out of her separate estate. He has had the full benefit of that homestead, and the law will not now permit him to deprive the minor children of his deceased sister-in-law of their moiety of inheritance in the estate of his deceased wife by having that estate also set apart to him as a homestead. The court below was correct in denying the application, and the order is affirmed.

We concur: PATERSON, J.; WORKS, J.

HOAGLAND v. STATE. (No. 13,118.)

(*Supreme Court of California.* Aug. 27, 1889.)

SUITS AGAINST STATE—CONSTITUTIONAL LAW—EMINENT DOMAIN.

1. When the state permits itself to be sued, the case is simply referred to the court to determine whether the claim constitutes a lawful demand against the state, and the only questions for determination are, what has been done, and what are the legal principles by which the responsibility of the state is to be measured, and whether upon these principles the state should be held liable.

2. By act Cal. March 12, 1885, plaintiffs were authorized to sue the state for damages alleged to have been suffered by them by reason of certain canal improvements made by the state, and to have judgment therefor "if it appears upon the trial * * * that damage has been done [to the plaintiffs] by any act for which the state is legally liable." *Held*, that the language of the act excludes the idea that any liability was admitted, or any defense waived, except that of immunity from suit. The state may still interpose the defense that it was engaged as a state in a public work for a common good.

3. Under the language of the California constitution as it existed prior to 1879, where the state, for public purposes, turns or straightens the channel of a river where it empties into another river, so that the land on the opposite side is, five years afterwards, injured or destroyed by the increased velocity of the current, such damage is not a "taking" of land for public use, and does not entitle the owner to compensation. THORNTON, J., dissenting.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Action by the appellant, Hoagland, against the state in pursuance of an act of the legislature, approved March 12, 1885, entitled "An act to enable John Hoagland, James Reid, Mrs. Rebecca C. Hoagland, George Cooper, William B. Todhunter, Mrs. Mary W. G. Van Arsdall, Henry Lienberger, Christopher Green, and Charles Trainer to sue the state of California" to recover damages alleged to have resulted to them in consequence of the straightening of the channel of the American river at its mouth or point of confluence with the Sacramento river, by the city levee commissioners of the city of Sacramento, done by them in the year 1862, in pursuance of an act of the legislature entitled "An act concerning the construction and repair of levees in the county of Sacramento, and the mode of raising revenue therefor," approved April 9, 1862. St. 1862, p. 151. The straightening of the American river is alleged to have been done in the year 1862. The damages resulting to the lands, etc., of appellant therefrom are alleged to have occurred December 25, 1867; that the appellant owned lands on the west bank of Sacramento river, in Yolo county, and opposite the mouth of the new-made channel of the American river, through which the waters of said river were conveyed into the Sacramento with such force and volume as to press the waters of the Sacramento against its west bank, cause them to break over and through the natural and artificial barriers there, and overflow, undermine, and wash away the lands of appellant, etc. Defendant demurred. The grounds of demurrer assigned were: (1) That the court has no jurisdiction of the person of the defendant, or the subject of the action; (2) that the complaint herein does not state facts sufficient to constitute a cause of action; (3) that plaintiffs have no authority to sue the state, and the act of the legislature approved March 12, 1885, authorizing them to sue, is unconstitutional; (4) that whatever cause of action is stated in the complaint is barred by the provisions of sections 336, 337, 338, 339, 340, and 343, Code Civil Proc. The demurrer having been sustained, plaintiff appeals.

John Heard, for appellant. *George A. Johnson*, Atty. Gen., for respondent.

WORKS, J. This is an action for damages. The demurrer to the complaint was sustained, and judgment rendered against the plaintiff, from which she appeals.

The case is, in all material respects, like Green v. Swift, 47 Cal. 536, and Green v. State, 73 Cal. 29, 14 Pac. Rep. 610, and on the authority of those cases the judgment is affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

I dissent: THORNTON, J.

(80 Cal. 220)

PROLL v. DUNN. (No. 13,866.)

(*Supreme Court of California.* Aug. 27, 1889.)

APPROPRIATIONS BY LEGISLATURE.

Act Cal. March 14, 1889, appropriating the sum of $100,000 "for the support and maintenance of the mining bureau," is sufficiently specific, within the meaning of the constitution and statutes of the state, and is not void because it fails to designate on what fund the warrant is to be drawn, and does not state that the money "is appropriated out of any moneys in the treasury not otherwise appropriated."

In bank. Application for writ of *mandamus*.

Pillsbury & Blanding, for petitioner. *Langhorne & Miller*, for respondent.

FOX, J. This is an application by petitioner for a peremptory writ of mandate, directing the respondent, state comptroller, to draw his warrant in favor of the petitioner for the sum of $297.75, alleged to be due petitioner for supplies furnished to the state mining bureau for the forty-first fiscal year. The demand has been duly approved and audited by the board of trustees of said mining bureau and by the state board of examiners, and it is claimed that it is payable out of an appropriation provided for by an act of the last legislature, approved March 14, 1889, and entitled "An act making an appropriation for the support and maintenance of a state mining bureau, for the forty-first and forty-second fiscal years." Said act, omitting the title and enacting clause, reads as follows: "Section 1. The sum of $100,000 is hereby appropriated for the support and maintenance of the mining bureau, created under an act entitled 'An act to provide for the establishment and maintenance of a mining bureau,' approved April 16, 1880, and the act supplementary thereto, approved March 21, 1885, and at least 70 per cent. of this appropriation shall be used for geological work in the field. Sec. 2. Not more than one-half of the said sum appropriated under this act shall be expended during the forty-first fiscal year. Sec. 3. This act shall take effect immediately." See St. 1889, p. 149.

The case turns upon the question of the sufficiency or insufficiency of this act to authorize the comptroller to draw his warrant for moneys expended under the appropriation therein attempted to be made.

The contention of the respondent is that the act is insufficient, because the appropriation attempted to be made is not specific within the meaning of the constitution, the statutes applicable to the comptroller's office and the revenue system, and the previous decisions of this court.

The only provision of the constitution relating to the subject, to which our attention has been called, or which we have been able to find, is that found in article 4, § 22. That part of the section bearing upon this question reads as follows: "No money shall be drawn from the treasury but in consequence of appropriations made by law, and upon warrants duly drawn thereon by the comptroller." Three other sections of the same article refer to the subject of appropriations, section 16 providing that, "if any bill presented to the governor contains several items of appropriation of money, he may object to one or more items, while approving other portions of the bill." Section 29 provides that "the general appropriation bill shall contain no item or items of appropriation other than such as are required to pay the salaries of the state officers, the expenses of the government, and of the institutions under the exclusive control and management of the state." And section 34 provides that "no bill making an appropriation of money, except the general appropriation bill, shall contain more than one item of appropriation, and that for one single and certain purpose to be therein expressed." This act does not conflict with nor fall short of the requirements of either of these constitutional provisions. There is no provision in the constitution providing or prescribing any particular form of words in which an appropriation shall be made, except that it shall be made by law. Neither is there any provision in the constitution prescribing the duties of the comptroller in the matter of drawing warrants upon the treasury, except as above quoted. The duties of the comptroller are defined by part 3, tit. 1, c. 3, art. 6, Pol. Code. The first section of that article (section 433) has twenty-one subdivisions, each specifying some special duty of that officer. Subdivision 17 is the only one which need to be considered in this case. It reads: "To draw warrants on the treasurer for the payment of moneys directed by law to be paid out of the treasury; but no warrant must be drawn unless authorized by law, and upon an unexhausted specific appropriation provided by law to meet the same. Every warrant must be drawn upon the fund out of which it is payable, and specify the service for which it is drawn, when the liability accrued, and the specific appropriation applicable to the payment thereof." Section 436 is a part of the same article, and reads: "All warrants for claims which have been audited by the board of examiners, and filed in his office, must be drawn in the order of the numbers placed upon them by that board." Article 18 of the same chapter provides for the organization, powers, and duties of the board of examiners. In that article, at section 660, it is provided that "any person having a claim against the state, for which an appropriation has been made, may present the same to the board in the form of an account or petition, and the clerk of the board must date, number, and file such claim, and the board must allow or reject the same in the order of its presentation. The board may for cause postpone action upon a claim for not exceeding one month. Sec. 661. If the board approve such claim, they must indorse thereon, over their signatures, 'Approved for the sum of ——— dollars,' and transmit the same to the office of the comptroller of state; and the comptroller must draw his warrant for the amount so approved in favor of the claimant or his assigns, in the order in which the same was approved." No point is made that this claim has not been properly presented to and approved by the board of examiners and filed with the comptroller. Other sections of the article provide for the action to be taken by the board of examiners when claims are presented for which no appropriation has been made, or where the appropriation has been exhausted; but these do not contemplate any action by the comptroller on such ground; the only further provision in regard to his powers and duties in that regard being that found in section 672, where it is provided that he shall not draw his warrant for any claim unless it has been approved by the board, except in certain cases of exemption from that rule, of which this is not one, when he may draw his warrant without the action of the board. It is his duty to keep an account under the head of each specific appropriation, showing at all times the unexpended balance of such appropriation. Section 433, subd. 7. And it is the duty of the board, who have the right at any time to call upon him for information, and to examine his books, to keep themselves advised as to the condition of that account.

It is claimed that the act does not specify upon what fund the warrant is to be drawn; and, as he is required in every warrant to specify the fund out of which it is payable, therefore that it is insufficient. Several authorities are cited which are claimed to support the proposition that the act itself must specify the fund out of which the money is to be drawn, but we do not think they bear that construction in the sense in which it is claimed for it here; and, as to the statutes, not one appropriation act in fifty designates the fund out of which the money is to be drawn. The majority of all appropriations are drawn out of a single fund, and that without any designation in the act as to what fund the money shall be drawn from.

In Fowler v. Peirce, 2 Cal. 167, cited by counsel, the question under consideration in that part of the opinion from which the quotation was made was whether or not mandate was the proper remedy. The words quoted by counsel were not necessary to the determination of that question, and, although the language quoted seems to assume that the fund out of which the money was payable had been specified in the act referred to, a reference to the act itself shows that such was not the fact in any sense other or different from that found in the act under consideration here. The case, as a whole, is against, rather than in favor of, the position taken by respondent. In McCauley v. Brooks, also cited by respondent, (16 Cal. 24,) there was nothing in the act designating the fund out of which the money was to be drawn. The language of the act there was: "Appropriated out of any money in the treasury not otherwise appropriated." These words constitute no designation of "the fund," in the sense in which that term is applied in this objection. By reference to the act referred to in Stratton v. Green, 45 Cal. 149, (the act creating a board of tide-land commissioners, St. 1869-70, p. 541,) it will be seen that it provided for the incurring of large expenses and salaries, and that the comptroller should draw his warrant upon the general fund for the payment of the same, but neither in that act, nor in any other, did the legislature make any appropriation out of the general fund or any other fund for the payment of those expenses or salaries. No attempt was made to appropriate money for that purpose, and the mandate was in that case refused for want of appropriation. Baggett v. Dunn, 69 Cal. 75, 10 Pac. Rep. 125, was a case where the claim was for a salary,—a claim which was not required to be presented to the board of examiners. The comptroller refused to draw his warrant, because no appropriation had been made for the payment of the salary for that year, and the court sustained him. In Marshall v. Dunn, 69 Cal. 223, 10 Pac. Rep. 399, the warrant was refused because the appropriation was exhausted, and the court sustained the ruling.

Neither the constitution nor the Code requires that an appropriation act shall specify the fund out of which the appropriation shall be paid, nor is it usual in appropriation acts to do so. If such a specification is required, the wheels of the government ought long since to have stopped, for out of many acts which we have examined, including the general appropriation bills for the current and past years, we find none which make such designation. It has become and is the custom in this state, of very general, but not universal, application, to use the phrase "appropriated out of any money in the treasury not otherwise appropriated;" but it seems to be mere custom, not founded upon any constitutional or other legislative requirement. And we learn from the argument that the comptroller interprets that phrase to mean "out of the general fund." We know of no law which authorizes such an interpretation. On the contrary, it would seem that everything authorized by law to be paid out of the state treasury is payable out of the general fund, if not specially made payable out of some specific fund,—as the "school fund," the "interest and sinking fund," and the like. The truth is, there are not many separate funds in the treasury, but there are many appropriations, and most of the latter are payable out of the same fund,—the general fund. The treasurer keeps an account of the separate funds, while the comptroller keeps account of the separate appropriations, as well as of the separate funds. "Appropriation" and "fund" are not synonymous terms. All through the statutes there is a distinction made between them. In the section of the Political Code (3713) which provides for the amount of revenue to be raised, (and which is amended at each session of the legislature,) a given amount is provided for each separate fund, but nothing is said about appropriations. The amount named for the general fund is supposed to be sufficient to meet the aggregate of all the appropriations made for the year, except such as have been expressly made payable out of some special fund. But if the word "fund," as used in subdivision 17, § 433, Pol. Code, is synonymous with the word "appropriation," it only remains to determine whether there has been an appropriation in this case. Appropriations are made, and can only be made, by the legislature. The constitution has prescribed no set form of words in which it is to be done. All that is required is a clear expression of the legislative will on the subject. It has declared that the sum of $100,000 is hereby appropriated, not more than one-half of which shall be expended in the forty-first fiscal year. That appropriation is made for the maintenance of a bureau theretofore established by act of the legislature, and for several years past supported in whole or in part by legislative appropriation. See St. 1883, p. 279; 1885, p. 86; 1887, p. 62. "But," says the comptroller, "it has not designated the fund out of which the appropriation is payable." It did not in any of the former years. Nor has it designated the fund out of which the salaries of any of the officers of the state, or the expenses of any of the other bureaus or departments of the government, shall be paid. "It has not said that the money is appropriated out of any moneys in the treasury not otherwise appropriated." What of it? The legislature can make no appropriation except "out of the treasury." The remaining words are not only a form not required by law, but usually a fiction, for at the time of the passage of appropriation bills there is not usually any money in the treasury in excess of existing appropriations, and whenever the legislature makes a new appropriation it is to be assumed that it will provide funds to meet the same. As said by Chief Justice FIELD in McCauley v. Brooks, supra: "Appropriations are made in anticipation of the receipt of the yearly revenues." "An appropriation is the act of setting apart, or assigning to a particular use or person, in exclusion of all others; application to a special use or purpose, as of * * * money to carry out some public object." Webst. Dict. "An appropriation of the money to a specific object would be an authority to the proper officers to pay the money, because the auditor is authorized to draw his warrant upon an appropriation, and the treasurer is authorized to pay such warrant if he has appropriated money in the treasury." Ristine v. State, 20 Ind. 339.

In this act we have a clear, distinct expression of the legislative will, making the appropriation. The words, "out of any moneys in the treasury not otherwise appriated," are not necessary to the expression of that will, or the making of such appropriation. They are in common use in this state, but nowhere made necessary, and are not always used. See act to provide for improvements of the deaf, dumb, and blind asylum, St. 1889, p. 303; act to provide for a system of irrigation, etc., St. 1877-78, p. 634, subd. 1, § 4; act making appropriations for benevolent purposes, St. 1875-76, p. 828. No doubt further examination would disclose many similar omissions. So far as we have observed they are never used in the acts of congress. Whether they are in common use in other states, and, if so, whether there is a reason for it, we have not time to inquire, nor do we deem it necessary, in the absence of any requirement for their use in this state. If the word "fund," in the point here made by the comptroller, and in subdivision 17, § 433, Pol. Code, is used in its technical sense, as designating the separate funds in the treasury, then the whole history and practice under it in this state, from its earliest organization, is against the contention now made, that the appropriation act itself must specify the fund upon which the warrant is to be drawn; but if it is used as an alternative for "appropriation," then all difficulty is removed, provided there is a specific appropriation against which the warrant may be drawn, and the case does not differ from all others where the appropriation is not by express words made payable out of some one of the separate funds in the treasury other than the general fund. The board of examiners have, by their action under sections 660, 661, Pol. Code, by implication at least, held that in this case there was a specific appropriation for the maintenance of the mining bureau, and that this claim was payable out of that appropriation. In this we think the board was correct, and, unless the appropriation has been exhausted, (of which there is no claim,) the comptroller has no discretion, but is required by law to draw his warrant therefor upon such appropriation. Let the writ issue as prayed.

We concur: BEATTY, C. J.; PATERSON, J.; THORNTON, J.; MCFARLAND, J.

80 Cal. 201

In re FIL KI *et al.* (No. 20,580.)

(*Supreme Court of California.* Aug. 17, 1889.)

PUNISHMENT FOR CONTEMPT—HARD LABOR—HABEAS CORPUS.

1. Pen. Code Cal. § 1446, provides that a judgment that defendant pay a fine may also direct that he be imprisoned till the fine be satisfied, at the rate of a day's imprisonment for each dollar of the fine. Defendants, being adjudged guilty of contempt of court, were fined $500 each, and the judgment directed that in default of payment they be confined in the county jail at the rate of a dollar a day each till the fines were paid. *Held*, that the prisoners could not be put to hard labor on the streets or elsewhere, as the imprisonment authorized by the judgment was intended as a means of collecting the fine, and not as a punishment.

2. Const. Cal. art. 11, § 11, provides that any county, city, or town may make and enforce within its limits all such local, police, sanitary, and other regulations as are not in conflict with general laws. *Held*, that this provision does not authorize county supervisors to put a prisoner to hard labor where his imprisonment is for the purpose of collecting a fine, because to do so would be to add to the judgment of the court.

3. A contempt of court, though a *quasi* criminal offense, is tried summarily by the court, and without the right of jury, and is not a misdemeanor within the meaning of St. Cal. 1889, p. 289, § 30, which authorizes the board of supervisors to require a prisoner confined in the county jail for a misdemeanor to be put to work.

4. Prisoners unlawfully put to work at hard labor on the streets, and discharged from such unlawful imprisonment by *habeas corpus*, are not discharged from the custody of the sheriff, or from lawful imprisonment in the county jail.

In bank. Hearing on *habeas corpus*.

For statement of the case and opinion on another application for *habeas corpus*, see 21 Pac. Rep. 974.

Frank M. Stone, for petitioners. *E. A. Forbes* and *A. L. Hart*, for respondent.

WORKS, J. This is an application for a discharge of the petitioners under a writ of *habeas corpus*. The allegations of the petition, tending to show the illegality of the alleged imprisonment, are as follows: "That the petitioners were held by the supreme court of this state at first to be legally imprisoned, but since such holding, the sheriff of said county of Yuba has placed petitioners at hard labor daily; that petitioners are held only by virtue of a warrant or judgment in contempt proceedings, and by no other warrant or judgment; that they are, and each of them is, daily caused to labor at hard labor upon the county highways or otherwise; that such hard labor for such (held) contempt of court is illegal, and in conflict with the substantial rights of said petitioners, in that the imprisonment is cruel and unusual (in most counties) for contempt for the court so holding by its judgment." The sheriff makes return that he holds the petitioners by virtue of a judgment of the superior court of Yuba county, convicting the defendants of contempt of court in disobeying an order of injunction in a civil case, and adjudging that they pay a fine of $500 each, and that in default of payment thereof they be imprisoned in the county jail of said county at the rate of one day for each dollar of said fine until the same is fully paid and satisfied. This judgment, it will be seen, only authorizes the imprisonment of the petitioners in the county jail, and that, not as a punishment, but as a means of collecting such fine. It was contended at the argument by the respondent that the detention of the petitioners at hard labor on the streets was justified and made lawful by a resolution of the board of supervisors of the county, by which it was provided that the sheriff should work and cause to be worked such convicted prisoners as were or might be confined in the county jail of said county.

Both the petition and return are so defective as not to present the real question intended to be presented, and which was argued at the hearing. The petition does not show that at the time the application for the writ was made the petitioners were imprisoned elsewhere than in the county jail, but that they "were daily caused to labor at hard labor." The return is equally faulty, in that it does not allege that any order of the board of supervisors was made authorizing the working of the petitioners on the streets or other highways. But counsel on both sides seem to have regarded these defects as unimportant, and have conceded the facts as above stated, and we decide the question thus presented. There was nothing in the judgment under which the petitioners were held authorizing their imprisonment or detention elsewhere than in the county jail, or justifying the sheriff in putting them at hard labor. If the judgment had provided for the kind of imprisonment now being imposed upon the petitioners the judgment would have been void. The Code allows the imprisonment in the county jail until the fine imposed is paid or satisfied by such imprisonment, or otherwise, but does not authorize imprisonment at hard labor. Pen. Code, § 1446; Ex parte Kelly, 65 Cal. 154, 3 Pac. Rep. 673; Ex parte Arras, 20 Pac. Rep. 683.

It is contended by the respondent that under section 11, art. 11, of the constitution of this state, the board of supervisors might, as a police regulation, provide that prisoners in the county jail might be worked on the streets or other public places, and that, having made such an order, the sheriff was thereby justified in putting the prisoners at hard labor, as therein provided for. But this would be giving a remarkable construction to the constitutional provision relied upon. If the board could add to the judgment of the court by ordering a prisoner to be worked on the streets as a means of rendering his imprisonment less burdensome and expensive to the county, they might, on the same principle, order him to be hanged, thereby relieving the county entirely from the expense of his keeping. The action taken by the board in this case was not an exercise of their police powers. They are authorized by statute to make and enforce such an order where a prisoner is confined in the county jail under judgment of conviction of a misdemeanor. St. 1889, p.

239, § 30. But the imprisonment in this case was not as a punishment, but as a means of collecting a fine which was imposed as a punishment.

As we have seen, the court could not have authorized imprisonment at hard labor by its judgment, and it is equally clear that the board of supervisors could not, by its order, do what the court could not have done by its judgment. The power to provide for the working of prisoners must be confined to such prisoners as are consigned to the county jail as a punishment, and not to cases where the punishment inflicted is a fine, and the imprisonment a means adopted for its collection. Besides, a contempt of court, which is summarily tried by the court, without the right of trial by jury, is not a misdemeanor within the meaning of the section authorizing the working of prisoners. It is a *quasi* criminal offense against the court, for which a party may be fined and imprisoned as for a specific criminal offense, but it is not a misdemeanor in the strict sense of the term. Ex parte Ah Men, 19 Pac. Rep. 380; New Orleans v. Steam-Ship Co., 20 Wall. 392. For these reasons the imprisonment of the petitioners at hard labor on the streets or elsewhere than in the county jail was unlawful, and from such imprisonment they must be discharged. But it does not follow that the petitioners must be discharged from the custody of the sheriff. They are properly in his custody under a judgment that has been held by this court to be valid, (21 Pac. Rep. 974,) and by virtue of such judgment he is entitled to hold and confine them in the county jail. It is therefore ordered that the petitioners be, and they are hereby, remanded to the custody of the sheriff of Yuba county, to be held and imprisoned by him in the county jail in accordance with the judgment under which they are held.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; FOX, J.

(80 Cal. 237)

SIMPSON v. SIMPSON *et al.* (No. 13,001.)

(*Supreme Court of California.* Aug. 30, 1889.)

DIVORCE—AWARD OF HOMESTEAD TO WIFE.

A wife had executed and recorded a declaration of homestead on certain land, and held possession under a decree rendered in a subsequent action for divorce, awarding the homestead property to her, "to be held by her in trust for her support and for that of her children." *Held*, that no trust was created in the homestead property by such decree, but it passed an absolute title to the wife, under Civil Code Cal. § 146, subd. 3, which provides, in case of a divorce, that if a homestead has been selected from the community property it may be assigned to the innocent party, either absolutely or for a limited time, subject in the latter case to the future disposition of the court.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; A. VAN R. PATERSON, Judge.

Action by John K. Simpson against Joshua Simpson and others, to quiet his title to certain land held by them as children and heirs at law of Roxanna Simpson, wife of the plaintiff, and from whom he was divorced. Judgment for plaintiff for an undivided one-half interest in the land and defendants appeal.

L. W. Elliott, for appellants. *Baldwin & Campbell*, (*Edward I. Jones*, of counsel,) for respondent.

VANCLIEF, C. While the plaintiff and Roxanna Simpson were husband and wife they acquired title to the land described in the complaint by patent from the United States to plaintiff. Afterwards, while they, with their children, were residing upon the land, the wife executed, acknowledged, and recorded a declaration of homestead upon the land, the validity of which is not questioned. Thereafter the wife brought an action against the plaintiff herein for a divorce on the grounds of extreme cruelty and habitual drunkenness, in which, on the 10th day of September, 1875, the district court rendered a judgment and decree, without written findings, other than recited in the decree, of which the following is a copy: "In the district court of the Fifth judicial district of the state of California, in and for the county of San Joaquin. Roxanna Simpson, Plaintiff, vs. John K. Simpson, Defendant. In this action it appearing to the satisfaction of the court from the evidence in the action that the defendant herein has been guilty of extreme cruelty as charged in the complaint in this action, and that said defendant has been for two years last past an habitual drunkard, it is therefore ordered, adjudged, and decreed that the bonds of marriage between plaintiff and defendant be, and they are hereby, dissolved, and said parties are, and each of them is, hereby released from all of the obligation thereof. And it is further ordered, adjudged, and decreed that the plaintiff in this action have and own, and that she be entitled to the possession of, the homestead and common property in the complaint described in this action, with the exception of three horses, their harness, and a wagon, and that said defendant have and own said horses, harness, and wagon as his separate property. It is further ordered, adjudged, and decreed that the children of plaintiff and defendant be, until the further order of this court, with the exception of their son John J. Simpson, awarded to the care and custody of plaintiff, and that the care and custody of their said son, John J. Simpson, until the further order of this court, be awarded to said defendant. It is further ordered that said homestead property hereby awarded to plaintiff be held by her in trust for her support, and for that of the children of the parties to this action. It is further ordered and adjudged that the said parties to this action be, and each of them is, authorized to visit and enjoy the society of their children at all suitable times and occasions. S. A. BOOKER, District Judge. September 10, 1875." On September 6, 1877, Roxanna Simpson died, leaving her surviving eight children of her marriage with the plaintiff, who are the defendants in this action, and three of whom were still minors when the judgment in this action was rendered.

The object of the action is to quiet plaintiff's alleged title to said homestead land, which title is denied by the defendants. What was the effect of the divorce decree upon the husband's title to the homestead? is the only question presented for decision. Upon the foregoing facts the trial court adjudged that from and after the entry of the decree of divorce Roxanna Simpson and the plaintiff held and owned the homestead land "as tenants in common, subject to the trust declared in said decree for the benefit of said Roxanna and her children; that, so long as any of said children are under age, said property must be held in trust for his or their support and maintenance; and that when the youngest of said children arrives at the age of majority said John K. Simpson will be entitled to have, hold, and own an undivided one-half interest therein, relieved from said trust." Subdivision 3 of the 146th section of the Civil Code provides, in case of a divorce, that "if a homestead has been selected from the community property it may be assigned to the innocent party, either absolutely or for a limited period, subject in the latter case to the future disposition of the court." The third paragraph of the divorce decree expresses an absolute, unconditional assignment of the homestead property to the wife—"the innocent party"—in pursuance of the authority conferred upon the court by the above section of the Code, unlimited to any period of time, and which is not limited to any period by any other part of the decree; nor, properly construed, does the fifth paragraph of the decree reduce the estate assigned to a trust, or otherwise qualify its absolute character.

The meaning of the fifth paragraph of the decree is certainly indefinite and obscure, and therefore properly subject to construction. The intent to create a trust does not clearly appear from the language of the decree itself, to say nothing of other considerations which may be properly invoked as aids to the construction. In section 1009 of Pomeroy's Equity Jurisprudence the author says: "The declaration of trust, whether written or oral, must be reasonably certain in its material terms; and this requisite of certainty includes the subject-matter or property embraced within the trust, the beneficiaries or persons in whose behalf it is created, the nature and quantity of interests which they are to have, and the manner in which the trust is to be performed. If the language is so vague, general, or equivocal that any of these necessary elements of the trust is left in real uncertainty, then the trust must fail." The decree under consideration is uncertain as to what interest the children are to have. Are they entitled to support for life or only during their minority? When a part of them arrive at the age of majority or die, is the interest of the infants or survivors thereby increased? Under any circumstances would the beneficiaries be entitled to have the land sold and the proceeds expended for their support, or are they limited to the rents and profits? In case the rents and profits should be more than sufficient to support those entitled to support, what disposition is to be made of the surplus? Who would be entitled to call upon the trustee to account for such surplus? And, finally, in what manner is the trust to be performed? Again, in the same section, the author proceeds to say: "No particular technical words need be used. Even the words 'trust' or 'trustee' are not essential; any other words which unequivocally show an intention that the legal estate was vested in one person, but to be held in some manner, or for some purpose on behalf of another, if certain as to all other requisites, are sufficient. On the other hand, if the words 'trust' or 'trustee' are employed, they do not necessarily show an intention to create or declare a trust." See, also, Perry, Trusts, § 83.

As to the inference of a trust from the uses of the words, "for her support, and for that of the children," and like words and phrases, Mr. Pomeroy says, (section 1012:) "No definite rule can be laid down; each case must stand upon its own circumstances. If the language is sufficient for the intention to be clearly inferred, the trust will be enforced; otherwise the donee will take an absolute estate, and the provisions concerning maintenance will be regarded as mere motives for the gift, and recommendations addressed to his discretion."

The words in the divorce decree from which it is claimed that a trust may be inferred, immediately follow the paragraph giving the wife the custody of seven minor children, and thereby casting upon her the duty of supporting and educating them, regardless of any aid which the court might allow her from the property of her husband. Under these circumstances it seems not to have been inappropriate for the court to express, as a reason or motive for giving her the homestead, that it was intended for the support of herself and children, for which, by the decree, she had been made solely responsible. Another consideration tending to support the construction here given to the decree is that the law did not authorize the court to assign the homestead, or any equitable interest in it, to the children, nor to the wife in trust for any purpose; and, in the absence of a reasonably clear expression to the contrary, the court must be presumed to have intended to act within the scope of its authority, and not to exceed it. The authority of the court, in actions for divorce, to transfer the property of either party to the other, or otherwise to dispose of it, is purely statutory; and the statute did not authorize the court to create a trust in the homestead or community property, but only to assign it directly to the innocent party "absolutely or for a limited period." If any trust was created in this case by the divorce decree, it must have been a direct or express trust, created not by the owner personally, nor by any agency authorized by him, but by the court, acting by authority of law; but it is plain that the court had no such statutory authority, and our courts have no common-law authority to create any kind of trusts, certainly not express trusts. In the exercise of equity jurisdiction they find and adjudge trusts to exist by reason of contracts, devises, bequests, gifts, or wrongful or fraudulent acts, and may always appoint trustees when necessary to execute them, but never, by common-law authority, create them. It should be further remarked in this connection that as to the interest given to the wife she could not be trustee for herself, it being a legal impossibility for a person to be both trustee and *cestui que trust* at the same time, (Perry, Trusts, § 13;) and, moreover, that it is at least doubtful whether an express trust, for the purpose claimed in this case, is authorized by our Civil Code, (sections 847 and 857,) since it is not expressed nor clearly implied in the divorce decree that the rents and profits only of the homestead property were to be applied to the use of the wife and children. Indeed, "rents and profits" are not mentioned in the decree. It is not necessary or proper to decide what would have been the effect of a decree (as to being void or only voidable by appeal) clearly expressing an assignment of the homestead in trust; since it appears, by proper construction of the decree rendered, that by it the court did not intend to create a trust, or to limit or qualify the absolute assignment to the wife expressed in the third paragraph of the decree. I think the judgment should be reversed, and that the trial court should be directed to give judgment for the defendants upon the findings of fact.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the court below directed to enter judgment for the defendants upon the findings of fact.

PATERSON, J., did not participate in the decision of the above cause.

In re ROSE'S ESTATE. (No. 12,408.)

(*Supreme Court of California.* Aug. 31, 1889.)

In bank. On application for rehearing. For opinion on first appeal, see 20 Pac. Rep. 712; for opinion on rehearing, reversing the former decision, see ante, 86.

Wal. J. Tuska and *W. W. Foote*, for appellant. *Stetson & Houghton*, for respondent.

BEATTY, C. J. Rehearing denied. The concluding paragraph of the opinion heretofore filed is modified so as to read as follows: The order appealed from is reversed, with instructions to the court below to allow, in the account of the administrator, the claim of $15 paid Noble for appraisers' fees, and all the items which the evidence shows to have been expenses of carrying on the business, as defined in the foregoing opinion, except such as are duplicated or withdrawn; also that the administrator be allowed to introduce any additional evidence he may have in support of any of the remaining items which have been rejected or retired from his account, and thereupon that the account be restated in accordance with this opinion.

(80 Cal. 452)

BORN *v.* HORSTMANN *et al.* (No. 12,586.)

(*Supreme Court of California.* Sept. 6, 1889.)

APPEAL—REVIEW—SUPERSEDEAS.

1. In a case where appellants are not required to do anything by the judgment, the filing of the statutory undertaking on appeal *ipso facto* operates as a *supersedeas*, staying all proceedings on the judgment.
2. In such case, an application by one of the respondents for a modification as to her of an order staying all proceedings on the judgment pending appeal, will not be allowed where the consideration of such motion presents an important issue of fact, and involves a question of law upon the construction of a provision of a will, even if the right to grant such modifying order were unquestioned, where such statutory undertaking has been filed.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Suit by Caroline Born against Herman Horstmann, trustee, and Magdalena Ellen Lux, Elizabeth Zimmer, Mary Schieffler, and the minor children of said three defendants, for partition of certain real estate in which plaintiff claims an interest under a will. The trial court ordered the property sold and the proceeds distributed. The minor defendants, by Charles A. Sumner, their guardian *at litem*, filed the statutory undertaking, and appealed from said decree, praying for a *supersedeas* to stay the distribution of said proceeds. The supreme court thereupon granted a temporary restraining order. Pending this appeal, respondent Elizabeth Zimmer now makes application to this court for a modification of the stay of proceedings, in order that she may immediately receive what she claims to be her share of the proceeds of said sale.

Charles A. Sumner, guardian *ad litem*, (*M. T. Moses*, of counsel,) for appellants. *E. J. Linforth*, (*Henry N. Clement*, of counsel,) for respondent Elizabeth Zimmer. *A. H. Loughborough*, for respondents Lux and Schieffer.

PATERSON, J. The $300 undertaking on appeal herein stays all proceedings on the judgment, independently of the restraining order made by the court on the 27th day of April, 1888. In Re Schedel, 69 Cal. 243, 10 Pac. Rep. 334, it was held that "sections 942 to 945, inclusive, apply to appellants who are required to perform the directions of the judgment or order appealed from." In the case before us the appellants are not required by the judgment to do anything. Therefore the perfecting of the appeal by giving the undertaking mentioned in section 941 *ipso facto* operates as a *supersedeas*, and the order heretofore made herein, on motion of appellants, was not essential to preserve their rights on appeal.

Counsel for Mrs. Zimmer, one of the respondents, now asks for a modification of the order as to her, for the reason that by a decree of divorce made and entered in the superior court on the 24th day of May, 1888, dissolving the marriage which had existed between her and her husband, she has become "lawfully separated from her husband," and therefore is entitled, under the provisions of the will, to her one-fifth share of the money,—$2,540.06. In support of this motion a certified copy of the decree of divorce referred to is presented to us. As the $300 undertaking operates, under the statute, as a stay of proceedings, however, it is questionable whether we could, under any circumstances, grant the order asked for; but under the peculiar circumstances of this case we should be unwilling to make the order if the power to do so were undoubted. The provisions of the will which are to be construed are very peculiar,—unusual. The motion now under consideration presents not only an important issue of fact, viz., whether Mrs. Zimmer has been "lawfully separated from her husband," within the meaning of the phrase as used in the will, but also a question of law as to the proper construction of one of the provisions of the will,—a question which ought to abide a hearing on the merits of the appeal. Motion denied.

We concur: Works, J.; Sharpstein, J.; McFarland, J.; Thornton, J

(80 Cal. 411)

Bell v. Marsh. (No. 13,041.)

(*Supreme Court of California.* Sept. 4, 1889.)

New Trial—Notice.

Under Code Civil Proc. Cal. §§ 656, 659, providing that "a new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, or court, or by referees," and that the party intending to move for a new trial must, within 10 days after the verdict of the jury, or after notice of the decision of the court or referee, if the action is tried without a jury, file notice of such intention, in a case tried as in equity, and submitted to the jury on special issues, notice of an intention to move for a new trial, filed and served by plaintiff within 10 days after the decision of the court, was in time, though nearly 9 months after the verdict of the jury was filed, as the verdict of the jury in such a case is not a "decision."

In bank. Appeal from superior court, Santa Barbara county; R. M. Dillard, Judge.

Thos. McNulta, for appellant. *Hall & Taggart* and *R. B. Canfield*, for respondent.

Paterson, J. This is an appeal from an order granting the plaintiff a new trial. The action was upon a promissory note. The answer denied that the sum named in the complaint, or any other sum, was due or unpaid on the note; and for a second defense, and by way of counter-claim, averred that defendant was induced to execute and deliver the note by certain false and fraudulent representations. Defendant asked for affirmative relief. The case was tried before a jury upon special issues, framed and submitted by the court, and the verdict was rendered and filed on the 7th day of May, 1887. All of the issues raised by the pleadings were submitted to the jury. The plaintiff objected to the entry of the verdict, or its adoption by the court, upon the ground that in certain specified particulars the findings were not justified by the evidence. The court took and held the matter under advisement until the 1st day of February, 1888, and then adopted the findings of the jury as the findings of the court, and entered judgment thereon that the plaintiff take nothing, and that the defendant recover his costs. Afterwards, on the 10th day of February, 1888, the plaintiff filed and served notice of his intention to move for a new trial, and on this notice and a statement of the case, subsequently filed, the new trial was granted.

The only question presented here for decision is, was the notice of intention to move for a new trial filed and served within proper time? Section 656, Code Civil Proc., provides that "a new trial is a re-examination of an issue of fact in the same court after a trial and decision by a jury, or court, or by referees;" and section 659, Code Civil Proc., provides that "the party intending to move for a new trial must within ten days after the verdict of the jury, if the action were tried by a jury, or after notice of the decision of the court or referee, if the action were tried without a jury, file with the clerk and serve upon the adverse party a notice of his intention," etc. These two sections of the Code must be read together. No proceedings for a new trial can be had until "after the trial and decision by a jury or court." In equity cases the findings of the jury are merely advisory. A case has not been tried until all the issues have been disposed of, and there has been no decision until the court has passed upon the facts, and drawn its conclusions of law therefrom. And so it has been held that in equity cases the time to give the notice does not begin to run until the court has either adopted or rejected the findings of the jury. Bates v. Gage, 49 Cal. 126; Warring v. Freear, 64 Cal. 54. The case at bar was treated by the court, and by the parties, in all respects as an action in equity; whether properly or improperly so treated it is unnecessary now to inquire. To hold that the time to give the notice of intention begins to run from the rendition of the special verdict would necessarily put each party to the trouble, in the protection of his rights, of preparing and prosecuting motions for a new trial before either party knows what the decision of the court is to be. Order affirmed.

We concur: Works, J.; Thornton, J.; McFarland, J.; Fox, J.

(3 Cal. Unrep. 121)

Smith *et al.* v. Irving. (No. 11,644.)

(*Supreme Court of California.* Aug. 30, 1889.)

Limitation of Actions—Mistake.

Under Code Civil Proc. Cal. § 338, providing that an action for relief on the ground of fraud or mistake must be commenced within three years after the cause of action accrued, such cause of action not to be deemed to have accrued until the discovery of the mistake by the aggrieved party, a complaint for relief on the ground of a mistake which occured 30 years previous, and which is silent as to the time when such mistake was first discovered, is bad on demurrer.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

Action by James Smith and others against Henry P. Irving. A demurrer to the petition was sustained, and plaintiffs appeal. Pending appeal, Henry P. Irving, respondent, died, and William Matthews, his executor, was substituted in his place. Code Civil Proc. Cal. § 338, prescribes a three-years period of limitation for the commencement of "an action for relief on the ground of fraud or mistake; the cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake."

Mich. Mullany, *Aylett R. Cotton*, and *W. H. H. Hart*, for appellants. *George Leviston*, for respondent.

Per Curiam. This is an action for relief on the ground of mistake. It was not commenced until more than 30 years after the mistake occurred. As to the time when the mistake was first discovered by plaintiffs, the complaint is silent. The complaint was demurred to on the ground, among others, that the alleged cause of action was barred by the provisions of section 338 of the Code of Civil Procedure. The demurrer was sustained, plaintiffs declined to amend their complaint, judgment was entered for defendants, and plaintiffs appeal. Section 338 of the Code of Civil Procedure provides that an action for relief on the ground of fraud or mistake must be commenced within three years after the cause of action accrued. In People v. Blankenship, 52 Cal. 619, it was held that an action for relief on the ground of fraud was barred after the lapse of three years, unless the plaintiff alleged a discovery of the facts constituting the fraud within three years before the commencement of the action. In that case an order overruling a demurrer was reversed. In Sublette v. Tinney, 9 Cal. 423, the court says: "The policy of the law is that actions on this ground should be commenced within three years; but that innocent parties may not suffer whilst in ignorance of their rights, the statute excepts them from the limitation until a discovery of the fraud. The latter clause of the section must, therefore, be construed as an exception, * * * and be pleaded as such. In the present case, then, the cause of action accrued upon the execution of the contract." It has always been held that statutes of limitation should be strictly construed. The language of the statute is plain, and we think the demurrer was properly sustained. It is unnecessary to consider the other grounds of demurrer. Judgment affirmed.

THORNTON, J., heard the agument, but took no part in the decision of this case, thinking himself disqualified

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3 Cal. Unrep. 122

PRIET *et al.* v. DE LA MONTANYA *et al.*

(No. 11,531.)

(*Supreme Court of California.* Aug. 30, 1889.)

LIABILITY ON TREASURER'S BOND—LIMITATION OF ACTIONS.

1. Defendant H. gave a bond as city treasurer for the faithful discharge of official duties then or thereafter imposed on him. As such treasurer he received money arising from the sale of certain street bonds, under St. Cal. 1875-76, p. 443, authorizing the widening of a certain street, and providing (section 11) that the treasurer "shall receive and safely keep the same as moneys belonging to said city and county are kept," and designating a separate fund therefor. A warrant—No. 92—on an award for damages to a certain lot was issued to one A. as owner, without knowledge of plaintiff's claim of interest therein, but on the discovery of such claim another warrant—No. 114—was issued to the owner or owners of said lot, and notice thereof given to defendant H. The money was illegally paid by defendant's deputy on warrant No. 92; and the fund was sufficient to pay only a part of plaintiff's share under warrant No. 114. *Held*, that the sureties on the bond were liable for the residue.

2. Where the evidence showed that at the end of the official term for which the bond sued on was given the principal had on hand $24,963.91 in the fund, against which there were no legal demands prior to warrant No. 114 for $10,932, a finding that there was a balance of $1,800 in said fund is against the evidence, if it relates to the first term of the treasurer, and if it relates to the end of his second term it is beyond the issues pleaded.

3. Where plaintiffs, whose cause of action depended on warrant No. 114, payment of which could not be enforced until the conflicting claims between them and the lot-owner were finally determined, commenced their action within seven months after such determination, though more than four years after the illegal payment by the treasurer, their right of action was not barred by Code Civil Proc. Cal. § 337, providing that actions upon any contract, obligation, or liability founded upon an instrument in writing shall be commenced within four years.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by Pierre Priet and others against J. de la Montanya and others on the official bond of Charles Hubert, as treasurer of the city and county of San Francisco, to recover the balance due and unpaid on a warrant held by plaintiffs and drawn by the board of Dupont-Street commissioners on the "Dupont-Street Fund." Plaintiffs had judgment. Defendants moved for a new trial, which was denied, and from the judgment and order denying their motion they appeal.

Mastick, Belcher & Mastick, for appellants. *D. H. Whittemore*, for respondents.

GIBSON, C. Defendant Hubert was treasurer of the city and county of San Francisco from December 6, 1875, until December 6, 1877, and before entering upon the discharge of his official duties gave the bond in suit, upon which his co-defendants are sureties. Upon the expiration of his term of office he succeeded himself by re-election.

Under the provisions of an act entitled "An act to authorize the widening of Dupont street, in the city and county of San Francisco," approved March 23, 1876, (St. 1875-76, p. 443,) he, as such treasurer, received from the sale of Dupont-Street bonds the sum of $966,950 to the credit of the "Dupont-Street Fund." A lot on Dupont street, belonging to one David Hunter, in which plaintiffs had a leasehold interest, was, pursuant to the act, taken for the improvement of the street, and the board of commissioners awarded the sum of $10,932 as damages for the taking of the lot, to David Hunter, as owner; and on April 20, 1877, issued to him, in his favor, a warrant, numbered 92, for the amount. Hunter, seven days thereafter, indorsed these words: "Received payment. DAVID HUNTER,"—upon the warrant, and delivered it to Henry S. Tibbey, the secretary of the board of commissioners. At the time the warrant was issued, the board was unaware of the interest of plaintiffs in the lot, but subsequently, on July 9, 1877, having discovered plaintiffs' claim of interest therein, it drew another warrant, numbered 114, for the same amount, payable to "the owner or owners" of the lot taken, and in compliance with section 15 of the act of March 23, 1876, deposited the same with the county clerk, and notified defendant Hubert, as treasurer. Both warrants were payable out of the Dupont-Street fund. The first warrant, No. 92, was afterwards illegally presented at the treasurer's office by Tibbey, and illegally paid to him by a deputy of the treasurer. The plaintiffs, in order to have determined the proportion of the amount so awarded that they were entitled to under said section 15 of the act, brought an action against Hubert, as treasurer, T. H. Reynolds, as county clerk, and David Hunter, and prosecuted the same to final judgment, which was entered on the 5th day of January, 1883, in accordance with the decision of this court rendered therein on appeal, (Priet v. Hubert, 62 Cal. 9;) in which decision it was also determined that the payment of warrant No. 92 was no defense to the payment of warrant No. 114. On the day after judgment was entered, the then treasurer paid on warrant No. 114 the sum of $1,800, being all that remained in the Dupont-Street fund. This amount was divided *pro rata* between plaintiffs and Hunter,—the former receiving the sum of $178, and the latter the remainder, leaving the sum of $1,472, with interest thereon, together with $100 as costs in that action, due the plaintiffs, to recover which this action was brought against Hubert and his sureties. Plaintiffs had judgment, from which and an order denying a new trial comes this appeal. Appellants contend (1) that Hubert, under the act of March 23, 1876, was not the agent of the city, but of the state, and consequently his sureties are not liable for any transaction under the act; (2) that the breach of the bond sued on did not occur within the official term for which it was given; (3) that the cause of action is barred by the statute of limitations.

In support of the first point, Liebman v. San Francisco, 11 Sawy. 147, 24 Fed. Rep. 705, is relied upon. That was an action against the city to recover on certain coupons attached to bonds issued under the act of April 1, 1872, (St. 1872, p. 911,) authorizing the opening of Montgomery avenue, and is similar in its provisions to the act in question here. The principal question in that case was as to the liability of the city on the bonds. It was held by the court that the board of public works created by the act was not the agent of the city, but of the state, and acted for the state in the performance of the duties imposed by the act, and that the city was not liable. Moreover, the act itself expressly declared that the city and county of San Francisco should not, in any event, be liable upon the bonds. Conceding that the Dupont-Street act simply made the board of public works or commissioners therein created, together with the treasurer, agents for the state, and not for the city and county, it does not follow that the treasurer would not be liable on his official bond for the loss of funds received under section 11 of the act, which provides that "the money arising from the sale of said bonds shall be paid to the treasurer of said city and county, who shall receive and safely keep the same, as moneys belonging to said city and county are kept; and said funds shall be known and designated as the 'Dupont-Street Fund.'" The general rule regarding sureties on an official bond is that they are only liable for such money as it is the legal duty of their principal to receive by virtue of his office, and must be determined by reference to the statutes making such principal a custodian of public funds. Brandt, Sur. § 451. The legislature, under the constitution of California of 1849, had plenary power to prescribe the duties of the treasurer of the city and county of San Francisco; and by the consolidation act of April 19, 1856, (St. 1856, p. 145, §§ 79, 80, 82,) did prescribe that such treasurer should receive, safely keep, and lawfully disburse "all moneys belonging to, or which shall be paid into, the treasury, and shall not * * * pay out any part of said moneys except upon demands authorized by this act," (section 79.) As the act only provides for the payment of demands against the city, it may be said that the statutory direction regarding the receiving, keeping, and paying out moneys applies only to moneys belonging to the city and county. Yet the legislature, having full power to prescribe the duties of the treasurer, could also curtail or enlarge those duties, and at any time within his official term. By the act of March 23, 1876, his duties were increased, and he was thereby charged with the additional duties of receiving and safely keeping all money derived from the sale of Dupont-Street bonds in the same manner "as moneys belonging to said city and county are kept," (section 11,) and of paying out the same in a certain manner. The county treasurers of the state are required to receive, safely keep, and pay out in the prescribed manner all moneys belonging to their several counties, and all other moneys directed by law to be paid into the county treasuries. Pol. Code, §§ 4144, 4161.

A familiar instance of where money other than county funds is directed to be paid to the county treasurer is in the matter of the sale of state school lands. No one would seriously contend that such a legislative direction does not make it obligatory upon the several county treasurers of the state to receive and account for such money to the state, or render their sureties liable. Hubert and his sureties, in compliance with Pol. Code, §§ 954, 960, gave the bond sued on, in view of this power of the legislature, and on the express condition therein that the sureties would answer for any failure on the part of their principal to faithfully discharge all official duties then required of him, as well as such additional duties as might be lawfully imposed upon him. Therefore, whether we regard Hubert as the agent of the state for the discharge of the additional duties imposed by the Dupont-Street act or not, the liability of his sureties for the faithful performance thereof remains the same.

Sureties on an official bond are liable only for a breach of official duty committed by their principal during the term of office for which the bond was given, (People v. Aikenhead, 5 Cal. 106; Brown v. Lattimore, 17 Cal. 93; Hubert v. Mendheim, 64 Cal. 213,) or committed by him after the expiration of his official term, and before he yields up the office to his successors, (Placer Co. v. Dickerson, 45 Cal. 12.) The evidence in this case shows without conflict that at the expiration of the official term for which the bond sued on was given, the principal, as treasurer, had on hand, belonging to the Dupont-Street fund, the sum of $24,962.91, against which no legal demands prior to that evidenced by warrant No. 114 appear. This amount was more than sufficient to meet the payment of warrant No. 114, if it could have been presented for payment during the first official term of Hubert. And as the treasurer had in the fund at the expiration of his first term of office the sum above stated, the court, in finding "that the balance left by said Hubert in the said Dupont-Street fund was the sum of $1,800," erred in finding against the evidence. If the finding relates to the end of his second term of office, it is beyond the issues tendered by the pleadings, as they only pertain to his first official term.

Considerable evidence was adduced tending to show the misappropriation of portions of the Dupont-Street fund, notably the illegal payment of warrant No. 92; but, as warrant No. 114 was not payable out of any particular portion of the fund, the misappropriations could not concern plaintiffs as long as there was enough in the fund not subject to prior demands to meet their warrant at any time prior to the expiration of Hubert's first term of office. If the deficiency illegally caused, whereby plaintiffs were prevented from obtaining the full amount of their portion of warrant No. 114, occurred during Hubert's second term of office, the sureties on the bond given for the second term would be responsible. See Heppe v. Johnson, 73 Cal. 270, 14 Pac. Rep. 833.

Plaintiffs' cause of action depended on warrant No. 114, issued under the Dupont-Street act, and payment thereof could not be enforced until the conflicting claims of plaintiffs and Hunter thereto were finally determined, pursuant to section 15 of the act, which was not done until the final judgment in Priet v. Hubert was entered on January 5, 1883; and, as this action was commenced on August 2, 1883, it results that the court correctly found that the right of action was not barred by the provisions of section 337, Code Civil Proc., as contended for by appellants. The judgment and order should be reversed, and the cause remanded.

We concur: VANCLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

80 Cal. 233

PEOPLE *ex rel.* WATERMAN *v.* FREEMAN.

(No. 13,187.)

(*Supreme Court of California.* Aug. 30, 1889.)

STATE OFFICERS—ELECTION BY LEGISLATURE—CONSTITUTIONAL LAW.

Under Const. Cal. 1879, art. 3, § 1, providing that the powers of the government of the state shall be divided into three separate departments, the legislative, executive, and judicial, and no person charged with the exercise of powers belonging to one department shall exercise any functions appertaining to the others, except as expressly directed or permitted in the constitution; and article 20, § 4, that all officers or commissioners whose election or appointment is not provided for by the constitution, and all officers or commissioners whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct,—the power of appointment to office is not exclusively an executive function, but, so far as it is not regulated by express provisions of the constitution, may be regulated by law, and, if the law so prescribes, may be exercised by the legislature; and Pol. Code Cal. § 2292, providing for the election of a board of trustees, to control the state library, by the legislature in joint convention assembled, is constitutional.

In bank. Appeal from superior court, Sacramento county; JOHN W. ARMSTRONG, Judge.

Information in the nature of a *quo warranto*, instituted by the attorney general, through special counsel, upon the relation of R. W. Waterman, governor of the state of California, against A. C. Freeman, to test his right to hold the office of trustee of the state library, under and by virtue of Pol. Code Cal. § 2292. Judgment for defendant, and the relator appeals.

George A. Johnson, Atty. Gen., (*Henry C. Dibble*, of counsel,) for appellant. *Freeman & Bates*, for respondent.

BEATTY, C. J. By section 2292 of the Political Code it is provided as follows: "The state library is under the control of a board of trustees, consisting of five members, elected by the legislature in joint convention assembled, and holding their offices for the term of four years." Under and in pursuance of this provision of the Code, the legislature in joint convention elected the respondent a member of said board of trustees, and he thereupon assumed, and has since exercised, the duties of the office. The relator, holding that the above-quoted provision of the Political Code is unconstitutional in so far as it attempts to confer upon a joint convention of the senate and assembly the power of appointment to the office in question, has instituted this proceeding for the purpose of ousting the respondent.

The contention on the part of the relator is that appointing to office is intrinsically, essentially, and exclusively an executive function, and therefore cannot be exercised by the legislature. Section 1 of article 3 of the constitution of 1879 provides: "The powers of the government of the state of California shall be divided into three separate departments,—the legislative, executive, and judicial; and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except as in this constitution expressly directed or permitted." If the making of appointments to office is a function which, in the sense of the constitution, appertains to the executive department of the state government, there would seem to be no escape from the conclusion that the appointment of the respondent by the members of the legislative department was invalid, unless by some specific provision of the constitution such appointment is expressly directed or permitted. On the part of the respondent, it is contended that such specific provision is found in section 4 of article 20, which reads as follows: "Sec. 4. All officers or commissioners whose election or appointment is not provided for by this constitution, and all officers or commissioners whose offices or duties may hereafter be created by law, shall be elected by the people, or appointed, as the legislature may direct." But we cannot construe this section as an express direction or permission to the legislature to exercise the power of appointment to office, if that is essentially an executive function. It would, upon such an assumption, amount only to this: That with respect to newly-created offices, or offices not provided for in the constitution, the legislature may direct whether they shall be filled by popular election or by executive appointment; in other words, that the legislature may prescribe the rule of selection, but may not itself make the selection. State v. Kennon, 7 Ohio St. 561. Our decision, therefore, must depend upon the solution of the question whether appointment to office is essentially an executive function. As to this point the authorities cited by counsel are meager and conflicting. In the case of Taylor v. Com., 3 J. J. Marsh. 404, the court of appeals of Kentucky held that the removal of a county clerk and the appointment of another in his place by the county court could not be reviewed on writ of error, because such removal and appointment, though made in pursuance of authority delegated to the court as such by the constitution, was essentially an executive and not a judicial act. In the case of Field v. People, 2 Scam. 80, and Hoke v. Henderson, 4 Dev. 1, the question was not involved, and of course was not decided, although incidentally discussed. In a dissenting opinion in the Illinois case a letter of Thomas Jefferson is quoted, (page 141,) in which he says: "Nomination to office is an executive function. To give it to the legislature as we do is a violation of the principle of the separation of powers. It swerves members from correctness by temptation to entreat for office for themselves, and to a corrupt barter for votes, and destroys responsibility by dividing it among a multitude. By leaving nomination in its proper place among executive functions, the principle of the distribution of power is preserved, and responsibility weighs with its heaviest force upon a single head." To the same effect is the decision above cited from 7 Ohio St. 561. No doubt these views as to the intrinsic nature of the power of appointment or of nomination to office, and the expediency of confining it to the executive department of the government, are entitled to the highest consideration; but the question here is not what the constitution ought to be, but what it is; or, in other words, what was the intention of its framers as to this particular matter? Of course, if there had been at the time of its adoption a general *consensus* of opinion in harmony with the views of Mr. Jefferson, as above quoted, we should be forced to conclude that its framers intended to forbid to the legislature the exercise of the power of appointment to office. But there was no such *consensus* of opinion. On the contrary, it had not only been decided in other states of the Union, under constitutions containing provisions substantially equivalent to the sections above quoted from our own, that the legislature could fill offices by itself created, but our own supreme court, construing identical provisions of our old constitution, had come to the same conclusion. People v. Langdon, 8 Cal. 16. In view of this construction, so long acquiesced in and acted upon, it must be held that the convention of 1879, in readopting the provisions so construed in the identical terms of the old constitution, intended that they should have the same operation and effect formerly attributed to them. If they had meant to prescribe a different rule it would have been easy to express such intention in language not to be misunderstood, and leaving nothing to construction. Upon these considerations we feel constrained to hold that the power of appointment to office, so far as it is not regulated by express provisions of the constitution, may be regulated by law, and, if the law so prescribes, may be exercised by the members of the legislature. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.; McFARLAND, J.; WORKS, J.; PATERSON, J.

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80 Cal. 243

COBURN v. AMES *et al.* (No. 11,582.)

(*Supreme Court of California.* Aug. 31, 1889.)

PROCEEDINGS BELOW AFTER REMAND—RECORD.

1. Pending ejectment, a receiver was appointed to take charge of the property and collect wharfage therefrom. Plaintiff recovered the land, but not the wharf attached, and the court ordered that the money collected by the receiver be paid to plaintiff. This order being reversed on appeal, the lower court, after hearing the evidence, made an order for an equal division of the wharfage, and that plaintiff pay the money into court. *Held* that, as the evidence showed that defendant was entitled to at least one-half the wharfage, the order will be affirmed.

2. Where the record shows no error of the court in making an order, and no exception thereto appears, the order will not be disturbed on appeal.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Craig & Meredith, for appellant. *Fox & Kellogg*, for respondents.

VANCLIEF, C. Ejectment for land, and a wharf connected therewith. The plaintiff recovered the land, but not the wharf. Pending the action, a receiver had been appointed to take charge of the land and wharf and to receive all wharfage and income from the same; and there was in the hands of the receiver $2,214.45, subject to be paid to the parties to the action as the court should direct; and the court ordered the whole sum to be paid to the plaintiff. From this order the defendant appealed, and this court reversed the order, on the ground that plaintiff was not entitled to all the money, but did not determine what portion thereof either party was entitled to, and remanded the case, with instructions to adjust the accounts in accordance with the opinion of the court. 57 Cal. 201. On the receipt of the *remittitur* the lower court heard the evidence produced by the parties, and ordered that the money be equally divided between plaintiff and defendants. From this order the present appeal is taken, on the ground that it is not justified by the evidence.

The evidence strongly tends to prove that the defendants were entitled to at least one-half of the money. The record shows no ground for the point that the court erred in ordering plaintiff to pay the fund into court. All that appears is that "motion for order to compel plaintiff to pay said fund into court granted." Neither the motion, nor the grounds upon which it was made or granted, nor any exception to the granting of it, appears. And it is even uncertain whether or not any appeal from it has been taken. I think that both orders should be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the orders appealed from are affirmed.

(80 Cal. 409)

GOYHINECH v. GOYHINECH. (No. 13,060.)

(*Supreme Court of California.* Sept. 4, 1889.)

APPEALABLE ORDER.

An appeal will not lie from an order denying a motion to set aside a judgment, there being no motion for a new trial, and the judgment being itself appealable.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Wicks & Ward, for appellant. *W. T. Williams* and *Williams & McKinley*, for respondent.

HAYNE, C. This was an action for divorce. Judgment passed for the plaintiff. After the judgment had been entered, the defendant moved the trial court to set such judgment aside on the ground that no findings had been made. This motion was denied, and the defendant appeals from the order denying such motion. The plaintiff moves to dismiss this appeal, and we think that the motion should be granted. The motion was not for a new trial, but was merely to set aside the judgment; and the judgment was itself appealable. It is settled that when a judgment or order is itself appealable the appeal must be taken from such judgment or order, and not from a subsequent order refusing to set it aside. Larkin v. Larkin, 76 Cal. 323, 18 Pac. Rep. 396; Tripp v. Railroad Co., 69 Cal. 632, 11 Pac. Rep. 219; Reay v. Butler, 69 Cal. 585, 586, 11 Pac. Rep. 463; Railroad Co. v. Railroad Co., 65 Cal. 295, 4 Pac. Rep. 13; Holmes v. McCleary, 63 Cal. 497; Coombs v. Hibberd, 43 Cal. 452; Water Co. v. Parker, 16 Cal. 83; Stearns v. Marvin, 3 Cal. 376. There are some exceptions to this rule, but the case does not fall within any of them. The plaintiff should have appealed from the judgment, with a bill of exceptions upon that appeal. We therefore advise that the appeal from the order refusing to set aside the judgment be dismissed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregong opinion the appeal from the order refusing to set aside the judgment is dismissed.

(80 Cal. 410)

GOYHINECH v. GOYHINECH. (No. 13,059.)

(*Supreme Court of California.* Sept. 4, 1889.)

RECORD ON APPEAL—REVIEW.

1. Where an appeal is taken from a judgment for want of findings, and the record discloses no findings, but also fails to show that they were not waived, waiver will be presumed, and the judgment will be affirmed.

2. A bill of exceptions, filed in an appeal from a non-appealable order, cannot be considered in an appeal from a judgment in the same case.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENY, Judge.

Wicks & Ward, for appellant. *W. T. Williams* and *Williams & McKinley*, for respondent.

HAYNE, C. Action for divorce. Judgment for plaintiff. Defendant appeals. The sole point made is that the judgment should be reversed for the want of findings. None appear in the record. But, on the other hand, there is nothing in the record to show that findings were not waived. There is another appeal in the same case from a non-appealable order, which appeal has been dismissed. And there was a bill of exceptions upon said appeal. But such appeal was from a different determination from the one in question here, which determination was not the subject of an appeal, and the bill of exceptions thereon is not even in the transcript on this appeal. That bill cannot be considered here. As above stated, therefore, there is nothing in the record before us to show that findings were not waived; and in such case it must be presumed that they were waived. Mulcahy v. Glazier, 51 Cal. 627; Smith v. Lawrence, 53 Cal. 34. The respondent has made a motion to dismiss this appeal, but, as we think that the judgment should be affirmed, we have not considered it necessary to examine the questions presented by that motion. We therefore advise that the motion to dismiss the appeal from the judgment be denied, and that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the motion to dismiss the appeal is denied, and the judgment is affirmed.

(80 Cal. 378)

McCLURE *et al.* v. COLYEAR *et al.* (No. 12,533.)

(*Supreme Court of California.* Sept. 3, 1889.)

ACCOUNTING—STATUTE OF LIMITATIONS.

1. A complaint showing that intestate, having a separate estate of $1,800 in money, and other personalty, died in 1860, leaving him surviving a widow and two children, the plaintiffs, aged ten and eight years; that there were no claims against the estate, which was not administered upon; that the widow took possession of the money and personalty for the benefit of herself and plaintiffs, and sold the personalty for $400, retaining the $2,200 until she married in 1861, when she invested it in real estate in her husband's name; that both knew of plaintiffs' interest in the money, and acknowledged their rights until within 60 days before suit brought; and praying for an accounting and a lien on the realty for the amount found due,—is sufficient to put defendants to answer.

2. Where plaintiffs and defendants are tenants in common in the fund of which an accounting is sought, and in the equitable ownership of the property in which the fund is invested, of which defendants are in possession, the statute of limitations will not commence to run until their rights are disputed or disturbed by defendants.[1]

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[1] As to the running of the statute of limitation between co-tenants, see Berg v. McLafferty, (Pa.) 12 Atl. Rep. 460, and note; Mayes v. Manning, (Tex.) 11 S. W. Rep. 136, and note.

In bank. Appeal from superior court, Tehama county; CHARLES P. BRAYNARD, Judge.

Action for an accounting by P. T. and J. A. McClure as heirs at law of John G. McClure, deceased, against John G. Colyear and Amanda, his wife, and widow of said John G. McClure. Defendants demurred, and the demurrer was sustained, and judgment entered accordingly, from which plaintiffs appeal.

John F. Ellison and *Jackson Hatch*, for appellants. *Chipman & Carter* and *L. V. Hitchcock*, for respondents.

FOX, J. Defendants' demurrer to plaintiffs' complaint was sustained, with leave to plaintiffs to amend. For failure to do so within the time granted, their default was entered, and judgment in favor of the defendants was thereupon rendered, from which plaintiffs appeal. From the complaint it appears that in 1860 one John G. McClure, a resident of Tehama county, died intestate, leaving as his separate estate $1,800 in money, and other personal property of the value of $400, and surviving him as his successors the plaintiffs, aged at the time, respectively, ten and eight years, and his widow, now the wife of her co-defendant herein. There were no claims against the decedent or his estate, and no administration was had, but his widow took possession of the money and personal property for the benefit of herself and her children, the plaintiffs in this cause. She sold the personal property, realizing $400 therefor, and retained the whole $2,200 until she married her co-defendant in 1861. During this year she, with her co-defendant, invested the money in business, and thereafter, with the money and its proceeds, bought the realty described in the complaint, and took the title thereto in the name of the defendant John G. Colyear, in whose name it still appears of record. Both defendants knew that the plaintiffs were the owners each of one-third of this money. *Quoad* their respective shares this fund was an express trust in the hands of the mother. The character of the trust was not and could not be changed by the act of the defendants in investing it in lands, although the title to such land was taken in the name of one not interested in the money, he having knowledge at the time that it was a trust fund. The complaint expressly avers that both defendants knew of and always acknowledged the rights of plaintiffs until within 60 days next before the commencement of this action. The demurrer was sustained on the ground that the complaint was indefinite and uncertain, but we think it sufficiently certain and definite to put the defendants to their answer.

Defendants also demurred on the ground that the claim was barred by the statute of limitations. Against such a trust the statute does not begin to run until the trustee repudiates the trust by clear and unequivocal acts or words, and claims thenceforth to hold the estate as his own, not subject to any trust, and such repudiation and claim are brought to the knowledge of the *cestui que trust*. Janes v. Throckmorton, 57 Cal. 368. The plaintiffs were not guilty of laches in failing to assert their rights until the defendants had taken some steps to dispute or disturb them. Barroilhet v. Anspacher, 68 Cal. 116, 8 Pac. Rep. 804. In addition to this the plaintiffs and the defendant Amanda have been at all times, and still are, tenants in common in the ownership of the fund, or the equitable ownership of the property in which the fund is invested, and she has been and is in possession. Her possession was their possession, so that in that view of the case the statute has never commenced to run against them, until their rights were denied, and she claimed to hold in hostility to them. Treating her husband as the holder of the legal title, holding it in trust for the benefit of his wife and her co-owners in the money which she furnished for the purchase of the property, then we find that she has been in possession with him all the time, and, through her the plaintiffs, her co-owners in the equitable title, have also been in possession. In such case the statute will not run in his favor, as it never runs in favor of a trustee, as against the *cestui que trust*, while the latter is in possession of the trust estate. Gilbert v. Sleeper, 71 Cal. 290, 12 Pac. Rep. 172; Love v. Watkins, 40 Cal. 548. Judgment reversed and cause remanded for further proceedings.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.; PATERSON, J.

(80 Cal. 266)

PENNIE v. REIS, Treasurer. (No. 13,198.)

(*Supreme Court of California.* Sept. 2, 1889.)

MUNICIPAL CORPORATIONS—POLICE DEPARTMENT—PENSIONS—CONSTITUTIONAL LAW.

1. Act. Cal. April 1, 1878, §§ 9–13, providing that on the death of a police officer of San Francisco the city and county treasurer shall pay a certain sum to his legal representatives out of a certain fund created by such act, does not create a vested right in such sum during the life of such officer; and a subsequent act, which repeals the former, passed before the death of such police officer, is not unconstitutional, as depriving him of property without due process of law.

2. Act Cal. March 4, 1889, created a police relief and pension fund, in the several cities and counties of the state, and provided (section 13) that "any fund provided by law, heretofore existing in any county, * * * city, or town, for the relief or pensioning of police officers, * * * or for the payment of a sum of money on their death," should be merged with the fund created by that act, and (section 15) repealed all inconsistent acts or parts of acts. *Held*, that this act impliedly repealed the provision of the act of 1878 for the payment of a sum on the death of a police officer, though it did not expressly refer to that act.

3. The title of the act of March 4, 1889, "An act to create a police relief, * * * and pension fund in the several counties, cities and counties, cities and towns, of the state," is sufficient.

4. Such act, in providing for a board to manage the fund created, does not create a "special commission" within the prohibition of Const. Cal. art. 11, § 13.

5. Nor does it contravene Const. Cal. art. 4, § 32, prohibiting the granting of "extra compensation" to public officers, in that it grants pensions to certain officers who have served for a certain time, or become disabled.

In bank. Petition for *mandamus*.

James C. Pennie, administrator of the estate of Edward A. Ward, deceased, petitions for a writ of mandate to C. Reis, the treasurer of the city and county of San

Francisco, commanding him, as treasurer of the Police Life and Health Insurance Fund of the city and county of San Francisco, to pay the petitioner the sum of $1,000, or to show cause.

Naphtaly, Friedenrich & Ackerman, (*Alfred Clarke*, of counsel,) for petitioner. *Davis Louderback*, for respondent.

McFarland, J. This is a petition for a writ of mandate to compel the treasurer of the Police Life and Health Insurance Fund of the city and county of San Francisco to pay petitioner, as administrator of Edward A. Ward, deceased, the sum of $1,000. On April 1, 1878, an act of the legislature was approved in relation to the police force of the city and county of San Francisco. It provided, (section 2,) among other things, that the compensation of police officers "shall not exceed" $102 per month, and that the treasurer "shall retain from the pay of each police officer the sum of $2 per month, to be paid into a fund to be known as 'The Police Life and Health Insurance Fund,' which shall be administered as is provided in sections 9 to 13, inclusive, of this act." These last-named sections provide, generally, that the mayor, auditor, and treasurer of the city and county shall constitute "the Police Life and Health Insurance Board," that such board shall invest the moneys of the fund in certain securities, and that upon the death of a member of the police force there shall be paid to his legal representatives, by said treasurer, the sum of $1,000. The said deceased, Edward A. Ward, was a member of said police force at and before the time of the passage of said act of April 1, 1878, and continued to be a member of said force until the time of his death, which occurred March 13, 1889. But before his death there went into effect an act of the legislature, approved March 4, 1889, entitled "An act to create a police relief, health, and life insurance and pension fund in the several counties, cities, and counties, cities and towns, of the state." This act is very comprehensive, and has many details. It provides, generally, for a police relief and pension fund, and for a board to manage it; for pensions to persons over 60 years old, who have been in the service for a certain period, and to those who become disabled in the performance of their duties, and to the widows or children of those who lose their lives in the performance of such duties; for the payment of a certain sum of money to the widows or children of those who die from natural causes after they have served 10 years, and for other benefits to members of the police force, not necessary to be here mentioned. Section 13 of the act provides that "Any police life and health insurance fund, or any fund provided by law, heretofore existing in any county, city and county, city or town, for the relief or pensioning of police officers, or their life or health insurance, or for the payment of a sum of money on their death, shall be merged with, paid into, and constitute a part of, the fund created under the provisions of this act." Section 15 provides that "All acts or parts of acts in conflict with the provisions of this act are hereby repealed." Under this act the respondent refuses to pay the money demanded by the administrator of the said Ward, deceased.

The petitioner makes numerous attacks on the validity of said last-named act, and upon its efficiency to accomplish the purpose for which it was evidently intended. We will notice a few of them.

1. The main contention of petitioner is that the act is in violation of the provisions of the constitutions of the United States and of this state, that no person shall be deprived of property without due process of law. This contention goes upon the theory that the deceased had a vested property right in the thousand dollars of public money which the statute had at one time directed to be paid to his legal representative upon the happening of the contingency of his death. Had he died while the law still directed such payment, a different question would have been presented. He had a mere expectancy, which could have none of the elements of a vested right until the contingency contemplated by the statute had happened; but when that event came there was no statute which gave it any significance. A public officer—at least one whose term and compensation are not prescribed by the constitution—has no contract by which he can have or hold either his office or his salary against the legislative will. In Miller v. Kister, 68 Cal. 144, 8 Pac. Rep. 813, this court say: "But it is well settled that salaried public officers created by the legislature are not held by contract or grant. The legislature has full control over them, unless restricted by the constitution, and may abolish them altogether, or impose upon them new duties, or reduce their salaries." And such an officer "accepts the office with the direct understanding that during his term of office the legislature may modify or amend the acts concerning fees of office, without impairing any legal right acquired by him by virtue of his election and entry upon the duties of his office." Miner v. Solano Co., 26 Cal. 118. See, also, Attorney General v. Squires, 14 Cal. 13; People v. Haskell, 5 Cal. 357. The said act of March 4, 1889, therefore, did not interfere with any vested right, and is not obnoxious to the constitutional principle invoked by petitioner.

2. It is contended that the said act last named did not repeal the provision of said act of April 1, 1878, under which petitioner claims. It is true that it does not expressly refer to that part of the former act, and repeal it in terms; but it repeals it by necessary implication. "The latter takes place whenever by subsequent legislation it becomes apparent that the legislature did not intend the former act to remain in force." Christy v. Sacramento Co., 39 Cal. 1. And it is apparent that the legislature, when passing the act of 1889, did not intend the act of 1878—so far, at least, as said provision is concerned—to remain in force. The two acts, with respect to the matter before us, are utterly inconsistent, and cannot both stand. The provision of section 24 of article 4 of the state constitution, about revising or amending a law by reference to its title, applies clearly to acts which are in terms revisory or amendatory of some former act. It does not apply to an independent act. When two independent acts

are incurably inconsistent and contradictory there is only one rule to follow, and that is, to give effect to the latest expression of the legislative will.

The two foregoing points are the main ones presented by petitioner; but his counsel makes one or two other points in his brief, and suggests or intimates a number of others, which we have no time to notice here in detail. We will content ourselves with saying that, in our opinion, the title of the said act of March 4, 1889, is sufficient; that it does not create a "special commission" within the prohibition of section 13 of article 11 of the state constitution; that it is not violative of the prohibitions in the constitution of granting an "extra compensation," etc., to any public officer, or increasing such compensation, or making any gift of public money; and that, so far, at least, as those parts of said act which affect the rights of petitioner are involved, we see no legal objection to the validity and efficiency of said act. The prayer of the petitioner is denied, and the writ dismissed.

We concur: WORKS, J.; THORNTON, J.; PATERSON, J.

(80 Cal. 310)

MCSHANE *v.* CARTER, Sheriff, *et al.*

(No. 12,578.)

(*Supreme Court of California.* Sept. 3, 1889.)

MINES AND MINING—CONVEYANCE OF MINES.

1. Under Laws Cal. 1880, p. 131, providing that it shall not be lawful for the directors of any mining corporation to sell or dispose of the mining ground of the corporation without the consent or ratification of the holders of two-thirds of the capital stock, in writing, signed by such stockholders, or by resolution duly passed at a stockholders' meeting, a conveyance of such ground without such consent does not pass title.

2. Such consent cannot be presumed from the mere fact of the conveyance, even though it is under the corporate seal.

3. The term "mining ground," as used in such statute, includes a ditch and water-right, by means of which a mine is operated, as an appurtenance thereof.

THORNTON, J., dissenting.

Commissioners' decision. Appeal from superior court, Nevada county; GEORGE E. WILLIAMS, Judge.

Action by A. McShane to enjoin R. D. Carter, sheriff, from selling plaintiff's property under judgment obtained against him by one J. M. Smith, who is a party defendant. Judgment for plaintiff, and defendants appeal.

C. W. Cross and *Cross & Simonds*, for appellants. *Joseph Kirk*, *Fred Searls*, and *Spencer & McEnerney*, for respondent.

HAYNE, C. This was a suit to enjoin the defendant Carter, who is a sheriff, from selling the property of the plaintiff under a judgment obtained by the defendant Smith against the Nevada Reservoir Ditch Company, from which plaintiff deraigned his title. The property which the sheriff was proceeding to sell is described in the complaint as follows, viz.: "That certain reservoir ditch, sometimes called the 'Big Ditch,' having its head about one-half mile above the residence of Joseph Perrin, on Little Wolf creek, in Grass Valley township, Nevada county, state of California, and extending thence westerly to the west line of Nevada county; and also that certain water-right, being the right to take the waters of said Wolf creek, and divert the same from said creek to the extent of the capacity of said ditch." The plaintiff alleges that he was the owner of several mining claims described in the complaint, and that "said property advertised for sale and levied upon under said execution has been for years past and now is by plaintiff used as appurtenant to said mining claims and reservoirs and mining lands of plaintiff, and is necessary and requisite to the working and operating thereof, and was and is appurtenant thereto." And this was found to be the fact both as to the plaintiff himself and as to his predecessors in interest. In the plaintiff's chain of title to the claims and ditch were two deeds from mining corporations, viz., a deed from said Nevada Reservoir Ditch Company to the Golden Gate Consolidated Mining Company, made in 1882, and a deed from the latter to one Patrick Campbell, made in 1884. These deeds were authorized by the boards of directors of said respective companies, and were executed by the proper officers, but were not ratified by the stockholders of said corporations. In 1880 the legislature passed an act entitled "An act for the further protection of stockholders in mining companies," which contained the following provision: "Section 1. It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation, nor to purchase or obtain in any way any additional mining ground, unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders' meeting called for that purpose." Laws 1880, p. 131. The court below gave judgment for the plaintiff, and the defendants appeal from said judgment and from an order denying their motion for a new trial. The appeal from the judgment was taken too late, and must for that reason be dismissed. The appeal from the order denying the motion for a new trial, however, is properly presented, (Pico v. Cohn, 20 Pac. Rep. 706,) and the important question arising on that appeal is whether the evidence is sufficient to show that the plaintiff was the owner of the property which the sheriff was proceeding to sell, and this depends upon whether the directors of said mining companies had power or authority to convey the property in the absence of a ratification by the stockholders as specified in the act of 1880.

1. We think that the provision of said act goes to the power or authority of the directors. It cannot be construed to relate merely to their personal liability, for no penalty is imposed upon them; and to so construe it would be to practically nullify the act. In our opinion the directors of mining corporations have no power or authority to convey the mining ground without the consent of holders of two-thirds of the stock, given as prescribed by the act, and it follows, without such consent, the title does not pass; and if this be so, the question can be raised by any one who connects himself with the title of the corporation which owned the

property, as well as by the stockholders thereof. Nor can the consent of the stockholders be presumed from the mere fact of the conveyance, whether under the corporate seal or not, for such consent or "ratification" may be after the deed is executed, and hence is not necessarily or presumptively involved in the execution of such deed.

2. Is the property in controversy here within the purview of the act? It is to be observed that the requirement relates to "the mining ground." Just what that term includes might perhaps admit of question in certain cases. Does it include only the ground actually mineralized, or does it embrace all the other adjacent lands of the corporation? It is not necessary to consider that precise question in this case; but we think that whatever realty is incident or appurtenant to the mineralized ground worked as a mine—whatever would pass by a conveyance of "the mine" itself, as an appurtenance thereto—is within the meaning of the requirement. The transfer of a thing transfers all its incidents and appurtenances, (Civil Code, § 1084;) so that the question is whether a ditch and water-right, by means of which "mining ground" is operated and used, is an incident or appurtenance thereof. In this regard it is to be remembered that the court finds that the ditch and water-right were appurtenant to the mines formerly owned by said corporations, and purported to have been conveyed by them and necessary to the use and operation thereof, and we think that this finding is in accordance with correct principles. The relation of a mine to the water by which it is operated is analogous to the relation between an ordinary mill and the water upon which its use depends. Water is as essential to the use of the one as it is to the use of the other, and it is well settled with reference to ordinary mills that the water-right is appurtenant to the mill, and will pass by a conveyance thereof, either with or without express mention of "the appurtenances." This has been the law from early periods. In Touchstone it is laid down that "by the grant of mills, the waters, flood-gates, and the like, that are of necessary use to the mills, do pass." Shep. Touch. 89. And in the old case of Nicholas v. Chamberlain, Cro. Jac. 121, "it was held by all the court, upon demurrer, that if one erect a house, and build a conduit thereto in another part of his land, and convey water by pipes to the house, and afterward sell the house with the appurtenances, excepting the land, or sell the land to another, reserving to himself the house, the conduit and the pipes pass with the house, because they are necessary and appurtenant thereto." Chancellor KENT says: "A conduit conveying water to the lands sold, from another part of the lands of the grantor, will pass as being necessary or *quasi* appendant thereto. So a race-way, conducting water from a mill to another part of the grantor's land, has been held to pass by a conveyance of land with the mill thereon." 4 Kent, Comm. *467. And in Richardson v. Bigelow, 15 Gray, 154, the court, per Chief Justice SHAW, said: "It is a well settled rule of law that the grant of a mill carries with it by necessary implication the right to the use of the water coming to the mill and furnishing power for working it, and also to the canal or race-way which carries the water from the mill, to the full extent of the grantor's right and power so to grant them." And this proposition is in accordance with the preponderance of authority, both as to the water connected with or arising from the particular tract and that arising from or connected with adjacent tracts of the same grantor, provided it was necessary to the use of the mill and was so used. Perrin v. Garfield, 37 Vt. 312; Morgan v. Mason, 20 Ohio, 401; New Ipswich Factory v. Batchelder, 3 N. H. 190; Neaderhouser v. State, 28 Ind. 257; Whitney v. Olney, 3 Mason, 280; Bank v. Miller, 7 Sawy. 163, 6 Fed. Rep. 545; Pickering v. Stapler, 5 Serg. & R. 110; Hammond v. Woodman, 41 Me. 177; Baker v. Bessey, 73 Me. 472; Coolidge v. Hager, 43 Vt. 9; Le Roy v. Platt, 4 Paige, 82; Curtis v. Norton, 58 Mich. 411, 25 N. W. Rep. 327. And the rule holds not only as to the water-right itself, but also as to the conduit or ditch through which the water flows; for while, as a general rule, land does not pass as an appurtenant to other land, yet it may be of such a nature as to pass with the principal thing. In Sheets v. Selden, 2 Wall. 187, 188, it was held that an adjoining parcel of land passed by a grant of a canal, and the court, per FIELD, J., said: "The objection that the deed does not cover the premises in controversy rests upon the fact that it does not convey the parcels of land for which the action is brought by specific designation and description. Such designation and description, though usual, are not always essential. Land will often pass by other terms. Thus a grant of a messuage, or a messuage with the appurtenances, will carry the dwelling-house and adjoining buildings, and also its orchard, garden, and curtilage. * * * The true rule on the subject is this, that everything essential to the beneficial use and enjoyment of the property designated is, in the absence of language indicating a different intention on the part of the grantor, to be considered as passing by the conveyance." And see to the same effect, Sparks v. Hess, 15 Cal. 195, 196. The statutory definition of an appurtenance is in harmony with the above rule. "A thing is deemed to be incidental or appurtenant to land when it is by right used with the land for its benefit, as in the case of a way, or water-course, or of a passage for light, air, or heat from or across the land of another." Civil Code, § 662. And in pursuance of this definition, it was held in Farmer v. Water Co., 56 Cal. 11, that where water had been conducted through a pipe to the grantor's premises, and rightfully used for domestic purposes and for irrigation of his grounds, it passed by his deed as an appurtenance to the land. And a decision similar in principle was made in Mining Co. v. Moses, 58 Cal. 168, with reference to a ditch used to operate a mine. And compare McDonald v. Mining Co., 13 Cal. 235, 236; Quirk v. Falk, 47 Cal. 455; White v. Barlow, 72 Ga. 887. If, therefore, we are right in our construction that the term "mining ground" includes all the realty that is incident or appurtenant thereto, it follows that the provision applies to the case in hand,

and that the title did not pass by the deeds in question, in the absence of a ratification by the stockholders. In this view it is unnecessary to consider the other questions argued.

We therefore advise that the appeal from the judgment be dismissed, and that the order denying the motion for new trial be reversed, and the cause remanded for a new trial.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed, and the order denying the motion for new trial is reversed, and cause remanded for a new trial.

THORNTON, J., dissenting.

(80 Cal. 426)

ADAMS v. LAMBARD. (No. 12,234.)

(*Supreme Court of California.* Sept. 3, 1889.)

APPEAL—REQUISITES—PAROL EVIDENCE—TRUSTS —INTEREST.

1. The supreme court will not examine 26 account-books, covering 12 years, and involving large amounts submitted to show that the evidence does not support the finding of the trial court, where the evidence contained in the record amply supports such finding, although the statement submitted contains an agreement by all the parties that such books may be used by either party without further identification, and that inaccuracies in said statement are to be corrected according to such books.

2. Plaintiff and others, by absolute deed, conveyed mining property to persons to whom plaintiff and one of the grantors, who had no interest in the property, were indebted, and about two months thereafter the creditors executed an agreement to reconvey one-third of the property to plaintiff when the creditors had realized sufficient to cancel the indebtedness due them. *Held*, that parol evidence was admissible to show the consideration for both the deed and the agreement, and to show that the latter was executed in pursuance of a parol agreement made at the time of the conveyance.

3. The conveyance constituted a valuable consideration which supported the agreement, and, on the happening of the contingency, a trust resulted in favor of plaintiff.

4. Where it appeared that plaintiff was in the employ of, and sustained confidential relations to, such creditors, and the contingency had occurred, it was proper, considering the nature of the transaction, to find and enforce a trust in favor of plaintiff, simply on the agreement.

5. In determining whether the amount realized by the creditors from the mine was sufficient to cancel the indebtedness, a sum paid by them to a third person for his interest in the mine, in pursuance of a covenant in the deed, is no part of such "indebtedness."

6. Where such agreement is silent as to interest, and such indebtedness became extinguished by the conveyance of the mine property, and said creditors were permitted to work the mine or not, at their discretion, interest will not be allowed on the amount of such indebtedness, or on moneys expended in working the mine, especially as the creditors were to retain an interest in the property in consideration of the money advanced, besides receiving payment for the indebtedness and the expenses.

7. Where the creditor neglected to render an accounting of the expenses and income of said mine, though often requested by plaintiff, and without plaintiff's knowledge sold the mine to an innocent purchaser, plaintiff is entitled to compound interest from the date of the sale.

BEATTY, C. J., and THORNTON, J., dissent.

In bank. Appeal from superior court, El Dorado county; GEORGE E. WILLIAMS, Judge.

Action by Horace Adams against O. D. Lambard. Plaintiff died pending trial, and Margaret A. Adams, his executrix, was substituted in his stead. Judgment for plaintiff, and defendant appeals.

G. J. Carpenter, (*Prentiss Carpenter* and *W. C. Belcher*, of counsel,) for appellant. *Fox & Kellogg*, (*Chas. F. Irwin* and *Geo. G. Blanchard*, of counsel,) for respondent.

PATERSON, J. This action was commenced by Horace Adams, plaintiff's testator, on September 2, 1880, for an accounting, and to compel the defendant to convey to him an undivided one-third interest in the Mount Pleasant mine. When the plaintiff learned from the answer to his complaint that the defendant had conveyed the property to innocent purchasers, and that a specific performance of the contract to reconvey was impossible, he filed an amended complaint, alleging the value of the mine, and praying that, if it should appear from the evidence that a specific performance could not be enforced, a judgment be entered against the defendant for the value of the property. The history of the transactions involved is clearly and fully set forth in the findings of the court. These findings show substantially the following facts: In 1868 the defendant and one Goss were engaged in carrying on a manufacturing and foundry business in the city of Sacramento. Until the dissolution of the copartnership of Goss & Lambard, Horace Adams continued to be an employe in their foundry, and his relations to the members of the firm were, and for a long time had been, and until after the dissolution of the partnership continued to be, of a close and confidential nature. Adams & Grissim were at that time, and for some time prior thereto had been, the owners of and in possession of the Mount Pleasant mine and a 20-stamp mill, hoisting-works, machinery, etc., situated thereon, holding the same under title acquired by valid locations duly made under the mining laws of the United States and of the district in which the mine was situate, but the mining claim had not then been patented. Adams was the owner of an undivided two-thirds and Grissim the owner of an undivided one-third thereof. Adams & Grissim were indebted to Goss & Lambard to a very large amount for milling and mining machinery, tools, etc., furnished for the use of the mining claims, and the firm held a lien under the mechanics' lien law upon the mine and mill for about $16,000 of the indebtedness, and had commenced a suit for the foreclosure thereof. On June 27, 1868, and while the foreclosure suit was pending, Grissim conveyed his interest in the mine to one Waters. On July 23d, in pursuance of a parol agreement theretofore made between the parties, Adams, Grissim, and Waters executed and delivered to Goss & Lambard a deed of conveyance of the whole of the mine, and put them in possession thereof. At the time of this conveyance the indebtedness of Adams & Grissim to the firm amounted to the sum of $31,148.88. Goss & Lambard agreed in consideration of the conveyance, and the conveyance was made, delivered, and accepted upon the condition that, in consideration thereof, they should cancel the indebtedness of Adams & Grissim to them, and should pay in addition thereto other indebtedness of Adams & Grissim to an amount not exceeding $5,000, and should also pay Waters for his interest in the mine the sum of $10,000 cash, which like sum they then and there did pay. Afterwards they paid on account of the indebtedness of Adams & Grissim to others such claims as were presented, not amounting in the aggregate to more than $5,000. It was also agreed between the parties and the deed and possession of the property were delivered upon the further condition that Goss & Lambard should work and develop the mine according to their judgment and discretion, and without any unnecessary expense, and without any charge for their own services in the premises, and upon the further condition that whenever they had realized sufficient from the mine to reimburse themselves for the amount of the indebtedness of Adams & Grissim, together with the costs and expenses of caring for, operating, and working the same, they should reconvey to said Adams the undivided one-third of the mining claim and property. On the 18th day of September, 1868, in pursuance of said agreement, and in completion of the transaction of which the delivery of the deed and the possession of the property under it was a part, the defendant, Lambard, and said Goss executed and delivered to Adams an agreement in the following language: "Whereas, Leonard Goss and O. D. Lambard, on the 26th of July, A. D. 1868, purchased of Horace Adams, —— Waters, and W. T. Grissim the Mount Pleasant mine, situated in Grizzly Flat, El Dorado county, and are now the sole owners of said property: now, this agreement witnesseth, that in consideration of $1 to them, the said Goss & Lambard, paid by H. Adams, the receipt whereof is hereby acknowledged, they hereby bind themselves, their heirs and executors, to convey to the said Adams the title they now possess to one undivided one-third of said property whenever the said property shall have canceled its indebtedness to them, and no indebtedness shall be incurred that is not strictly required, and neither of the said Goss & Lambard shall receive any salary for attention to the business till the indebtedness is canceled. Witness our hands and seals this the 18th of September, A. D. 1868. O. D. LAMBARD. LEONARD GOSS." In pursuance of this agreement, Goss & Lambard commenced to work and develop the mine, and continued the same until April 21, 1871, with varying success, when the firm of Goss & Lambard was dissolved. In the distribution of their partnership property, Goss conveyed his interest in the mine to the defendant, Lambard, who accepted the same with full knowledge of all the conditions of the agreements between them and Adams. Lambard continued to work, develop, and operate the mine with some interruptions, suspending the work at times to suit his own pleasure, until the 30th day of July, 1880, when, without consultation with, or the knowledge of, Adams, he sold and conveyed the same, and delivered the possession thereof for a valuable consideration to an innocent purchaser. While the defendant held the mining claim and property he procured a patent therefor from the government of the United States for a distance of 3,635 feet along the lode, and 300 feet in width on each side thereof, and from the state of California for 200 acres of land adjoining the same, but all the mining ground covered by these patents was embraced within the tract known as the "Mount Pleasant Mine." These patents were procured in further assurance of, and to protect, the title acquired from Adams, Grissim, and Waters, and not in hostility thereto; and the defendant based his claim to the patent upon, and received the same because of, his claim to the property under Adams, Grissim, and Waters. Adams at all times acknowledged that the legal title stood in Goss & Lambard, but at all times up to the commencement of the suit, which was commenced without a knowledge that Lambard had conveyed away the property, claimed that Goss & Lambard, and afterwards Lambard, held the property, as to the undivided one-third thereof, in trust, to be reconveyed to Adams as soon as and whenever Goss & Lambard should have realized sufficient from the total income from the property to reimburse them for the amount of the indebtedness of Adams & Grissim, and the other advances agreed upon, including the expenses of operating the mine. Adams frequently requested the defendant for information as to the costs and disbursements, and the income from the mine, and demanded an accounting thereof. The defendant never, to the knowledge of Adams, disputed his claim until after this suit was brought, but always made evasive replies, always postponed, and never made any accounting, as requested. Before the day of the sale and transfer of the mine and mining property he had received from the workings of the mine and the sale of bullion more than sufficient to repay the indebtedness, and the costs and expenses of working the mine, and of improvements made thereon, and of procuring and protecting the title thereto. There had been received from sales of bullion $183,834.06, from sales of machinery $3,600; making a total of receipts in the sum of $187,434.06. The total amount expended in the working and improvement of the mine and procuring patents, traveling expenses, etc., is $148,403.37; the amount of the original indebtedness, which, with the expenditures, the defendant is entitled to have deducted from the receipts, is the sum of $36,000; making a total of $184,403.37 to be deducted. The receipts and expenditures having been received and incurred from month to month, and from time to time, during all the period from July, 1868, to July, 1880, the court below was unable from the accounts to fix exact periods of rest and strike balances at different times of receipts and expenditures. The value of the property on the 30th day of July, 1880, when defendant sold the same, was the sum of $50,000.

The court adds its conclusions of law, to the effect: (1) That by the delivery and acceptance of the deed of July 23, 1868, all indebtedness of Adams & Grissim to Goss & Lambard was settled and canceled; (2) that by the terms and conditions of the conveyance a trust was created in favor of

Adams whereby Goss & Lambard were to hold, operate, and manage the mine, as to the undivided one-third part thereof, as trustees, and were to reconvey the same to Adams as soon as they realized from the mine a sum of money sufficient to reimburse them for the indebtedness in satisfaction of which the interest of Adams, and such interest as Grissim then had, was received, and for the further advances then agreed upon, amounting in the aggregate to $36,000, together with the costs and expenses of operating and managing the same; (3) that when the interest of Goss in the property was conveyed to Lambard, Lambard had full knowledge of the trust, and the same passed to him fully charged therewith; (4) that immediately prior to the 15th day of July, at which time the court has found he had received from the mine an amount more than equal to all the indebtedness on account of which the interest of Adams & Grissim had been received, together with the expenditures made by him and the said Goss during the whole period in which they had managed the property, it was the duty of defendant to account to Adams and pay over one-third of the moneys which he had already received, less the indebtedness and expenditures aforesaid, and to convey an undivided one-third part of the mine to Adams; (5) that the patents did not vest the defendant with any title adverse to the title acquired and received under the deed of July 23, 1868, but that the defendant is entitled to have costs and expenses of procuring them allowed to him out of the income of the mine as a part of the expense of managing the same; (6) that, inasmuch as the defendant, Lambard, in selling and conveying the property without the knowledge and consent of Adams, had been guilty of a violation of the trust under which he held the same, and a fraud upon Adams, and by that act had placed it out of his power to comply with the terms of the trust, and reconvey the undivided one-third of the property to Adams, plaintiff became and is entitled to receive from the defendant the sum of $16,666.66,—one-third of all the moneys derived from the income of the mine, over and above the sum of $184,403.37,—with interest thereon at the rate of 7 per cent. per annum, compounded annually, from July 30, 1880, to the day of judgment. Upon the filing of these findings and conclusions of law, a judgment was entered against defendant in favor of plaintiff for the sum of $27,126.38, and costs, taxed at the sum of $1,868.65.

The only important question upon which appellant and respondent appear to differ is the question whether the amount defendant had realized from the mine at the time he sold it was sufficient to cancel the indebtedness mentioned in the agreement. This question involves the inquiries as to whether the $10,000 paid to Waters should be considered as a part of the "indebtedness," and whether interest should be computed on the account. It is contended by appellant that the agreement of September 18, 1868, was without consideration, was an independent transaction, and that the court erred in its construction of the agreement, and in admitting parol evidence to explain it. Nevertheless defendant disavows any intention to repudiate the agreement or deny any of the rights of plaintiff thereunder. It is admitted that the contract is to be construed in the light of the surrounding circumstances, and that proof on that subject was proper; but it is claimed that the parol evidence introduced by the plaintiff went further, and accomplished a modification of the written agreement. It is conceded by all parties that the transaction between Adams and Goss & Lambard was not a mortgage, but that the deed conveyed the legal title to the latter parties. It is also conceded that the defendant was not bound absolutely to work the mine, but was at liberty to cease work whenever in his judgment it was impolitic or unwise to work it longer, (respondent insisting, however, that, and correctly, we think, if he did work it and receive back the amount of indebtedness, etc., defendant could not sell it,) and that he had the right to sell the mine in good faith, if, after reasonable efforts, the proceeds of the mine should be insufficient to pay the indebtedness. The court found that the deed to and possession of the property were delivered "upon the further condition that the said Goss & Lambard should work and develop the said mine according to their judgment and discretion, and without any unnecessary expense, or any charge for their own services in the premises, and that whenever they had realized sufficient therefrom to reimburse themselves for the amount of the indebtedness to Adams & Grissim, together with the costs and expenses of caring for, operating, and working the same, they should reconvey to said Adams the undivided one-third of said mining claim and property." The court has found, also, that the agreement of September 18th was made, executed, and delivered in pursuance of the parol agreement, and in completion of the transaction of which the delivery of the deed and possession under it was a part, and that it was not made without consideration, but was given as a part of the consideration for the deed. There can be no doubt, we think, that parol evidence was admissible to prove the true consideration of both the deed and the agreement. The two constituted one transaction. Adams conveyed his entire interest in the mine in full satisfaction of a debt for which he and another were personally liable, and he delivered possession thereof, and surrendered all control over the same. Grissim paid no part of the debt. Adams paid it all. To the extent of Grissim's share of the debt, certainly, which was one-third, Adams had in effect paid the purchase price allowed by Lambard for the property. In consideration of that fact, and of the further fact that the whole purchase price was to be returned out of the property and an interest in the mine retained by Lambard, the latter agreed that, as soon as he had realized sufficient from the property to cancel the indebtedness for which it was received, with the costs of management, he would convey to Adams an undivided one-third of the property so received from him. The consideration for the agreement was certainly a valuable one, and there was not merely a part performance, but a full performance on the part of Adams; and upon the subsequent happening of the contingency provided for a trust was created in favor of Adams. If it be conceded that the rights of the parties turned upon the agreement of September 18, 1868, the court was correct, considering the confidential relations of the parties, and the nature of the transaction, we think, in finding the existence of a trust, and enforcing it. Adams had fully executed the trust, and the contingency had arisen under which Lambard had promised to reconvey. Under such circumstances, a court of equity will enforce the trust. Brison v. Brison, 17 Pac. Rep. 689; Thomas v. Jameson, 19 Pac. Rep. 177; Sandfoss v. Jones, 35 Cal. 481; Hearst v. Pujol, 44 Cal. 230; Janes v. Throckmorton, 57 Cal. 368; Love v. Watkins, 40 Cal. 547; Estate of Webb, 49 Cal. 541; Bostwick v. McEvoy, 62 Cal. 501. There is nothing in Feeney v. Howard, 21 Pac. Rep. 984, (filed July 1, 1889,) in conflict with this view.

It is claimed by appellant that the finding of the court to the effect that the amount received by defendant from the mine prior to his sale thereof was sufficient to cancel the indebtedness, is not supported by the evidence. This contention seems to be based largely upon the condition of the account, as shown in the books of the Mount Pleasant mine, kept by the defendant. It is said that these books are part of the *res gestæ*, and furnish *prima facie* evidence of the facts stated therein. Upon the evidence contained in the record we think that the finding of the court is amply supported. We have no means of knowing what opinion the learned judge of the court below entertained of the books kept by the defendant. It may be that they were entirely discredited. It is contended by the respondent that the books show upon their face that they had been made up for the purposes of the trial; that the receipts and returns correspond in number with the number of entries made upon the loose fly-leaves presented, but do not correspond in dates or amounts; that there is not an instance in which the weight of shipment and weight of receipt correspond. As to the truth of these contentions, on either hand, we do not purpose to investigate. It is true, the parties have stipulated at the end of the statement "that the original books of account of the Mount Pleasant mine, given or offered in evidence on said trial, may be exhibited and used by either party, or upon motion for new trial herein, or in the supreme court on appeal, without further identification, and with the same force and effect as if the same had been fully incorporated in this statement; and that, if any inaccuracies are discovered in the foregoing statement, purporting to be collated from said books, the same may at any time be corrected according to the books." This is a very convenient way of making a statement, but it places a burden upon this court which, notwithstanding the fact that it is agreed to by all the parties, we decline to assume. It is the duty of the party moving for a new trial to present a statement containing the grounds upon which he intends to rely, and so much of the evidence as may be necessary to explain the same, and no more. The parties have presented for our consideration the books of the Mount Pleasant mine, kept by the defendant, 26 in number, covering a period of 12 years, and representing transactions amounting in value to hundreds of thousands of dollars. We do not feel called upon to perform the labor the examination of these books would impose upon us.

We think the court properly refused to allow as a part of the moneys which defendant was authorized to deduct from the income of the mine the $10,000 paid to Waters for his one-third interest. Waters had become the owner of an undivided one-third in the mine. Of course Grissim's interest, which Waters acquired, was subject to its proportion of the lien claimed by Goss & Lambard, but the purchase seems to have been an independent transaction,—one not in any way connected with the real purpose of the transaction between Goss & Lambard and their debtors, Adams & Grissim. The deed, it is true, was executed by Waters as well as by Adams & Grissim; but Goss & Lambard knew that Grissim had no interest in the property at the time he joined in the deed. The $10,000 paid to Waters we think constituted no part of the debt which Adams undertook to pay off by conveying his two-thirds interest in the mine. It does not seem to have been contemplated in the negotiations leading up to the final adjustment of their affairs. The court below evidently believed, from all the circumstances surrounding the transaction, that the parties did not understand Adams was to buy any outstanding one-third of the mine for Lambard, or to allow the latter to purchase it, and figure the purchase price in the amount of indebtedness which he (Lambard) was to be reimbursed for before Adams could receive anything in return. The indebtedness referred to in the contract was the indebtedness of Adams & Grissim, and not the indebtedness which Lambard might incur by purchasing an outstanding title.

We think the court properly refused to allow the defendant interest on the amount of the indebtedness or moneys expended in working the mine. As said in Tirrell v. Jones, 39 Cal. 655: "As we construe the contract, it was not within the contemplation of the parties that the defendant was to charge interest on the money to be advanced by him." It is conceded by all parties that the indebtedness was paid by the conveyance of the property; and it is also conceded that the defendant was not bound absolutely to work the mine at all, and that he was at liberty to cease the work whenever in his judgment it was best to do so. Therefore the debt no longer existed as a subsisting debt. Adams took the risk of losing his interest in the mine, which rested upon their disposition to work the mine, without reserving to himself any power to compel them to do so. It does not seem reasonable to suppose that Adams intended to take the risk of allowing an accumulation of interest on the $36,000 of indebtedness until principal and interest had grown to an indefinite amount. Furthermore, it was for the advantage of Goss & Lambard to recover back their principal sum in the manner agreed upon as quick as possible, and secure the one-third interest in the mine without cost to themselves, except the use of their money. We think that, where the agreement is silent as to interest, and where the creditor secures the property of the debtor under such circumstances, no interest should be allowed; especially where, as in this case, in addition to paying the indebtedness out of the property, and all advances made thereon, the creditor is to retain an interest in the property in consideration of the use of the money advanced.

The court has found that the defendant, in fraud of the rights of the plaintiff, and without the knowledge of the latter, sold and conveyed the property, and delivered possession thereof, for a valuable consideration, to an innocent purchaser; that the plaintiff frequently requested the defendant for information as to the costs and disbursements, and the income from the mine, and demanded an accounting thereof, but that the defendant, without notifying the plaintiff of any intention to claim the property as his own, always made evasive replies, always postponed, and never made any accounting as requested. Under these circumstances he was not entitled to any interest on his account, and the plaintiff was entitled to compound interest after the date of the sale of the mine by defendant. Hollinshead v. Simms, 51 Cal. 163; Tyler v. Granger, 48 Cal. 259; Tirrell v. Jones, supra. It is a general rule that where the omission of the trustee is due to simple negligence, without any actual intent to cheat or defraud, simple interest alone is allowed the *cestui que trust* on the trust funds; but if the omission is willful, compound interest is allowed. Tiff. & B. Trust, 593; Lathrop v. Smalley, 23 N. J. Eq. 192; State v. Howarth, 48 Conn. 207.

We have fully considered the other points made upon this appeal, and find nothing in any of them warranting a reversal of the judgment. Judgment and order are therefore affirmed.

We concur: McFarland, J.; Sharpstein, J.; Works, J.

We dissent: Beatty, C. J.; Thornton, J.

(80 Cal. 245)

LAVENSON v. STANDARD SOAP CO. *et al.*

(No. 11,609.)

(*Supreme Court of California.* Aug. 31, 1889.)

RIGHTS OF MORTGAGEE—FIXTURES.

1. Under Civil Code Cal. § 2929, providing that "no person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security," a complaint alleging that one of defendants had executed a mortgage on certain realty to plaintiff; that defendants detached and removed certain permanent fixtures, thereby impairing plaintiff's security, which they well knew; that plaintiff thereafter foreclosed and failed to realize the amount of his mortgage claim; that defendant mortgagor was insolvent; and that a personal judgment for the deficiency was entered and remained unsatisfied,—states a cause of action.

2. Under Civil Code Cal. §§ 658, 660, providing that real property embraces land and that which is affixed thereto, and that a thing is deemed to be affixed to land when it is permanently attached, "as by means of cement, plaster, nails, bolts, or screws," soap-kettles, candle-machines, a gun-metal digester, and a high-pressure boiler, which are permanently attached to the realty by bolts, and to each other by pipes, and which were placed in the building to be used in manufacturing, for which the premises were used, are fixtures.

3. Under Civil Code Cal. § 2926, providing that a mortgage is a "lien upon everything that would pass by a grant of the property," and a clause of the mortgage, providing that "all boilers, engines, and fixed machinery shall be deemed to be included in said property," such fixtures were covered by the mortgage lien in the absence of evidence *aliunde* to the contrary.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

Daniel Titus and *Mastick, Belcher & Mastick*, for appellants. *T. C. Coogan* and *Freeman, Johnson & Bates*, for respondent.

Gibson, C. Action on the case for damages suffered by the impairment of a mortgage security. Judgment for plaintiff, from which, and an order denying a new trial, defendants appeal. The complaint shows that the plaintiff had from the Mege Pacific Commercial Company, one of the defendants, a properly executed and recorded mortgage upon the realty therein described; that the other defendant, knowing this fact, with the said mortgagor, dug up, detached, and removed certain fixtures, permanently attached to the realty, well knowing that such severance and removal would impair and render insufficient plaintiff's security, and by such acts it was rendered insufficient; that said mortgagor was at the time insolvent, and has since so remained; that thereafter plaintiff foreclosed his mortgage and failed to realize sufficient to satisfy his claim; that a personal judgment for the deficiency was entered and remains unsatisfied. These facts are amply sufficient to constitute a cause of action, and the demurrers were properly overruled.

The Civil Code (section 2929) provides that "No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security." The converse of this rule was declared in Hill v. Gwin, 51 Cal. 47, in which it was held that a mortgagor was answerable in damages for the removal, prior to foreclosure, of fixtures attached to the mortgaged property. "In New York, a mortgagee may have an action on the case against the mortgagor for an injury to the mortgage security." 2 Wash. Real Prop. 141, and the leading case of Van Pelt v. McGraw, 4 N. Y. 110, there cited. That case was approved by this court in support of the same principle, in the case of Robinson v. Russell, 24 Cal. 467. That was a suit by a mortgagee in possession for an injunction to restrain the defendants from removing from the premises mortgaged certain trees and vines, and a steam-engine and pump erected to irrigate the land, and to prevent one of the defendants from paying over to his co-defendants certain money in his hands, representing fruit sold from the premises. It was found by the trial court that the defendants had not removed, and did not intend removing, from the premises anything besides the growing fruit, nursery trees, and vines, which had been attached by the sheriff at the suit of some of the defendants. Defendants had judgment, which was affirmed, for the reasons that the injuries resulting from such acts were not irreparable, and it did not appear but what adequate damages for the trespass could be recovered against the defendants, as it was not shown that they were insolvent. The court said: "There can be no doubt but that an action can be maintained by the mortgagee for injuries of the character set forth in the complaint in this case when it appears that by the acts complained of the mortgage security is impaired. This is clearly shown in Yates v. Joyce, 11 Johns. 136; Lane v. Hitchcock, 14 Johns. 213, and Gardner v. Heartt, 3 Denio, 232, cited by the appellants' counsel, and more fully in Van Pelt v. McGraw, 4 N. Y. 110. But all those were actions on the case for the wrongful and fraudulent injury committed upon the premises, whereby the mortgagee's security was impaired. There can be as little doubt that the mortgagee may, by injunction, stay the commission of waste upon the mortgaged premises when he makes a proper case in equity and shows that the commission of the threatened acts will materially impair the value of the property subject to the lien, so as to render it an inadequate security for the mortgage debt." Thus it appears that the mortgagee has concurrent remedies by an action at law for damages, or by suit in equity for an injunction to prevent threatened damages. This seems reasonable under a system like ours, where nothing but a lien passes to the mortgagee, which would not enable him to maintain replevin for fixtures severed from the freehold, as could be done at common law where the legal title passed to the mortgagee. The removal of the fixtures complained of in this case deprived the mortgagee of his lien thereon, (Buckout v. Swift, 27 Cal. 433,) and before he could resort to other property of the mortgagor it was incumbent upon him to exhaust his mortgage security, (Code Civil Proc. § 726; Ould v. Stoddard, 54 Cal. 613; Bartlett v. Cottle, 63 Cal. 366; Mascarel v. Raffour, 51 Cal. 242.) This he did do, and found it insufficient by reason of the wrongful removal of some of the fixtures, and his personal judgment against the mortgagor of little worth on account of its insolvency.

The findings substantially show that on and prior to the 20th day of November, 1882, the plaintiff was the owner of certain real property in South San Francisco, with the building thereon, and certain machinery and fixtures therein, viz.,—1 gun-metal digester, 2 soap-kettles, 1 high-pressure boiler, and 13 candle-machines, each and all of which were permanently affixed to the realty, and formed a part thereof. There were on that date certain other fixtures in the building that had been detached and severed therefrom, and which were not included in or subject to the mortgage executed on the same date and hereinafter mentioned. All of these appliances were adapted to the manufacture of soap and candles, and were by the plaintiff put in, and together with the premises, were used by him for such purpose. On the 22d day of August, 1882, he leased the premises to one Easterbrook for 90 days from said date, with the knowledge that the lessee intended to manufacture oleomargarine and stearine on the premises, if the lessee should determine that such business could be conducted at a profit, in which event he (the lessee) intended to form a corporation to carry on such business on the premises and place thereon machinery suitable for the purpose. Thereafter the defendant corporation, the Mege Pacific Commercial Company, was formed, and on the 20th of November, 1882, purchased the premises and fixtures of the plaintiff for the sum of $25,000, of which sum it paid $10,000, and gave its promissory note for the remainder, and on the same date, to secure the payment of the note, executed and delivered to plaintiff a mortgage on the same premises. This mortgage was on the 23d day of the same month duly recorded. After the execution of the mortgage, Easterbrook and the mortgagor, at an expense of about $9,386.86, placed on the property certain machinery and appliances, only adapted for manufacturing oleomargarine and stearine, which, on the suspension of the business, became and remained useless, and did not add anything to the salable value of the mortgaged premises. None of these appliances so put in by the mortgagor were intended to be or were received by the plaintiff as security for the promissory note in place of the fixtures which were covered by the mortgage. Prior to the 13th day of April, 1884, the mortgagor became insolvent, and, finding its business unprofitable, suspended the same permanently, and about said date sold to its co-defendant, the Standard Soap Company, the gun-metal digester, 2 soap-kettles, 1 high-pressure boiler and mountings, and 13 candle-machines, together with other fixtures not attached to nor a part of the realty, nor subject to the mortgage lien. The Standard Soap Company thereupon dug up, detached, and removed from the premises, without the consent of plaintiff, the said digester, soap-kettles, boiler, and candle-machines. These articles, at the time of their removal, were of the aggregate value of $4,950, to which extent plaintiff's mortgage security was permanently decreased by such removal. Both defendants knew at the time of the removal that the articles were subject to the mortgage lien, and that the removal of them would impair and render insufficient the mortgage security of plaintiff, which, prior and up to the time of the removal was of the value of $25,000. Plaintiff, after the removal of the articles, foreclosed his mortgage, and caused the property to be sold on execution, and the proceeds realized therefrom failed to the extent of $9,947.50 to satisfy his claim. For this deficiency a personal judgment was entered against the Mege Pacific Commercial Company, which still remains insolvent.

The principal question raised by the appellant is whether the articles for the value of which the court below gave judgment were affixed to the realty and were covered by the mortgage lien. Real property, as defined by the Civil Code, (section 658,) is land and that which is affixed thereto; and "a thing is deemed to be affixed to land when it is attached to it by roots, as in the case of trees, vines, or shrubs; or imbedded in it, as in the case of walls; or permanently resting upon it, as in the case of buildings; or permanently attached to what is thus permanent, as by means of cement, plaster, nails, bolts, or screws." Id. § 660. In order to determine whether a thing is a fixture or not, we must look at the manner in which it is annexed, the intention of the person who made the annexation, and the purpose for which the premises are used. Fratt v. Whittier, 58 Cal. 126; 1 Jones, Mortg. §§ 429, 444. The fixtures here consisted of a digester made of gun-metal, 2 soap-kettles, 1 high-pressure boiler, and 13 candle-machines The digester was 20 feet long and 40 inches in diameter. It was 4 or 5 feet under the ground below the basement floor, and extended up through this floor and about 3 feet above the next floor. There was a brick wall 4 inches thick surrounding it and extending up to the second floor. The digester contained a pump, and was connected by steam-pipes with the high-pressure boiler. The soap-kettles were large, each having a capacity of 50,000 pounds. They were attached to heavy brick walls, extending about 5 feet above the basement floor, by sheet-iron bolted thereto, and were also connected by steam-pipes with the boiler. The high-pressure boiler was 16 feet long and 3 feet in diameter, and was connected with two other boilers by a brick wall and steam-pipes and a heavy cast-iron front piece. It rested on a brick foundation, and was all inclosed, except the front, with brick walls, which formed a nest. The sides of this nest were bolted together with iron bolts three-fourths of an inch in diameter, extending through from one side to the other, and were fastened with nuts. On one side they ran through the timbers that supported the building, and on the other side through iron braces. The candle-machines were on the third floor of the building, and were nailed to scantlings, which were in turn fastened to the floor. They contained perforated steam-pipes, and were attached to the boilers by steam-pipes. All these appliances were of a permanent character, and were put into and attached to the building by the plaintiff with the intention of using them for the making of soap and candles, for which purpose the premises were used and solely appropriated by him prior to his lease thereof to Easterbrook, and the subsequent transfer of the property in November of the same year to the Mege Pacific Commercial Company. Thus it is clear, considering the character of the appliances, the manner in and the intention with which they were affixed to the land and building, and their necessity for the uses to which the premises were devoted, that they were fixtures, and formed part of the realty within the meaning of the provisions of the Civil Code; and as the court has found upon evidence that is not without conflict that they were all in position and undetached at the time the mortgage was executed, we cannot disturb the finding. The mortgage contains this clause: "All boilers, engines, and fixed machinery shall be deemed to be included in said property." As the fixtures in dispute were part of the realty, they passed with the grant of the property to the Mege Pacific Commercial Company, and became subject to the lien of the mortgage that was given back to plaintiff, which created "a lien upon everything that would pass by a grant of the property." Civil Code, § 2926. Therefore the words quoted, in the absence of evidence *aliunde*, cannot be construed to restrict the operation of the mortgage to the land and building alone. Allen v. Woodard, 125 Mass. 400.

There was a bill of sale of "all the machinery, boilers, pipes, shafting, belting, candle-moulds, presses, wheels, pulleys, barrels, tubs, tallow, and any and all other personal property" on the premises, given to the Mege Pacific Commercial Company with the deed of the premises. This, together with certain parol evidence, was adduced by defendants to show that at the time the sale of the premises and fixtures was consummated all the parties thereto understood all the appliances on the premises, whether detached or not, to be personal property, and that the bill of sale was given as evidence of the sale thereof, and the mortgage, being a mortgage of real property, was not intended to, and did not, include them. But the trial court, in finding that the articles for which damages were awarded were part and parcel of the realty, and were covered by the mortgage, which finding, as before remarked, cannot be disturbed, must have concluded that the bill of sale, if it had any operation at all, transferred only the fixtures that, at the time, were severed from the premises, and that the deed carried the undetached fixtures as part of the realty. Looking at the entire record, we perceive no error, and therefore advise that the judgment and order be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order appealed from are affirmed.

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80 Cal. 323

SMITH v. SMITH. (No. 12,955.)

(*Supreme Court of California.* Sept. 2, 1889.)

EJECTMENT—JOINDER OF ACTIONS—MORTGAGES—ADVERSE POSSESSION—EVIDENCE.

1. Under Code Civil Proc. Cal. §§ 427, 1048, providing that claims to recover specific real property may be united in the same complaint, and that two or more causes of action pending at the same time between the same parties, and in the same court, upon causes of action which might have been joined, may be consolidated, two actions of ejectment brought in the same court, at the same time, between the same parties, to recover separate tracts of land in the same county, are properly consolidated.

2. Whatever may be the exact nature of the interest which a partner takes under a deed of land to the firm, he takes a sufficient interest to enable him to maintain ejectment against a mere intruder.

3. Where the evidence in ejectment shows that the deed, absolute on its face, under which plaintiff claims, was in fact given to secure a debt, and is therefore merely a mortgage, he has failed to show either title or right of possession.

4. Defendant set up in his answer that the deed under which plaintiff claimed was only a mortgage, and that the debt had been fully paid; but he did not ask for any affirmative relief from the mortgage. *Held*, that the answer was in effect only a denial of plaintiff's title; that whether the debt had been paid or not was immaterial; and that plaintiff was not entitled to proceed first with the trial of the question as to whether the deed was a mortgage, on the ground of an equitable defense.

5. Defendant testified in support of his claim of adverse possession that plaintiff "told me to go on the place, and live on it, and make it my home, and he would give it to me for to stay there permanently." Also, that the arrangement was that

he was to take some of plaintiff's sheep on the place, and take care of them on shares. He admitted that he afterwards agreed to take a lease from plaintiff if one could be made to suit him. During a portion of the time of his possession, he caused the land to be assessed to plaintiff. Defendant would not deny that he knew of an offer made by his wife during the time to purchase the land from plaintiff, or that he did not object thereto. *Held*, that the evidence failed to show adverse possession.

BEATTY, C. J., and THORNTON, J., dissenting.

In bank. On rehearing. For former opinion, see 21 Pac. Rep. 4.

Code Civil Proc. Cal. § 427, provides that "the plaintiff may unite several causes of action in the same complaint where they all arise out of * * * claims to recover specific real property," and section 1048 provides that "whenever two or more actions are pending at one time between the same parties, and in the same court, upon causes of action which might have been joined, the court may order the actions to be consolidated."

J. K. Law and *E. Jackman*, for appellant. *E. A. Rogers*, *J. C. Campbell*, *Thos. Gardner*, and *C. H. Clement*, for respondent.

PER CURIAM. A rehearing was granted in this case and the same has been reargued; but we adhere to our former decision, and adopt the former opinion of Commissioner HAYNE as the opinion of the court.

The judgment and order are reversed as to the N. W. ¼ of section 13, township 2 S., range 13 E., and the cause remanded for a new trial as to said property, and said judgment and order are, in all other respects, affirmed, the appellant to recover one-half of the costs on appeal.

We dissent: BEATTY, C. J.; THORNTON, J.

80 Cal. 343

WARD *v.* MATTHEWS. (No. 13,095.)

(*Supreme Court of California*. Sept. 2, 1889.)

TRUSTS—TAX-TITLES TO TRUST-ESTATE—JUDGMENT.

1. Although a tax-title to land acquired by one who holds the legal title to the land in trust to secure the payment of a debt is also held in trust, yet where the debtor was in possession, claiming ownership, when the tax assessment was made, and failed to pay the taxes, he can only demand a conveyance of the trustee's interest on payment of the amount of the debt, taxes, costs, and interest.

2. Where a decree orders a conveyance to the debtor within a specified time, upon payment or tender of the specified amount, and the trustee appeals therefrom, a refusal by the latter to accept a tender made by the former within the time specified does not entitle the debtor to a commissioner's deed conveying a good title, as the decree is not final until the appeal is decided.

Commissioners' decision. In bank. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

Gray & Sexton, for appellant. *H. V. Reardan*, for respondent.

BELCHER, C. C. The plaintiff brought an action of ejectment to recover possession of 320 acres of land. The case was tried upon the issues raised by the answer, and on the 12th day of June, 1885, the trial court found and adjudged that the plaintiff held the title to the demanded premises in trust to secure the payment by defendant to him of the sum of $1,192.93. It further adjudged "that said defendant pay to said plaintiff the said sum of eleven hundred and ninety-two and 93-100 dollars within twenty days from the date of this decree;" "that if payment or tender of payment is not made within the time herein specified, then this decree shall be null and void and of no effect, and judgment shall be entered for plaintiff as prayed for in his complaint;" "that upon payment or tender of payment by said defendant to said plaintiff within the time herein provided, then at the time of such payment or tender of payment said plaintiff shall execute and deliver to said defendant a good and sufficient deed of the premises in the complaint herein described;" "that if said plaintiff shall refuse and neglect to execute and deliver such deed for the space of one day after such payment or tender of payment, then the clerk of the superior court, * * * or his successor in office, is hereby constituted and appointed the commissioner of this court, with full power to make, execute, deliver, and have recorded such deed." The plaintiff moved for a new trial of the case. The defendant, on the twentieth day after the decree was rendered, tendered to the plaintiff the amount of money named in the decree, and demanded a deed of the premises, but the plaintiff refused to accept the money or make the deed. The defendant did not deposit the money, and never applied to the commissioner appointed by the court to execute a deed. Subsequently the plaintiff moved the court to enter judgment in his favor, on the ground that defendant had failed to comply with the terms of the decree. The court denied the motion for new trial and the motion for judgment, and the plaintiff appealed from both orders. Judgment affirming the orders appealed from was entered in this court on the 30th day of June, 1887, (73 Cal. 13, 14 Pac. Rep. 604,) and thereafter, on the 8th day of July, 1887, plaintiff tendered to defendant a deed of the premises, duly executed, conveying all the right, title, and interest which vested in and belonged to plaintiff on and prior to the 12th day of June, 1885, and demanded payment of the amount of money named in the decree, but defendant refused to accept the deed or pay the money. The deed was then left by plaintiff in the office of the clerk of the court. On the 17th day of January, 1889, the plaintiff again moved the court below that judgment be entered in his favor, on the ground that the defendant had failed and refused to pay to plaintiff the money, or any part thereof, which he was adjudged to pay, or to comply in any respect with the terms of the decree. The motion was made upon affidavits showing all of the foregoing facts. The defendant opposed the motion by a counter-affidavit, made by himself, in which he stated, among other things, that on the first Monday in March, 1885, the legal title to the land in controversy stood in the name of plaintiff, and that it became and was plaintiff's duty to return the property to the county assessor as his, and thereafter to pay and discharge all taxes levied against it for that year; that plaintiff failed and neglected to return the property to the assessor, and it was assessed to defendant; that the taxes became delinquent, and the land was sold therefor in February, 1886; that at the sale the plaintiff became the purchaser, and, there being no redemption, he, in the month of February, 1887, demanded and received from the tax collector a deed of the premises; that on the 13th day of May, 1887, plaintiff commenced another action, based upon his tax deed, to eject the defendant from the land, which action is still pending; that, in consequence of the said deed and action, defendant's right to the land became clouded and uncertain, and it was impossible for him to raise any money upon the land; that defendant is a poor man, and has no other means of complying with the decree, except by raising money on the land; that defendant is now, and has at all times been, ready to pay to plaintiff the money found to be due him, but the plaintiff has at all times refused to execute a deed conveying all his title to the land. Upon this showing the court denied the plaintiff's motion, and the appeal is from that order.

The motion seems to have been resisted and denied on the ground that the deed tendered by plaintiff did not include the interest acquired by him under the tax sale and deed. And in support of the ruling it is argued that, as plaintiff held the title in trust for defendant when the assessment was made and when the property was sold and the tax-deed executed, he took the tax-title also in trust, and was not entitled to the relief demanded until he offered to convey all the title which he then held. The argument appears to be sound, but, conceding it to be so, still, as the defendant was in possession of the property, claiming ownership, when the assessment was made, it was properly assessed to him, and it was his duty to pay the taxes when they became due. Reily v. Lancaster, 39 Cal. 357; Christy v. Fisher, 58 Cal. 259. He failed to perform this duty, and the plaintiff was, therefore, justified in buying in the property for his own protection, and has now a just claim for the repayment of the taxes and costs, with legal interest thereon. Plaintiff has also a just claim—and this is not questioned—for the payment of the amount found due him by the decree. This money he might and perhaps should have taken when it was tendered to him at the end of the 20 days, but he had a right to question the correctness of the decision by a motion for new trial and appeal, and the judgment was not final until the appeal was decided. And in this connection it was said on the former appeal, (73 Cal. 17, 14 Pac. Rep. 608:) "It will still be incumbent on the defendant to tender to and deposit the money with the commissioner named in the decree before he can obtain a deed to the land, which will divest the plaintiff's title thereto."

Evidently the defendant ought not to be permitted to retain both the land and money, and the plaintiff should have some means of securing his rights. In our opinion, the plaintiff ought to be permitted to renew his motion in the court below, and if he shall do so, and shall tender to defendant a good and sufficient deed, conveying all the interest he has in the property, upon payment by defendant of the sum directed by the decree to be paid by him, and also the amount paid by plaintiff for taxes and costs, with interest thereon, then, on failure of defendant to make such payment within a reasonable time, the relief asked for should be granted. The order here appealed from should be affirmed.

We concur: Gibson, C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion, the order appealed from is affirmed.

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80 Cal. 390

Carter v. Paige. (No. 12,637.)

(*Supreme Court of California.* Aug. 31, 1889.)

Pleading—Judgment.

In pleading a judgment it is unnecessary, after alleging the giving and entry of the judgment, to allege further that said judgment was in full force, and not appealed from. Thornton, J., dissenting.

In bank. On rehearing. For former report, see 20 Pac. Rep. 729.

D. S. Terry, (*Edward J. Pringle*, of counsel,) for appellant. *Stanton L. Carter*, for respondent.

Beatty, C. J. In this cause there were so many motions and proceedings to dismiss the appeal, amend the record, etc., preliminary to the hearing on the merits, and so many printed arguments were filed by counsel, that the court cannot be severely blamed for having overlooked one of the additional and supplemental briefs filed on the part of the appellant. When the case was taken up for decision, we considered the single point made by appellant in his points and authorities, and pronounced the opinion reported in 20 Pac. Rep. 729. Our attention being called to the fact that we had neglected to notice a point made in a supplemental brief filed by appellant under leave of the court, a rehearing was granted in order that we might consider that point.

The suit is for damages for the malicious levy of an attachment by the defendant upon lands of the plaintiff. The complaint shows that the attachment suit was upon a promissory note not alleged to have been secured by mortgage or otherwise, and shows, consequently, that defendant had an undoubted right to an attachment, if there was anything due on the note. But it is alleged that the note had been paid before suit brought, and that the malice of defendant consisted in suing and attaching when he knew that his debt had been paid. It is clear from all the allegations of the complaint that the question of malice or no malice in issuing the attachment depended entirely upon the further question whether the defendant had a right of action,—whether, in other words, his note had been paid. This being so, defendant contends in support of his appeal from the judgment entered against him by default that the amended complaint is not sufficient to support the judgment, because, as he claims, it does not show that a final judgment was given or entered against him in the attachment suit before this action was commenced. The allegations of the complaint on this point are as follows: "That thereafter, to-wit, on the 8th day of December, 1880, said cause came on for trial in the said superior court of the county of

Stanislaus, state of California, in which court said action was then duly pending, and upon said trial judgment was duly given, made, and entered in favor of this plaintiff, (the defendant therein,) and against this defendant, (the plaintiff therein,) which said judgment was duly entered and recorded in the judgment book of said court, in vol. 1, at pages 831 and 832, and no appeal was taken from said judgment within five days after the entry thereof, and no bond or undertaking was given to continue said attachment in force, and because and by reason thereof said attachment became and was dissolved and discharged by said judgment." It will be seen that here is an allegation that judgment was given and entered for the defendant in the attachment suit, (plaintiff here,) and that no appeal was taken therefrom within five days. Evidently the theory upon which the complaint was drawn was that a right of action for a malicious attachment accrued at least as soon as the attachment was dissolved, irrespective of the finality of the judgment, and that the attachment was finally dissolved by judgment for the defendant, unappealed from within five days. Code Civil Proc. § 946. We doubt the correctness of this theory, but we deem it unnecessary to decide upon it. We may concede for the purposes of our decision that the appellant is right in his contention that no cause of action could have accrued against him on account of the attachment in his suit against respondent until final judgment was given and entered against him therein, for we must hold that such final judgment is sufficiently alleged. It was not necessary, after alleging the giving and entry of the judgment, to allege further that it was in full force and effect, and not vacated, set aside, reversed, or appealed from. Such allegations are not uncommon where a judgment is pleaded, but they are not necessary. If the judgment has been appealed from, or set aside, or reversed, or is for any reason no longer in force, the allegation of that fact comes more properly from the party against whom it is pleaded. Campbell v. Cross, 39 Ind. 156, 157, and authorities there cited. The allegation that the judgment was not appealed from within five days cannot be held an admission that it had been appealed from after five days. It was clearly intended for no other purpose than to show a dissolution of the attachment on the theory above stated, and, with respect to the material fact of the finality of the judgment, must be treated as surplusage. We think the amended complaint was sufficient to sustain the judgment, and the judgment is affirmed.

We concur: McFarland, J.; Sharpstein, J.; Works, J.

I dissent: Thornton, J.

(80 Cal. 375)

Younglove v. Steinman *et al.* (No. 13,068.)

(*Supreme Court of California.* Aug. 31, 1889.)

Injunction — Notice — Corporations — Assessments.

1. A notice of a motion to dissolve an injunction, given at the statutory time, is sufficient, though the court in which the motion is to be heard has no jurisdiction of the case at that time, where it has jurisdiction when the motion is made.

2. Though the notice states that the motion will be "based upon the papers, pleadings, and records in said cause, and upon affidavits hereafter to be filed," the court may hear evidence outside of that mentioned in the notice, if necessary.

3. Under Civil Code Cal. § 331, providing that the directors of a corporation may levy assessments "for the purpose of paying expenses, conducting business, or paying debts," an assessment to pay for the repair of an engine and other machinery necessary in conducting the corporation's business is valid.

4. A finding that a meeting of directors of a corporation was "duly and regularly convened," and that an assessment made thereat was "lawfully and rightfully" levied, includes a finding that the necessary notice was given.

In bank. Appeal from superior court, Sacramento county; John W. Armstrong, Judge.

L. N. Goldsby, for appellant. *S. C. Denson* and *C. H. Oatman*, for respondents.

Works, J. This is a suit to enjoin the enforcement of an assessment of the stock of a corporation on the grounds that the meeting of the board of directors, at which the assessment was ordered, was not legally called, and that the assessment was not made for any of the purposes allowed by law. There was a temporary injunction. The suit was commenced in the county of Santa Cruz, and subsequently transferred to the county of Sacramento. On the 13th of August, 1888, that being the day the order transferring the cause was made, the defendants gave notice that they would, on the 23d of the same month, move the superior court of Sacramento county to dissolve the injunction. At the time and place named in said notice, the attorney for the plaintiff appeared and objected to the hearing of the motion, on the ground that at the time the notice was served upon him the papers in the case had not been filed in that court. His objection was overruled, the motion heard, and the injunction dissolved. A trial was subsequently had which resulted in findings and a judgment in favor of the defendants. A motion by the plaintiff for a new trial was denied, and this appeal is from the order dissolving the temporary injunction, the final judgment, and the order denying a new trial.

The appellant contends that the notice of the motion to dissolve was not given in time, and that it was not effective, as a notice, for the reason that the court in which the motion was to be heard had no jurisdiction of the case at the time it was given. There is no force in either of these points. The notice was given for 10 days, which was sufficient as to the time. Code Civil Proc. § 1005. The mere giving of the notice was not a proceeding in court, and it was not necessary to its validity that the superior court of Sacramento county should have had jurisdiction of the case at that time. It was enough that it had jurisdiction when the motion was made.

The further point is made that the notice stated that the motion would be "based upon the papers, pleadings, and records in said cause, and upon affidavits hereafter to be filed," and that the court below erroneously admitted in evidence an answer filed by the defendants after the notice was given. There was no error in this ruling. The notice did not confine the defendants to the use, as evidence, of such pleadings, only, as were on file at the time it was given; but if it had, the court might in its discretion very properly hear evidence outside of that mentioned in the notice, if necessary to aid it in arriving at a proper determination of the question. There was no error in the order dissolving the injunction.

It is contended in support of the appeal from the judgment and order denying a new trial that the evidence shows that the meeting of the board of directors, at which the assessment was levied, was not a legal meeting, for the reason that no notice of the meeting was given. But the court below found that the meeting was "duly and regularly convened," and that the assessment was "lawfully and rightfully" levied. This included a finding that the necessary notice was given, and the finding is supported by sufficient evidence. The secretary testifies that written notices were sent to the directors of all of the meetings of the board, whether regular or special, and the plaintiff, who was himself one of the directors, admitted having received notices of some of the meetings, and declined to say that this meeting was not one of them. The minutes of the meeting proved the other facts necessary to show that the same was regularly and legally held, and that the levy of the assessment was properly made.

It is further contended that the levy of the assessment was not made for the purpose of "paying expenses, conducting business, or paying debts," as authorized by section 331 of the Civil Code. The evidence shows that the defendant corporation was an electric light company, and that the money to be raised by the assessment was necessary for the repair of its engine and other machinery, and that without such repairs the company would be unable to answer the demands upon it for the supply of electric lights. This brought the case clearly within the provisions of the statute. The judgment and orders appealed from are affirmed.

We concur: SHARPSTEIN, J.; PATERSON, J.; McFARLAND, J.; FOX, J.; THORNTON, J.

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80 Cal. 285

PEOPLE v. McDONNELL. (No. 20,509.)

(*Supreme Court of California.* Sept. 2, 1889.)

COUNTERFEITING—FOREIGN BANK-NOTES—INFORMATION—CONFLICT OF LAWS.

1. Pen. Code Cal. § 480, providing that "every person who makes, or knowingly has in his possession," anything employed "in counterfeiting bank-notes or bills, is punishable," applies to foreign as well as domestic bank-notes.

2. Under Pen. Code Cal. § 959, subd. 6, § 960, providing that an information is sufficient if the offense charged is set forth in such clear and distinct manner as to enable a person of common understanding to know what it is, and defendant is not prejudiced in any substantial right by the defect, an information for having possession of tools for counterfeiting notes of the "Bank of England" need not allege the incorporation of such bank.

3. Proof that the bank is known and acting as a corporate company, and as such issues bills which come within the statute, identifies the notes set out sufficiently to show that they were "bank-notes."

4. The state courts have jurisdiction of such offense, under the statute which is an exercise of the general police power of the state, though it is also punishable under a federal statute.

5. A charge in substance that to constitute the crime a mere possession and intention to use, though without ability to use, is sufficient, is proper.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

Information against McDonnell for having counterfeiting tools in his possession. Pen. Code Cal. § 959, subd. 6, provides that the information is sufficient if it shows "that the act or omission charged as the offense is clearly and distinctly set forth, in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." Section 960. "No indictment or information is insufficient, nor can the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form which does not tend to the prejudice of a substantial right of the defendant upon its merits." Defendant was convicted, and appeals.

C. B. Darwin, (*Crittenden Thornton* and *F. H. Merzbach*, of counsel,) for appellant. *George A. Johnson*, Atty. Gen., and *Davis Louderback*, for the People.

FOOTE, C. The defendant was charged by information, under section 480 of the Penal Code, with having knowingly, willfully, unlawfully, and feloniously in his possession a certain stamp, block, and plate, made use of in counterfeiting bank-notes, designed and engraved for the purpose of striking and printing counterfeit bank-notes, in the likeness and similitude of the genuine "five pound" notes of the "Bank of England;" such possession being had by him for the purpose of knowingly and feloniously counterfeiting such "bank-notes." His demurrer to the information on various grounds was overruled. He then pleaded not guilty, was tried, and convicted as charged. A motion for a new trial was made and refused, as also a motion in arrest of judgment. From the two orders made upon the motions mentioned, and the judgment of conviction, the defendant has appealed.

The jurisdiction of the trial court is assailed on the ground that the information did not present any offense against the laws of this state, in that the note set out, and which the plate was said to be intended to print, was not sufficiently averred to be a "bank-note;" that if it was a "bank-note" it was a foreign one, and not within the "bank-note" protected by the Penal Code of this state, in section 480 thereof; that if the note set out in the information, to quote the language of his brief, "did fall within the bank-note named in our state Code, yet the state had no jurisdiction herein, because the congress of the nation, by virtue of its international power, and in discharge of its international duty, had enacted a law for the protection of the very same bank-note, and denounced the very same plate, in the same terms, and with the same intent, and had therein submitted the jurisdiction to its own tribunals, and had made no reservation in favor of state courts; that, therefore, under the laws regulating judicial cognizance, the state court had no jurisdiction of the offense, even though she had denounced the same transaction in her Code." Section 480 of the Penal Code, under discussion, is as follows: "Every person who makes, or knowingly has in his possession any die, plate, or any apparatus, paper, metal, machine, or other thing whatever, made use of in counterfeiting coin current in this state, or in counterfeiting gold dust, gold or silver bars, bullion, lumps, pieces, or nuggets, or in counterfeiting bank notes or bills, is punishable by imprisonment in the state prison not less than one nor more than fourteen years; and all such dies, plates, apparatus, paper, metal, or machine, intended for the purpose aforesaid, must be destroyed." The suggestion is made that the legislature, when it used the words "bank notes or bills," did not mean to include any foreign bank notes or bills; and in support of this it is ingeniously and strenuously argued that such intention could not have existed on the part of the law-making body, or else it would have used more apt and certain language upon the subject, such as had been formerly employed in prior laws, and in the New York Code, upon which our Penal Code is modeled. However plausible the argument may be, we cannot suppose that the legislature intended by the comprehensive words "bank notes and bills" to mean less than all bank notes and bills, both foreign and domestic, current in this state or otherwise. To say to the contrary would be to declare, without proper foundation, that the legislative assembly of our state had deliberately made California an asylum for all those evil-disposed persons who might desire to injure the currency of foreign nations, or to defraud our own citizens by passing off upon or selling to them counterfeit bills of such nations. Without some more direct and positive declaration of legislative intent to that end than has been shown in the argument of appellant, we should be very much averse to the belief which he so much desires us to entertain in his behalf. Nor was it necessary that the information should have alleged the incorporation of the Bank of England. The fact of incorporation was not an element of the crime. People v. Ah Sam, 41 Cal. 652; People v. Henry, 19 Pac. Rep. 832; Pen. Code, § 959, subd. 6, § 960. "So, too, as a matter of identity, we think the description is satisfied by proof that the company is known as a corporate company, and is acting as such, and as such issues bills which come within the statute." People v. Ah Sam, supra.

A painstaking and lengthy argument is made that the federal courts have exclusive jurisdiction of this crime, since the enactment of section 711 of the Revised Statutes of the United States, which reads as follows: "The jurisdiction vested in the courts of the United States in the cases and proceedings hereinafter mentioned shall be exclusive of the courts of the several states—*First*, of all crimes and offenses cognizable under the authority of the United States." That provision of law was in existence when the supreme court of the United States, through Mr. Chief Justice WAITE, delivered its opinion in the case of U. S. v. Arjona, 120 U. S. 479-488, 7 Sup. Ct. Rep. 628. This was a case where the defendant had been indicted for the violation of sections 3 and 6 of the act of congress of May 16, 1884, c. 52, (23 St. 22,) "to prevent and punish the counterfeiting within the United States of notes, bonds, and other securities of foreign governments." The statute, among others, makes the following things criminal: Sec. 6. Having in possession "any plate, or any part thereof, from which has been printed or may be printed any counterfeit note, bond, obligation, or other security, in whole or in part, of any foreign government, bank, or corporation, except by lawful authority," etc. After holding that the law in question was constitutional, and that the offense is one which the United States government may denounce in the performance of a duty towards other nations, that tribunal observed: "A right secured by the law of nations to a nation or its people is one the United States, as the representative of this nation, are bound to protect. Consequently, a law which is necessary and proper to afford this protection is one that congress may enact, because it is one that is needed to carry into execution a power conferred by the constitution on the government of the United States exclusively. There is no authority in the United States to require the passage and enforcement of such a law by the states. Therefore the United States must have the power to pass it and enforce it themselves, or be unable to perform a duty which they may owe to another nation, and which the law of nations has imposed on them as part of their international obligations. This, however, does not prevent a state from providing for the punishment of the same thing; for here, as in the case of counterfeiting the coin of the United States, the act may be an offense against the authority of a state as well as that of the United States." Although the point did not arise, and was not made in that case, that the federal jurisdiction was supreme and exclusive, and a state could not provide for the punishment of the same thing as did the United States, yet the language of that court is directly decisive of and against the objection made here; and we should respect it as the opinion of the tribunal of last resort as to such matters, which must be the final and supreme arbiter as to the jurisdiction of federal courts. The language of the chief justice was evidently used for a purpose, to the end that a principle relative to the police powers of a state, which had been settled by the supreme court of the United States, over which he then most ably presided, in prior adjudications, should be still more firmly established,—that is, that for violation of the federal laws the federal courts alone have jurisdiction; but that such acts, although denounced by federal laws, and punishable under such laws in federal courts alone, may nevertheless be punished by state laws in state courts, where the punishment of such acts pertain to the police power of a state; that for such an act as here alleged to have been committed the federal law may punish, for the protection of foreign nations and their people, and the state law for the act as one which may result in a fraud upon its citizens, by passing upon them counterfeit bills of a foreign bank or corporation.

In Prigg v. Pennsylvania, 16 Pet. 625, in asserting the exclusive power of congress over the subject of fugitive slaves, Justice Story observes: "To guard, however, against any possible misconstruction of our views, it is proper to state, that we are by no means to be understood in any manner whatsoever to doubt or to interfere with the police power belonging to the states in virtue of their general sovereignty. That police power extends over all subjects within the territorial limits of the states, and has never been conceded to the United States."

In Eells v. People, 4 Scam. 512, Eells had been indicted under a statute of Illinois making it an offense to harbor and secrete a negro slave. The court said, by Mr. Justice Shields: "This (the state law) prescribes a rule of conduct for our own citizens. If the state can do this, and I hardly think the power questionable, it can punish those who violate the rule. If a state has power to regulate its own affairs, it has the power to define offenses and punish offenders." "It is also said that this law may punish a man twice for the same offense. There is no force whatsoever in this objection. The offenses are separate and distinct,—violations of distinct and different laws,—and the punishment inflicted by different sovereignties." Id. 514. This case was afterwards affirmed in Moore v. People, 14 How. 19, by the supreme court of the United States, where it was said: "But, admitting that the plaintiff in error may be liable to an action under the act of congress for the same acts of harboring and preventing the owner from retaking his slave, it does not follow that he would be twice punished for the same offense. * * * The same act may be an offense or transgression of the laws of both," (state and United States,) for which, as afterwards said, the offender may be justly punishable. It was there, in addition, said: "The power to make municipal regulations for the restraint and punishment of crime, for the preservation of the health and morals of her citizens and of the public peace, has never been surrendered by the states or restrained by the constitution of the United States." Page 18.

In the case of U. S. v. Marigold, 9 How. 569, Mr. Justice Daniel, speaking for the court, says: "This court, in the case of Fox v. Ohio, 5 How. 432, have taken care to point out that the same act might, as to its character and tendencies, and the consequences it involved, constitute an offense against both the state and federal governments, and might draw to its commission the penalties denounced by either, as appropriate to its character in reference to each."

In the case of U. S. v. Cruikshank, 92 U. S. 542, Mr. Chief Justice Waite, in discussing the subject of citizenship of the state and of the United States, disposes of the question in a statement, as we think, clear to demonstration: "The people of the United States resident within any state are subject to two governments, one state and the other national; but there need be no conflict between the two. The powers which one possesses the other does not. They are established for different purposes, and have separate jurisdictions. Together they make one whole, and furnish the people of the United States with a complete government, ample for the protection of all their rights, at home and abroad. True, it may sometimes happen that a person is amenable to both jurisdictions for one and the same act. Thus, if a marshal of the United States is unlawfully resisted while executing the process of the courts within a state, and the resistance is accompanied by an assault on the officer, the sovereignty of the United States is violated by the resistance, and that of the state by the breach of peace, in the assault. So, too, if one passes counterfeited coin of the United States within a state, it may be an offense against the United States and the state; the United States, because it discredits the coin, and the state, because of the fraud upon him to whom it is passed. This does not, however, necessarily imply that the two governments possess powers in common, or bring them into conflict with each other. It is the natural consequence of a citizenship which owes allegiance to two sovereignties, and claims protection from both. The citizen cannot complain, because he has voluntarily submitted himself to such a form of government. He owes allegiance to the two departments, so to speak, and within their respective spheres must pay the penalties which each exacts for disobedience to its laws. In return he can demand protection from each within its own jurisdiction."

The defendant here is not sought to be punished under any federal statute, as such. He has been tried and convicted in a state court, under a state law, having for its object the prevention of the passing to her citizens fraudulently, and to their damage, of counterfeit bank-notes of a foreign bank. The state is not inhibited from passing laws to punish an act which may result in fraudulent imposition upon its citizens, because the federal government has the exclusive right to punish for an infraction of its laws made in consequence of a duty it owes under the law of nations. The act is the same for which the person is punished, but the laws are different and for a different purpose. The state could not punish for an infraction of the federal statute, but can do so as to its own statutes, when the object is to exercise the police power which appertains to it under the constitution of the United States. This is not an attempted nullification of a federal statute, or an effort to enforce it in a state court; it is a law to prevent frauds upon the citizens of the state, and has nothing to do with the purpose or enforcement of the federal law.

It is also pressed upon our consideration that the charge of the court in reference to what constituted possession of the plate or block, in order to bring the defendant's act within the denunciation of the statute, was erroneous. It is claimed that the decision of the appellate court in the Case of Ah Sam, supra, which was given to the jury by the court as part of its charge upon the question of possession, was not applicable to the case in hand; that it went only to the point of declaring that an intention to use such a block was enough without a potential intention, and that it was not a decision on the meaning of the word "possession," as used in section 480 of the Penal Code. There is no clearer or better way that occurs to us by which this argument may be successfully refuted than to quote here the language of Justice TEMPLE in that case, (41 Cal. 654,) in which the facts relating to the guilty possession were in all essential features similar to those in the case at bar, all italicized words being our own: "There is but one other question in this case which we think it worth while to notice. That arises upon this state of facts, as appears from the bill of exceptions: The blanks, the possession of which is charged in the indictment, were printed by one Baker, who, before printing them, revealed the matter to the city police, and had an arrangement with them by which the police should be in ambush, ready to seize the defendants and the blanks immediately after they had been handed to them by Baker. Baker had from the police assurances that the blanks would be paid for, and without such assurances he would not have printed them. The ambush was laid according to the arrangement, and upon a signal being given by Baker, according to an understanding between him and the police, the latter appeared and seized Ah Sam and Ah Tuck, and took from them the impressions soon after they had come into their hands. *It is claimed that the defendants never had such a possession of the blanks as is contemplated by the statute;* that they were printed for the police, under a contract with them, and were really delivered to them according to contract, and were the property of the police; that the mere handing of them to the defendants, to be immediately taken away by the real owners, was no more than laying them upon a counter for them to take; they were given to the defendants at the request of the police, and remained, during all the time they were in defendants' hands, completely under the control of the police; *that the defendants did not have them as their property*, and, during the time they held them, could not have intended to pass them; *that they must have had the ability to commit the offense*, as well as the intention, *and that ability they never had any more than they would have when immured in a dungeon;* that the intention meant by the statute is potential, and not a mere desire which there are no means to effectuate, and which does not, and cannot, result in any act; that *Baker and the police never parted with the possession of the blanks, but determined not to do so, and all the time supervised the handling of them by the defendants.* The police laws cannot be tested by any such metaphysical niceties as these. The problem proposed is similar, if not the same, as that which has baffled the best intellects of the world of all ages, in attempting to reconcile the fore-knowledge and providence of divinity with the freedom and the moral responsibility of man. The law adopts the theory of responsibility of man, notwithstanding the controlling supervision of Providence. The defendants were not under duress, nor compelled by the police, *prior to the arrest, to do anything whatever.* They contracted with Baker for the blanks as freely and as completely as though the authorities had not permitted him to do so. They had absolute control of their own actions when *they received the blanks*, and up to the very time they were arrested. The knowledge or intention of the police did not interfere with their freedom prior to that time. They had *the ability to commit the crime as fully as they would have had if the police had arrested them at the same time*, without any understanding with Baker, and upon mere suspicion. * * * To constitute the crime, the law only requires the guilty possession. * * * Although Ah Sam was a mere *messenger*, he was properly convicted if he knew the purposes for which the blanks were designed."

We conclude that the possession of the defendant, under the facts of this case, was a guilty possession, and the instructions of the court were in accordance with law. Perceiving no prejudicial error in the record, we advise that the judgment and orders be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and orders are affirmed.

(80 Cal. 330)

SYMONS v. BUNNELL *et al.* (No. 12,558.)

(*Supreme Court of California.* Aug. 31, 1889.)

NEW TRIAL—SURPRISE.

Code Civil Proc. Cal. § 473, provides that a party may be relieved from a "judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect." *Held*, that where it appears that there was a misunderstanding between the attorneys for the respective parties regarding the day set for trial, which caused one of the attorneys to omit making preparations for trial on that day, a new trial should be granted. MCFARLAND, J., dissenting.

In bank. On rehearing. For former report, see 20 Pac. Rep. 859.

Ejectment by William Symons against E. F. Bunnell and Joseph Clark. Judgment for plaintiff. Defendants' motion for new trial denied, and they appeal. Section 473, Code Civil Proc. Cal., cited in the opinion, provides, *inter alia*, that a party may be relieved from a "judgment taken against him through his mistake, inadvertence, surprise, or excusable neglect."

I. M. Kalloch and *Warren Olney*, (*M. G. Cobb* and *Theodore Bradley*, of counsel,) for appellants. *F. D. & G. W. Nicol*, (*P. W. Bennett*, of counsel,) for respondent.

THORNTON, J. Action of ejectment to recover possession of two mining claims, situate in the county of Tuolumne. Judgment for plaintiff. Motion for new trial by defendants, which was denied. Appeal by defendants from the judgment and order denying a new trial. The affidavits, used on the hearing of the motion for a new trial, are identified by the certificate of the judge as having been so used. The notice of intention to move for a new trial was served and filed in time. There was no notice of the decision of the court given defendants. As they had a right to wait until such notice was given before commencing proceedings to procure a new trial, the notice of intention given before such motion was in time. We think it evident that there was a misunderstanding between Gardiner, the attorney for defendants, and F. D. Nicol, one of the attorneys for plaintiff, in regard to the day when the cause would be tried, which caused Gardiner to omit making preparations for the trial of this cause on the 15th of July, 1887. That misunderstanding arose in this way: On the 1st day of July, 1887, the cause was set down to be heard on the 15th of the same month. On the same day Gardiner wrote from Tuolumne county to defendant Clark, who resided in San Francisco, informing him that the cause was set for trial on the day above named. On the 4th of July following, Clark, in the city of San Francisco, wrote Gardiner in regard to the case as follows: "In respect to Symons' case, Mr. Nicol and myself agreed that it should not be taken up for trial until the last week in July or first week in August. He said that he could not get ready to try it until then. I saw him here last week." The Nicol mentioned in the letter was and is one of the attorneys of plaintiff herein. The above letter from Clark was received by Gardiner in Tuolumne county on the 6th of July, 1887. Soon after Gardiner received this letter from Clark he met Mr. Nicol and said to him: "I have just received a letter from Clark,"—to which Nicol replied: "Yes; I have just seen him in San Francisco; that is all right." From this Gardiner concluded, and was justified in concluding, that Nicol had seen Clark, and that the agreement mentioned in Clark's letter that the trial should take place during the last week in July or the first week in August had been made between them. Clark deposes that such an agreement had been made, between him and Nicol, while Nicol denies it; but Nicol does not deny that the conversation above detailed did occur between him and Gardiner. Nothing stated by Nicol in his affidavit is inconsistent with or contradictory of what Gardiner deposed as regards this conversation. We are convinced from the foregoing that Gardiner was misled by the conversation had with Nicol into the belief that the trial would not take place until the last week in July, or first week in August, and therefore did not make preparation to try the cause. It seems that his co-defendant had left to Clark the preparation of the cause for trial, and, as Clark heard nothing to the contrary of what he had written to Gardiner in regard to his agreement with Nicol, he supposed that the agreement would be carried out, and therefore he (Clark) took no steps to get ready for trial on the 15th of July, 1887. When the cause was called for trial on the 15th of July, Gardiner asked for a continuance, and subsequently moved to set aside the judgment, and for a new trial; all of which were refused. The above-stated facts came out on the motion for a new trial. The defendants, on the motion to vacate the judgment and for a new trial, presented the affidavit of merits required by law.

The judgment in this case was procured against defendants under circumstances which entitled them to be relieved from it. The evidence shows that the neglect of defendants, on account of which the judgment lien went against them, was excusable. The court below should therefore have granted them a new trial, and it erred in refusing it. Code Civil Proc. § 473. The judgment and order are therefore reversed, and the cause remanded, that it may be again tried. So ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; WORKS, J.; FOX, J.; PATERSON, J.

I dissent: MCFARLAND, J.

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80 Cal. 320

PERKINS v. BROCK *et al.* (No. 12,625.)

(*Supreme Court of California.* Sept. 3, 1889.)

ASSIGNMENT FOR BENEFIT OF CREDITORS—ACTIONS BY ASSIGNEE.

1. In an action by the assignee of an insolvent partnership to recover property alleged to have been transferred in fraud of creditors, allegations in the same count—that the firm transferred the property, and that it was made by one partner without the knowledge or consent of the other—are inconsistent under Civil Code Cal. § 2430, which provides that one partner has no authority as such to assign partnership property.

2. An answer which affirmatively avers the transfer by the firm, without denying the allegation of want of authority, is inconsistent with such allegation, and raises an issue.

Commissioners' decision. In bank. Appeal from superior court, Butte county; LEON D. FREER, Judge.

Rearden & Freer, for appellant. *Gray & Sexton*, for respondents.

HAYNE, C. Action by the assignee of an insolvent partnership to recover certain personal property alleged to have been transferred in fraud of creditors. Judgment passed for the defendants, and the plaintiff appeals. The findings negative the charges of fraud; and as the evidence is not brought up, the findings must be taken to be true.

The main contention of the appellant is that the transfer was void for want of authority in the person who made it. The only difficulty arises from inattention to a few simple rules of pleading. The plaintiff began by placing inconsistent allegations in the same count of his complaint. He alleged, first, that the firm transferred the property; and then that the transfer was made by one partner without the consent or knowledge of the other, and was of the whole property of the firm. These allegations are inconsistent, because one partner has no power or authority to make such a transfer, except in certain contingencies, which do not arise here. Civil Code, § 2430. The first allegation cannot, in favor of the plaintiff, be construed as a mere conclusion; because the rule is that pleadings are to be construed most strongly against the pleader; nor, for the same reason, will the complaint be construed as alleging that the transfer was in the name of the firm, and purported to be by its authority, but was void for want of authority; though, even if this latter construction were adopted, it would not change the conclusion which we have reached. The two allegations are inconsistent. If the person making the transfer had no authority to bind the firm, it follows that the firm did not make the transfer.

The defendants did not deny the allegation showing a want of authority, but averred affirmatively that the firm transferred the property; and it is now contended for the plaintiff that the pleadings admitted the want of authority to transfer, and that the finding to the contrary is against such admission, and must, therefore, be disregarded. It seems plain that if a complaint first alleges a fact, and then, in the same count, alleges the contrary, (the latter allegation not being of mere evidence,) and the defendant does not choose to demur specially for uncertainty, (see Blasingame v. Insurance Co., 75 Cal. 636, 17 Pac. Rep. 925,) it is sufficient to deny the statement which he wishes to controvert, leaving the other unnoticed. In such cases the denial of one statement would be construed as an affirmation of the other. If, therefore, the defendants had denied the allegation showing a want of authority, there would have been no difficulty. They did not deny it, but averred affirmatively the truth of the inconsistent allegation; and the question is whether this raised an issue. It is not essential that a traverse should be expressed in negative words. An averment in the answer of the contrary of what is alleged in the complaint, has been held to be equivalent to a denial. Miller v. Brigham, 50 Cal. 615; McDonald v. Davidson, 30 Cal. 174; Thompson v. Lynch, 29 Cal. 189. If, therefore, the averment had been of the direct contrary of the allegation, showing the want of power, the averment would have raised an issue. It was not of the direct contrary, but was inconsistent with the truth of said allegation. This mode of pleading is not to be commended, because it savors of argument; but, under the circumstances, we think that it may be held to raise an issue. The alternative is to say that the answer admits that the transfer was invalid,—or, in other words, that it admits that the firm did not transfer the property, when it expressly averred that the firm did transfer it. And, in view of the fact that the first fault was committed by the plaintiff, and that, so far as appears, he took no proceeding in the trial court to test the sufficiency of the answer, this seems to be too great a degree of strictness. The finding negatived the allegation showing the invalidity of the transfer; and we think that this finding must be held to be within the issues. We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons expressed in the foregoing opinion the judgment is affirmed.

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80 Cal. 257

MILLER *et al.* v. LUCO. (No. 12,921.)

(*Supreme Court of California.* Aug. 31, 1889.)

QUIETING TITLE—PLEADING—EVIDENCE—NONSUIT—FINDINGS.

1. It is not ground for demurrer that plaintiff's legal capacity to sue does not appear in the complaint.

2. In a complaint alleging a certain person's death, and that he left a will which was duly probated in a court of competent jurisdiction, an allegation of the due execution of such will is unnecessary.

3. In an action to quiet title, it is sufficient to describe the land as a certain lot, part of a larger tract containing a certain number of acres, where the tract has been partitioned by commissioners, and the said lot described in their report and awarded to the estate of plaintiffs' testator.

4. Where defendant relies upon title in himself, his cross-complaint may be stricken out.

5. A motion for nonsuit on the ground that "plaintiffs had failed to prove a sufficient case," is properly denied as not stating the grounds relied on sufficiently.

6. It appeared that defendant conveyed all his interest in a certain tract of land to plaintiffs' decedent; that thereafter the land in suit was set apart to plaintiffs' decedent in a suit for partition brought by defendant; that decedent left a will, whereby his whole estate was to be divided between his two sisters; that one of the sisters died after the testator; that plaintiffs are the special administrator, the surviving sister and her husband, and the children of the deceased sister, and the husband of one of them; and that the will was duly probated in another state, and the special administrator appointed in California. *Held*, that a judgment for plaintiffs was warranted, and it was unnecessary for plaintiffs to prove that the deceased sister's children succeeded to her interest, or that defendant held adversely, or that plaintiffs were in possession.

7. The facts that the land was sold for taxes, and that defendant obtained a tax-deed therefor after the trial and before judgment, do not constitute newly-discovered evidence warranting a new trial.

8. Under Code Civil Proc. Cal. § 385, providing that in case of transfer of interest an action may be continued in the name of the original party, a conveyance by plaintiffs *pendente lite* of the land in suit is no ground for new trial, though not known to defendants until after the trial.

9. In such action, a sheriff's deed, reciting a judgment and execution against the administrator of plaintiffs' decedent, and the sale of his interest in the land, is inadmissible.

10. Findings of probative facts are sufficient, where the material, ultimate facts result necessarily therefrom.

Commissioners' decision. In bank. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Action by John H. Miller, special administrator of the estate of Thomas T. Bouldin, jointly with the heirs and legatees of said decedent, against Juan M. Luco, to quiet title to lands. Judgment for plaintiffs, and defendant appeals.

H. S. Mulford, for appellant. *Hunsaker, Britt & Lamme* and *Patterson, Sprigg & Cassius Carter*, for respondents.

BELCHER, C. C. This is an action to quiet the plaintiffs' title to land in San Diego county. The land is alleged to belong to the estate of Thomas T. Bouldin, deceased, and the plaintiff Miller sues as special administrator of the estate, and the other plaintiffs as legatees and heirs of deceased. Defendant demurred to the complaint on the ground that Miller had not legal capacity to sue; that the alleged heirs were improperly joined with the special administrator; that the complaint did not state facts sufficient to constitute a cause of action; and that the complaint was uncertain and ambiguous in that it did not show the respective interests of the plaintiffs, nor sufficiently describe the property, their title to which they sought to have quieted. The demurrer was overruled, and the defendant answered. By his answer he denied, among other things, that Bouldin, at the time of his death, or at any time during his life, owned or possessed the land in controversy, or any part thereof, in fee-simple absolute, but admitted that he held an equitable title to the same. It was then, for further answer, and by way of cross-complaint, alleged that defendant was the owner, seised in fee, in the possession, and entitled to the possession, of all the lands described in the complaint, and that the plaintiffs had not, nor had any of them, any estate, right, title, or interest therein; and the prayer was that defendant's title to the lands be quieted as against the plaintiffs. On motion of plaintiffs the cross-complaint was stricken out. The case was then tried, and judgment given for plaintiffs, from which, and from an order denying him a new trial, defendant appealed.

1. It is claimed for appellant that the court erred in not sustaining his demurrer, but we think the ruling proper. The averment relating to the appointment of Miller as special administrator is as follows: "That by an order of the superior court in and for the city and county of San Francisco, state of California, (department 9,) John H. Miller, one of the plaintiffs herein, was duly appointed and constituted special administrator of the estate of Thomas T. Bouldin, deceased, on the 15th day of June, 1887, and by such order he was especially authorized and empowered to institute and defend all proceedings, actions at law, and suits in equity as shall be necessary and proper to recover possession of any of said estate claimed or held adversely by others; that on the 15th day of June, 1887, he took the oath and filed the bond required by law as special administrator of said estate, and his said letters to him issued as aforesaid are in full force and effect, and have not been revoked." It certainly does not appear from this averment, or on the face of the complaint, that Miller had not the legal capacity to sue. The most that can be said is that it does not sufficiently appear that he had such capacity. But "it is not a good ground for demurrer that it does not appear in the complaint that the plaintiff has the legal capacity to sue. That omission can only be taken advantage of by answer." District No. 110 v. Feck, 60 Cal. 405.

The objection that there was a misjoinder of parties plaintiff is met by section 1452 of the Code of Civil Procedure, which expressly provides that "the heirs or devisees may themselves, or jointly with the executor or administrator, maintain an action for the possession of the real estate, or for the purpose of quieting title to the same," etc.

It is alleged in the complaint that Bouldin died in the city of San Francisco in the month of April, 1873, and "that he left a will, which was duly admitted to probate in the county of Charlotte, in the state of Virginia, by the county court of said county, (the same having jurisdiction to probate said will,) in the month of May, 1873." The objection is that the complaint is insufficient "because it does not allege a due execution of the said will of the said Thomas T. Bouldin, deceased; also, because it does not allege that said will has been duly proved or admitted to probate in the county of Charlotte, in the state of Virginia; also that it did not allege that said court has jurisdiction to approve and admit said will to probate." We see nothing in this point. The complaint seems to us to state the facts referred to as fully as was necessary for the purposes of the case.

The objection that the complaint is ambiguous and uncertain because the land is not sufficiently described is also untenable. The complaint, as finally amended, describes the land as that part of the Mission rancho of San Diego, known as Lot 23, containing 516 acres. The rancho had been partitioned, and lot 23, as described on a map accompanying the report of the commissioners making the partition, was awarded to the estate of Bouldin. The description was, therefore, sufficient for identification of the property.

2. There was no error in striking out the defendant's cross-complaint. In an action to quiet title, where defendant relies upon title in himself, a cross-complaint is unnecessary. Wilson v. Madison, 55 Cal. 5; Association v. Wagner, 61 Cal. 349. Besides, as judgment was given for plaintiffs, the error, if any, was harmless.

3. At the conclusion of plaintiff's testimony the defendant moved for a nonsuit on the ground "that the plaintiffs had failed to prove a sufficient case." The motion was denied, and it is claimed that the ruling was erroneous. "It is settled law in this state that a party moving for a nonsuit should state in his motion precisely the grounds on which he relied, so that the attention of the court and the opposite counsel may be particularly directed to the supposed defects in the plaintiff's case." Coffey v. Greenfield, 62 Cal. 608. The motion made here did not comply with this rule, and it was therefore properly denied.

4. It is urged that the court erred in denying defendant's motion for new trial. The motion was based upon the alleged insufficiency of the evidence to justify the decision upon newly-discovered evidence and upon errors in law occurring at the trial. We think the evidence sufficient to justify the decision. It was proved by plaintiffs that on the 9th day of September, 1871, the defendant, Luco, executed to Bouldin a quitclaim deed, by which he conveyed to the party of the second part "all the right, title, and interest of the party of the first part in and to the undivided interest of five hundred (500) acres of that certain tract of land situate in the county of San Diego, state of California, and known as 'the lands of the ex-Mission of San Diego,' granted by the Mexican government to Santiago Arguello, and finally confirmed by the courts of the United States to the grantee; the said undivided interest hereby conveyed being a portion of the interest in said ex-Mission lands derived by said party of the first part from Isaac Hartman, by deed dated the 23d day of March, A. D. 1869, and by said Hartman derived from Augustin Olvera by an instrument in writing dated the 5th of February, A. D. 1869, and theretofore conveyed to said Olvera by the widow and heirs of said Santiago Arguello, which said deed, instrument, and conveyance are of record in the county recorder's office of San Diego county." And it was proved by defendant

that an action was commenced in his name, as plaintiff, for the partition of the Mission rancho, and that on the 19th day of April, 1886, final judgment was rendered in the action, by which there was awarded and set apart to the estate of Bouldin, in severalty, a portion of the rancho, described by metes and bounds, containing 516 acres, and designated as lot 23. It was also proved by plaintiffs that Bouldin died in April, 1873, leaving a will, which was executed in March, 1849, and by which he provided that "the dividends and interests" arising from his estate should be collected by his executors and paid to his father annually during his natural life, and that after his father's death the whole of his estate should be equally divided between his two sisters, Joanna T. Spencer and Alice S. Bouldin; that the father died in 1854, and the sister Alice in 1885; that the plaintiffs other than Miller, the special administrator, were the sister Joanna and her husband, and the children of the sister Alice, and the husband of one of them; and that the will was admitted to probate in the state of Virginia, and that Miller was appointed special administrator of the estate in California. This, we think, constituted sufficient proof that the plaintiffs had an interest in the property in question, and that all of them except Miller and the husbands were the legatees or heirs of the decedent. It was not necessary to prove that the children of Alice had succeeded to her interest, nor that she did not in her life-time devise her interest to strangers. This, if true, was matter of defense. Nor was it necessary to prove that the defendant held the premises adversely to the plaintiffs, or that the plaintiffs were in possession thereof.

The newly-discovered evidence upon which defendant relied for a new trial was set forth in an affidavit made by his attorney as follows: (1) The property described in the complaint was assessed for the year 1886 to the administrator of the estate of Bouldin, and the state and county taxes levied thereon amounted to $8.60. These taxes were not paid, and on the 7th day of March, 1887, the property was sold therefor, and defendant became the purchaser. There was no redemption, and on the 26th day of March, 1888, (between the time of the trial of this action and the entry of judgment therein,) defendant obtained a tax collector's deed for the property. (2) While this action was pending, and before the trial thereof, the plaintiffs conveyed all the property described in the complaint to one William R. Wells, who thereafter conveyed the same to other parties. Neither the defendant nor his attorney had any knowledge of these conveyances until two days after the judge of the court below made and filed his findings and decision in the case.

We do not think the tax-deed or the matters leading up to it constituted newly-discovered evidence. At most the deed, if valid, showed a title acquired *pendente lite*, and, under a well-settled rule, such a title cannot be availed of unless set up by supplemental answer. The conveyance by plaintiffs was not good ground for a new trial. If proof of it had been made at the trial, the result would not thereby have been changed. The Code provides that in case of a transfer of interest the action or proceeding may be continued in the name of the original party, or the person to whom the transfer is made may be substituted. Code Civil Proc. § 385; Hestres v. Brennan, 37 Cal. 385; Camarillo v. Fenlon, 49 Cal. 202.

There are several alleged errors in law for which it is claimed a new trial should have been granted, but none of them are discussed by counsel for appellant. In his points and authorities he has simply copied the specifications of error found in the statement of the case, without any attempt to show how or why the rulings complained of were erroneous. Only two of these specifications need be noticed. Defendant offered in evidence a sheriff's deed, dated February 21, 1887, purporting to convey to him the land in controversy. The deed recited that, whereas, by virtue of an execution issued out of the superior court of San Diego county, upon a jugment recovered therein, on the 19th day of April, 1886, in favor of Juan M. Luco, plaintiff, and against John W. Carter, administrator of the estate of Thomas T. Bouldin, deceased, defendant, the sheriff was commanded to make certain moneys out of the personal property of the judgment debtor, and, if sufficient personal property could not be found, then out of the real property belonging to the judgment debtor at the date of the judgment; and whereas, sufficient personal property could not be found, the sheriff did levy on, take, and seize all the right, title, interest, and claim which the said judgment debtor had to the lands, tenements, and real estate thereafter described, and did, on the 19th day of August, 1886, sell all the right, title, interest, and claim of the said judgment debtor in and to said premises at public auction to the party of the second part (defendant Luco) for the sum of $84.67; and whereas, six months after the sale had elapsed, and no redemption had been made therefor, the sheriff, in consideration of the premises, granted, sold, and conveyed unto the party of the second part all the right, title, interest, and claim which the said judgment debtor had, on the 16th day of July, 1886, or at any time afterwards, in and to the land described.

The plaintiffs objected to the deed being received in evidence, and the court sustained the objection. We see no error in this ruling. The deed recites a judgment and execution against Carter, and a sale of his interest in the land.

The defendant offered in evidence a deed made by the tax collector of San Diego county under date of February 25, 1887, purporting to convey to defendant "the whole of the undivided 305 acres of land in the ex-Mission rancho," situate in the county of San Diego, in pursuance of a sale for $6.55, state and county taxes levied against the property for the year 1885.

The plaintiffs objected to the deed being received in evidence on the ground that it appeared on the face thereof to have been altered in a material respect after its execution, and the court sustained the objection. We see no error in this ruling. It was fully justified by section 1982 of the Code of Civil Procedure.

5. Finally, it is claimed for appellant that the findings do not cover all of the is-

sues raised by the pleadings, and that the decision was therefore against law. There is no necessity for findings upon immaterial issues, or as to facts which are alleged in the complaint and not denied by the answer. Findings should be of the ultimate, not the probative, facts; still a finding of probative facts is sufficient, if the court is enabled to say that the ultimate facts necessarily result therefrom. Coveny v. Hale, 49 Cal. 552; Coglan v. Beard, 65 Cal. 58, 2 Pac. Rep. 737. The findings under review here are almost wholly of probative facts, and are not to be commended. We think, however, that the ultimate facts, so far as they are material and in issue, result from the facts found, and the findings should therefore be held sufficient.

It results that we find in the record no error prejudicial to appellant, and therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(80 Cal. 397)

DE NECOCHEA *v.* CURTIS. (No. 12,742.)

(*Supreme Court of California.* Aug. 31, 1889.)

IRRIGATION—NOTICE.

Civil Code Cal. § 1415, provides "that a person desiring to appropriate water must post a notice * * * at the point of intended diversion." Section 1419 provides "that a failure to comply with such rules deprives the claimant of the right to the use of the water as against a subsequent claimant who complies therewith." *Held*, that a diversion of water without compliance with the statute gives a right to continue the diversion as against a subsequent pre-emptioner of the land through which the water flows who has also not complied with the statute. Affirming 20 Pac. Rep. 563.

On rehearing. For former report, see 20 Pac. Rep. 563.

Hunsaker, Britt & Lamme, for appellant. *Collier & Haines*, for respondent.

BEATTY, C. J. A sufficient statement of this case will be found in our former opinion, filed February 23, 1889, and reported in 20 Pac. Rep. 563. After filing that opinion we concluded, on account of the novelty and importance of the question decided, to order a rehearing, and the case, after full and exhaustive reargument, has been again submitted for decision. In their printed brief filed upon the rehearing, counsel for appellant have urged several assignments of error in addition to that upon which we held that the judgment of the superior court must be reversed; but since, after the most attentive consideration of the very able and ingenious argument of counsel for respondent, we are still satisfied of the correctness of that decision, and of the validity of the reasons upon which it was based, we do not deem it necessary to consider any other questions affecting the right of appellant to a reversal of the judgment. We held in our former opinion that De Necochea, having, by means of an artificial ditch, completed the diversion of the waters of a spring rising on public lands of the United States from their natural channel to lands occupied and owned by him, where they were used for irrigation and other purposes, thereby acquired a right to continue such diversion and use, as against Mrs. Curtis, a subsequent pre-emptioner of the land upon which the spring rises, and this notwithstanding De Necochea's diversion and use of the water was not completed or even commenced prior to the enactment of the Civil Code, and notwithstanding he failed and neglected to post or record the notice prescribed by section 1415 of the said Code. This conclusion counsel for respondent vigorously combat in an argument which we are sure leaves nothing further to be said on their side of the question. If the time at our disposal permitted, it would not be unprofitable to take up the points of this argument and consider them *seriatim*, and perhaps it is only fair to counsel that we should do so, but, as it is, we can only repeat with a little more fullness what we have before said, noticing incidentally some of the more important of the objections to the grounds of our decision. There is no difference between counsel and the court as to the meaning and effect of the acts of congress cited in our former opinion. It is conceded on all sides that rights to the use of water on the public lands of the United States for mining, manufacturing, agricultural, and other purposes (and to the ditches and reservoirs used in connection with such water-rights) which have vested and accrued, and are recognized by local customs, laws, and decisions of the courts, are confirmed and assured to the owners; and that all purchasers of public lands affected by the diversion of streams from their natural courses for the purposes named take such lands subject, and subject only, to such vested and accrued water rights. When, therefore, a contest like this arises between a pre-emptioner of public land claiming riparian rights in a spring rising upon, or a stream flowing through, his land, as against one who asserts a right to divert the spring or stream to other lands for agricultural or other beneficial purposes, the sole question is whether a right so to divert and use the water had vested and accrued before the right to purchase the land became a vested right. In this case it is clear from the findings that the respondent's right to purchase did not become a vested right prior to the year 1885, and that as early as the year 1880 the appellant had completed the diversion, and was in full enjoyment of the use of the water of the spring for the irrigation of his land.

But the respondent contends that he was nevertheless not an appropriator and had no vested right to the use of the water recognized or acknowledged by the laws of this state, because having commenced and completed his diversion of the waters of the spring after the enactment of the Civil Code he failed and neglected to post or record the notice prescribed by section 1415. As this is the point upon which our decision must turn we will endeavor to state our views with respect to it somewhat more fully and explicitly than we have hitherto done.

Sections 1415 and 1416 of the Civil Code read as follows:

"Sec. 1415. A person desiring to appropriate water must post a notice in writing in a conspicuous place at the point of intended diversion stating therein (1) that he claims the water there flowing to the extent of (giving the number) inches measured under a 4-inch pressure; (2) the purposes for which he claims it, and the place of intended use; (3) the means by which he intends to divert it, and the size of the flume, ditch, pipe, or aqueduct in which he intends to divert it.

"A copy of the notice must, within ten days after it is posted, be recorded in the office of the recorder of the county in which it is posted.

"Sec. 1416. Within sixty days after the notice is posted, the claimant must commence the excavation or construction of the works in which he intends to divert the water, and must prosecute the work diligently and uninterruptedly to completion, unless temporarily interrupted by snow or rain."

It may be conceded that if these provisions of the law stood alone and unqualified, strict, or at least substantial, compliance with their requirements would be, as counsel claim, a *sine qua non* to the acquisition of any right to divert running water from its natural channel.

But these provisions do not stand alone. Section 1418 reads as follows:

"Sec. 1418. By a compliance with the above rules the claimant's right to the use of the water relates back to the time the notice was posted."

In this provision we begin to see the purpose and object of the legislature, which, in our opinion, was merely to define with precision the conditions upon which the appropriator of water could have the advantage of the familiar doctrine of relation upon which it had always been held before the statute that one who gave sufficient notice of his intention to appropriate, and followed up his notice by diligent prosecution of the work, was, upon its completion, to be deemed an appropriator from the date of his notice, and was, therefore, prior in time and stronger in right than an intervening appropriator, notwithstanding his diversion of the water might be first completed. We are not, however, left to any doubtful implication to be drawn from section 1418.

Section 1419 reads as follows:

"Sec. 1419. A failure to comply with such rules deprives the claimants of the right to the use of the water as against a subsequent claimant who complies therewith."

This language clearly and necessarily implies that there is a right to the use of running water acknowledged by the legislature and cognizable by the courts which is good against all the world, except a claimant who has complied with the rules prescribed in sections 1415 and 1416. Now what is this right,—what can it be except the right of one who has fully completed the diversion of running water and applied it to a beneficial use before the initiation of an adverse right of appropriation under the law, or the acquisition of an adverse right in the land to be affected by the diversion? And why should not such a right be recognized and enforced? The case supposed is that of a man who has gone upon the public unoccupied lands of the United States, diverted water from its natural course, conveyed it through ditches and flumes to a distant point, and used it for irrigation, mining, or manufacturing purposes. Is the pre-emptioner, who sees him in actual possession of his dams and ditches, diverting the water and using it, when he first sets foot upon the land, in anywise injured by the circumstance that such actual diversion was not preceded by the posting and recording of a notice of intention, followed by work commenced within sixty days and diligently prosecuted? We cannot perceive that he is. If he wishes to locate and purchase the land he can see precisely what the nature and extent of the servitude is to which it has been subjected, far more precisely, at least, than he could have known from a mere notice of intention such as the Code prescribes. But, irrespective of any considerations of convenience, the sole question is, has the appropriator in the case supposed a right to the water which our laws recognize and enforce? If he has, he is within the terms and entitled to the benefit of the congressional legislation above referred to. And there can be no doubt that since the Code, as before, he has a perfect right, deducible from common-law principles, to the water actually appropriated as against all the world except the owner of the soil and those claiming adversely who have complied with the law. In the absence of such adverse claim his right is perfect, for the owner of the soil—the United States—has recognized and confirmed it, and has declared that all subsequent purchasers must take subject to it.

Counsel for respondent seem to understand the last sentence of our former opinion as holding or intimating that while she, as a riparian owner, can claim no advantage from the failure of appellant to post and record a notice of his intended appropriation, another appropriator could at any time, by compliance with the provisions of the Code, take the water which he has diverted and is using. We must not be understood as holding or intimating any such opinion. The case presents no such question for decision, even incidentally, and we express no opinion about it. Since, therefore, we have not made this supposed peculiar and invidious discrimination against purchasers of public land, we need not stop to defend it. If there is any such discrimination, which we do not admit, it is made by the terms of the statute, and not by any construction put upon it by us. We concede the force, the conclusiveness even, of the argument that if the pre-emptioner cannot, in view of section 1419 of the Civil Code, take advantage of the failure of an appropriator to post a notice, he cannot, for the same reason, take advantage of his failure to commence and prosecute the work of diversion with diligence, as provided in section 1416. But of what consequence is this? We decide nothing except that a diversion of water, without compliance with the statute, gives a right to continue the diversion against a pre-emptioner whose right of purchase vests after the diversion is fully completed, and then only to the extent and in the manner of such actual and completed diversion. We do not hold that an uncompleted diversion without compliance with the statute gives any right to complete or continue the diversion as against an intervening right of pre-emption.

The question under discussion was not involved in the case of Lux v. Haggin, 69 Cal. 255, 10 Pac. Rep. 674, and, of course, was not there decided. There are expressions in the opinion which seem to imply that an appropriation can only be made by strictly pursuing the rules prescribed by the Code, but it is evident they were not used for the purpose of establishing the proposition, and nothing which was decided depends on such a proposition for its support. The same may be said of Osgood v. Mining Co., 56 Cal. 571.

For these reasons and those assigned in our former opinion, we think the judgment of the superior court should be reversed, and as both parties agree that a new trial is not required, it is ordered that the judgment appealed from be reversed and the cause remanded, with directions to the superior court to enter a judgment for the plaintiff in accordance with the views herein expressed.

We concur: PATERSON, J.; THORNTON, J.; MCFARLAND, J.; SHARPSTEIN, J.

(80 Cal. 348)

HALL v. ARNOTT *et al.* (No. 13,174.)

(*Supreme Court of California.* Sept. 2, 1889.)

MORTGAGES—ABSOLUTE DEED—FORECLOSURE—REDEMPTION.

1. Where an indebtedness existing at the time of the execution of a deed, the purpose of the deed as a security therefor, and the continuance of the relation of debtor and creditor, are admitted, such deed operates as a mortgage, though it be in form absolute, under Civil Code Cal. § 2924, providing that "every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage;" and a defeasance executed subsequently, and reciting that the legal title conveyed by the deed would be reconveyed upon payment of the indebtedness secured therein, does not change the effect of the deed.

2. Under Code Civil Proc. Cal. § 726, providing that there can be but one action for any debt secured by mortgage upon real estate, where two deeds are for the benefit of the same parties and to secure the same debt, though on different property, they must be included in the same action for foreclosure, and failure to include one of such deeds in such an action extinguishes the lien given by it.

3. Though the lien is thus extinguished, the deed remains a cloud upon the grantor's title to the property therein described, which he is entitled to have removed upon payment of any balance due on decree of foreclosure of the other deed.

4. Failure of the mortgagee to take a personal judgment for the balance does not affect the mortgagor's remedy, since judgment cannot be taken after exhausting the security by waiver, under Code Civil Proc. Cal. § 726, allowing such judgment in case proceeds of sale of mortgaged property are insufficient.

5. Under Civil Code Cal. § 2903, providing that "every person having an interest in property subject to lien has a right to redeem it from the lien at any time after the claim is due and before his right of redemption is foreclosed," the right to redeem is unaffected by the running of the statute of limitations against the principal debt.

6. The mortgagor, or those claiming under him, can require no more than a reconveyance of the interest originally conveyed by the mortgage.

7. Under Rev. St. U. S. § 2319, providing that a valid location or relocation of a mining claim can be made only when the ground is open to exploration and relocation, allegations by plaintiff that while the ground was not open to appropriation it was relocated for the sole purpose of facilitating the procurement of a patent therefor are contradictory, and averments by the defendant that the ground was vacant public land, and that a notice of location was posted thereon, do not raise an issue as to ownership by relocation.

Commissioners' decision. In bank. Appeal from superior court, Sierra county; F. D. SOWARD, Judge.

Action by Robert Hall, grantee of Charles Waterhouse, against James Arnott, Isabella Baird, and —— Henderson, to redeem from a mortgage in form of a deed absolute executed by said Waterhouse. Judgment for defendants, and plaintiff appeals. Before the appeal was perfected he died, and Delia Hall, as administratrix, was substituted in his stead. Civil Code Cal. § 2924, provides: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage." Code Civil Proc. Cal. § 726, allows a personal judgment for the balance due a mortgagee when the proceeds of a sale of the mortgaged property are insufficient.

Gray & Sexton and *Smith & Ford*, for appellant. *P. Vanclief*, for respondents.

GIBSON, C. Action to redeem from a mortgage in form of a deed absolute. On the 7th day of August, 1882, one Charles Waterhouse became the owner of an undivided one-tenth interest in the Pacific mining claim, situated in the Port Wine district, in Sierra county, and in conjunction with N. B. Abbott and S. M. Boyce on the same date executed and delivered to James Arnott and Thomas Baird, who were mining partners at the time, a deed absolute in form, conveying said one-tenth interest in the Pacific mining claim to secure the payment of money due from Waterhouse to the grantees, the amount of which was then unascertained. At the time of the conveyance, and prior thereto, Boyce, as a mortgagee of Waterhouse, had a mortgage lien upon the latter's interest in the claim, and Abbott claimed adversely to Waterhouse, which lien and adverse claim were satisfied and extinguished by Waterhouse on the date mentioned, and thereupon Boyce and Abbott joined with Waterhouse for his benefit in the conveyance to Arnott and Baird. Baird died on September 29, 1882, leaving Arnott the sole survivor of the mining partnership. Thereafter, on December 20, 1882, Waterhouse executed another deed absolute in form, conveying to Arnott certain additional mining claims and water-rights in the same county as additional security for the payment of the indebtedness secured by the first deed, and of any additional present or future indebtedness of Waterhouse to the defendants Arnott, Baird, and Van Clief. Defendant Arnott at the same time executed and delivered back to Waterhouse an agreement, reciting among other things, "that both of said conveyances [deeds of August 7, 1882, and December 20, 1882] were executed, and the legal title thereby conveyed is held in trust to secure the payment of the indebtedness of said Waterhouse to the following persons:

* * * On the payment of all the abovementioned indebtedness I hereby agree to reconvey, or cause to be reconveyed, to said Waterhouse all the described property." In the same court in which the action was tried, on the 31st day of July, 1884, in an action for that purpose, prosecuted by James Arnott and all the defendants herein except Henderson, as plaintiffs, against Charles Waterhouse, as defendant, a decree was entered foreclosing as a mortgage the deed of December 20, 1882, and ordering the premises therein described to be sold to satisfy all the indebtedness of Waterhouse to Arnott individually, and as the surviving partner of Thomas Baird, deceased, Isabella Baird, and P. Van Clief, adjudicated to be the sum of $13,684 and costs. Thereafter, upon an order of sale duly issued, the sheriff returned that he had sold the property to Arnott, the highest bidder, for $12,571, and that $1,505, together with $325.32 for fees, remained unsatisfied. No personal judgment was docketed for this deficiency, or any part thereof. In that foreclosure suit an attempt was made in the original complaint to foreclose, as a mortgage, the deed of August 7, 1882, but, upon a demurrer to such complaint for a misjoinder of causes of action being sustained, it was abandoned by omitting it from the amended complaint upon which the suit was tried. On the 21st day of December, 1885, Arnott, still holding whatever interest he may have acquired by the deed of August 7, 1882, with others, to the exclusion of Waterhouse, relocated the Pacific mining claim, under the name of the "Manzanita Placer Company Claim." Waterhouse, by deed dated May 31, 1887, conveyed all his interest in the Pacific mining claim to Robert Hall, who, on the 25th day of October, 1887, tendered to defendant Arnott the sum of $1,854 as the full amount of the remainder due on the decree of foreclosure in Arnott et al. v. Waterhouse, and demanded a reconveyance of the mining property conveyed by the deed of August 7, 1882. The tender and a demand for reconveyance were refused, and thereupon Hall brought this action to obtain a reconveyance of the one-tenth interest in the Pacific mining claim. Defendants resisted, on the grounds that the deed of August 7, 1882, was not a trust-deed conveying the legal title, but merely a mortgage, and that a release could not be had until $2,500, the remainder of all the indebtedness, secured by both deeds and determined by the proceedings in Arnott et al. v. Waterhouse, was fully paid; that, as no trust relation existed between Waterhouse, the grantor to plaintiff herein, and defendants Arnott and Baird, but merely that of mortgagor and mortgagee, the relocation of the Pacific mining claim by Arnott and others, to the exclusion of Waterhouse, did not inure to the benefit of Waterhouse, and as the indebtedness secured by the deed of August 7, 1882, was barred by the statute of limitations, the right of redemption, evidenced by the instrument dated December 20, 1882, executed and delivered by Arnott to Waterhouse, was also barred. These defenses prevailed, and judgment that plaintiff has no cause of action against defendants, and that defendants be discharged from all things alleged against them, passed for the defendants, from which, and an order denying a new trial, this appeal is taken. Before the appeal was perfected Robert Hall died, and his wife, as administratrix, was substituted in his stead.

From the view we take of the cause the judgment and order must be reversed. The deed of August 7, 1882, although a deed absolute in form, having, as admitted by the pleadings, been given to secure an existing indebtedness of the grantor to all of the defendants except Henderson as between the parties thereto, did not pass the legal title, but merely operated as a mortgage between them, (Civil Code, § 2924; Montgomery v. Spect, 55 Cal. 352; Taylor v. McLain, 64 Cal. 513, 2 Pac. Rep. 399; Healy v. O'Brien, 66 Cal. 519, 6 Pac. Rep. 386; Raynor v. Drew, 72 Cal. 307, 13 Pac. Rep. 866; Booth v. Hoskins, 75 Cal. 271, 17 Pac. Rep. 225,) and gave a mortgage lien only upon the property that would have passed if the deed had been intended as an absolute grant of the property instead of as a mortgage, (Civil Code, § 2926.) The defeasance executed by Arnott to Waterhouse on December 20, 1882, and reciting that the legal titles conveyed by both deeds would be reconveyed upon the payment of the indebtedness secured by both deeds therein mentioned, did not change the effect of the deed of August 7, 1882, in view of the purpose for which the said deed was given. The fact of an existing indebtedness between the parties thereto at the time of the execution of the deed, and the object for which it was executed, and the continuation of the relation of debtor and creditor being admitted, the court properly found that the deed was not intended as a trust-deed conveying the legal title to the property, but merely a security for the payment by Waterhouse of the indebtedness existing at the time it was executed, and afterwards incurred by him, in accordance with the terms of the defeasance of December 20, 1882, executed and delivered by Arnott to Waterhouse. Montgomery v. Spect, supra.

A mortgagee is not entitled to the possession of the mortgaged property unless expressly provided for by the terms of the mortgage. Civil Code, § 2927. The deed in controversy, being a mortgage, which did not pass the legal title, did not give the right of possession, and as there is no evidence of an agreement, written or verbal, between Waterhouse and Arnott and Baird, or either of them, relating to the possession of the mortgaged property, the finding of the court that there was no such agreement is impregnable.

The other portion of the same finding, to the effect that none of the defendants ever entered into and retained the actual possession of the ground, unless Arnott and Henderson acquired a constructive possession thereof under their notice of relocation of the ground, comes within the rule that when there is a substantial conflict in the evidence this court will not disturb a finding based thereon. The contention of plaintiff regarding the alleged possession of the ground by defendants is upon the theory that if the deed in controversy is a mortgage only, and defendants, Arnott and Henderson—the latter representing the interest of his sister, the defendant Isabella Baird, relict of

Thomas Baird, deceased—were in possession of the property as mortgagees, there was no breach or violation of the mortgage upon which they could hold adversely to the mortgagor and his successors until the relocation of the claim by Arnott and Henderson and their co-locators, on December 21, 1885, and, five years not having elapsed from that time until the suit was commenced, plaintiff is entitled to redeem, under section 346 of the Code of Civil Procedure, and Raynor v. Drew, supra. We are, however, of the opinion that on the facts in this case plaintiff can redeem, regardless of whether the actual possession was held by defendants or not.

The Code of Civil Procedure (section 726) provides that there can be but one action for the recovery of any debt secured by mortgage upon real estate. In applying this section in Ould v. Stoddard, 54 Cal. 613, it was held that a mortgagee who commenced and prosecuted a suit to final judgment in the state of Ohio, upon a promissory note secured by a mortgage upon land in this state, exhausted his remedy upon both the note and security, and could not thereafter maintain a suit to foreclose the mortgage. It is therefore apparent that as the deed in controversy was for the benefit of the same parties as those to the deed of December 20, 1882, and to secure the same indebtedness, although upon different property, it should, by appropriate allegations in the amended complaint in Arnott et al. v. Waterhouse, in which the last-mentioned deed was foreclosed, have been included and foreclosed. It is no excuse to say that the court sustained a demurrer to the complaint in which an effort was made to include it, as we are bound to presume that the ruling of the court was correct and the complaint insufficient to make evident the necessary connection between the two deeds. The plaintiffs in that suit exhausted their remedy upon their security, and by failing to include the deed in controversy waived any security afforded by it, and the lien thereby given was nullified. See Mascarel v. Raffour, 51 Cal. 242.

The lien created by the instrument being thus nullified and extinguished, and the legal title and right of possession remaining in the mortgagor, it may be said that there is nothing to redeem. But the instrument, being a deed absolute in form, constitutes a cloud upon whatever interest the grantor may have had in the property therein described at the time it was executed, or that he or his successors in interest may have subsequently acquired. The plaintiff is in equity entitled to have such cloud removed upon doing equity in paying the remainder due upon the decree of foreclosure in Arnott et al. v. Waterhouse. Raynor v. Drew, supra, and Booth v. Hoskins, supra; Rodriguez de Cazara v. Orena, ante, 74, (12,933, filed August 1, 1889.)

The court found such remainder to be $1,854, and the amount proper to be paid in the event of the plaintiff being entitled to redeem, and also found that no personal judgment for such deficiency had been docketed. This latter fact does not affect plaintiff's remedy, because the mortgagees, having waived their first mortgage, which was to secure the same indebtedness, but upon different property exhausted their security, and could not obtain a personal judgment for any deficiency until they exhausted their security, not by waiver, but by sale on foreclosure. Code Civil Proc. § 726; Biddel v. Brizzolara, 64 Cal. 354.

It is urged by the defendants that the indebtedness secured by the instrument of August 7, 1882, being barred as found by the court, the right to redeem is also barred. "Such," said this court in Raynor v. Drew, supra, "was undoubtedly the rule before the Code. Cunningham v. Hawkins, 24 Cal. 406; Arrington v. Liscom, 34 Cal. 369; Espinosa v. Gregory, 40 Cal. 58. But perhaps it may be doubted whether the reason of the old equity rule applies under a system where no title passes to the mortgagee." By the Civil Code (section 2903) "every person having an interest in property subject to lien has a right to redeem it from the lien at any time after the claim is due, and before his right of redemption is foreclosed." It is evident that this section changed the rule laid down in the cases cited in Raynor v. Drew, and is intended to give the mortgagor or other persons interested the privilege, at any time after the principal obligation becomes due, to have the lien extinguished that would otherwise cloud their title, upon paying the debt, regardless of the running of the statute of limitations against the principal obligation. This conclusion renders it unnecessary to consider whether the indebtedness secured by the instrument in question was barred or not at the commencement of this action.

The only limitation upon this right to redeem is when the mortgagee, or any one claiming under him, has continuously maintained an adverse possession of the premises mortgaged for five years after the breach of some condition of the mortgage. Code Civil Proc. § 346. It is apparent that such adverse possession would not operate upon the lien alone, but would attack and overcome the legal title, and, in effect, would be the same as if a stranger to the title should obtain actual possession by a trespass and succeed in holding adversely for the statutory period. Assuming that Waterhouse, after he executed the deed of August 7, 1882, forfeited or abandoned his interest in the mortgaged property, and the defendants, while the ground was open to appropriation, relocated the ground, as found by the court, and thereby acquired the highest title obtainable thereto against Waterhouse and all others, except the United States, plaintiff would still be entitled to redeem. Lorenzana v. Camarillo, 45 Cal. 125. This last case was an action to redeem from a mortgage in form of a deed absolute. The plaintiffs were husband and wife, the mortgaged property being the separate property of the latter. Both joined in the instrument, but it was found that the acknowledgment by the wife was not properly taken, her husband having been present at the time. Defendant urged that as the mortgaged property belonged to the wife separately, and as she did not join in the deed, her husband had no right to convey, and consequently no right to redeem. On this the court said: "There is nothing in the point that it appears in the amended complaint that Manuel Lorenzana, who seeks to redeem from the mortgage he gave to Camarillo, had no title to the mortgaged premises. His right to redeem springs from the fact of the execution and delivery of the mortgage, and in such a case it is no concern of the mortgagee whether or not the mortgagor, in point of fact, has a valid title to the mortgaged premises, or any part thereof." All that the plaintiff can receive by the reconveyance demanded by him is whatever passed by the mortgage deed of August 7, 1882. He certainly cannot obtain by nor require in such a reconveyance any adverse or superior title subsequently and in good faith acquired by the mortgagees, and a reconveyance from the mortgagees should be limited to the interest conveyed by the deed referred to.

In Miller v. Thayer, 74 Cal. 351, 16 Pac. Rep. 187, an action to redeem from the mortgage in the form of a deed absolute, with a defeasance in which a reconveyance was demanded, it was held: "This was certainly a proper, perhaps the only, mode of entering upon the record evidence of the satisfaction of such a mortgage." Regarding the relocation of the mortgaged mining ground by the defendants, this relocation was set up in defendants' answer to meet the allegation in plaintiff's complaint, to the effect that while the ground was not open or subject to appropriation, it was relocated for the sole purpose of facilitating the procurement of a patent therefor from the United States. A valid location or relocation of a mining claim can be made only when the ground is open to exploration and appropriation, (Rev. St. U. S. § 2319; Taylor v. Middleton, 67 Cal. 656, 8 Pac. Rep. 594, and numerous other decisions of this court;) and a relocation for the sole purpose of correcting an error in the original location can only be made when the rights of the others have not intervened between the acts, and cannot change or affect the title to the same ground acquired by the original location. Therefore these allegations in plaintiff's complaint were contradictory, and superfluous, and should have been disregarded.

Defendants' answer does not contain a positive averment of ownership of the mining property in question, nor of facts sufficient to show the ownership of the ground by the defendants. The averment that the ground was vacant public land, and that a notice of location was thereon posted, is insufficient. Jones v. Jackson, 9 Cal. 238. When a general statement of ownership of a mining claim is not made in a pleading, the pleading must show all the facts necessary to constitute such ownership. Hence, as there was no issue as to ownership tendered by the pleadings, the finding of the fact relative to the relocation of the ground must be disregarded.

We therefore advise that the judgment and order be reversed, and the cause remanded, with the direction that judgment for plaintiff be entered in accordance with this opinion.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed and the cause remanded, with the direction that judgment for plaintiff be entered in accordance with the above opinion.

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STONE v. HAMMELL. (No. 13,024.)

(*Supreme Court of California.* Sept. 2, 1889.)

PRINCIPAL AND SURETY—CONTRIBUTION—PARTIES—INSOLVENCY—EVIDENCE.

1. Where the maker of a note gives his sureties a mortgage to secure its payment, and the property is sold and the proceeds applied on the note, the maker cannot dispute the satisfaction of such mortgage in an action against him by a surety who has paid part of the note.

2. Under Civil Code Cal. § 2848, providing that a surety, upon paying the principal's debt, is entitled to enforce all the creditor's rights of action against the principal for the amount so expended, and to require his co-sureties to contribute thereto, a co-surety, having so contributed by giving his own note to the paying surety, is entitled to reimbursement from the principal precisely as if he had paid the money to the creditor.

3. Where a surety on a note holds security for the payment thereof the creditor is not bound to require the application of such security to the payment before he can sue the sureties.

4. A surety who has paid a note and received contribution from a co-surety is not a necessary party to a suit by the latter against the principal for the amount contributed.

5. Code Civil Proc. Cal. § 339, provides that an action on a contract not in writing must be brought within two years. Section 351 provides that when the right of action against a party accrues during his absence from the state, the action may be brought within the time limited after his return. *Held*, that the surety's right of action for contribution against a co-surety who was absent from the state when the note was paid, accrued on his return, and the co-surety's right of action against the principal accrued on his giving his note for the amount of such contribution within two years after returning.

6. The rights of a creditor are not affected by the discharge in insolvency of his debtor, where neither the creditor himself nor his debt were within the jurisdiction of the court in which the proceedings in insolvency were had.

7. The discharge in insolvency of a debtor does not affect the rights of his surety on a note who subsequently contributes to the payment thereof.

8. The records of a probate court, showing the insolvency of a deceased surety who had not contributed to the payment of the note, are admissible in evidence in an action by a co-surety against the principal.

Commissioners' decision. In bank. Appeal from superior court, Santa Barbara county; R. M. DILLARD, Judge.

Action by H. P. Stone against James Hammell, to recover $1,000 and interest. Judgment for plaintiff, and defendant appeals. Code Civil Proc. Cal. §§ 337, 339, provide that an action founded upon a writing executed in said state must be brought within four years after the right of action accrues, and an action upon a contract, etc., not founded upon a writing, within two years thereafter. Section 351 provides that, when the right of action against a person accrues during his absence from the state, such action may be brought within the time limited after his return thereto. Civil Code Cal. §§ 2847, 2848, provide that a surety, upon satisfying the obligation of his principal, is entitled to enforce every remedy which the creditor has against the principal, to the extent of reimbursing what he has expended, and also to require all his co-sureties to contribute thereto.

Wells, Guthrie & Lee and *S. W. Bouton*, for appellant. *B. F. Thomas*, for respondent.

FOOTE, C. This action was brought by the plaintiff to recover from the defendant the sum of $1,000 and interest. It is alleged in the complaint that the plaintiff, with three other persons, became the sureties of the defendant upon a promissory note, payable to one Byron Stevens, for the sum of $3,000, the money borrowed, for which the note was given, being for the use and benefit of the defendant, and received and used by him alone; that the defendant neglected to pay the note, or any part of it; that Newell, one of the sureties, paid upon the note, as principal and interest, the sum of $3,855, of which sum the defendant repaid him the sum of $1075 only; that the plaintiff, Stone, about the 1st of August, 1878, changed his residence from the state of California to the state of New York, and the said 1st of August left the state of California, and was absent therefrom until December, 1883; that about the 1st of March, 1884, Newell, the surety who had paid the promissory note to Stevens, demanded of Stone, the plaintiff, that he should pay the sum of $1,000, as plaintiff's *pro rata* share of the money which Newell had paid on account of their suretyship on the promissory note; that the plaintiff, on the 1st of March, 1884, made, executed, and delivered to Newell his promissory note in the sum of $1,000 in full satisfaction of the amount of money which the plaintiff should contribute to Newell for his payments for and on account of the promissory note to Stevens, and Newell gave to the plaintiff a receipt in full satisfaction for the plaintiff's liability to contribute to him for the payments he made as heretofore stated; that the defendant has not paid the plaintiff anything, either principal or interest, for the sum of $1,000 thus paid out for the defendant to Newell; that one of the four sureties, Hamilton, paid nothing on the note to Stevens, and contributed nothing to Newell; and that Hamilton died insolvent. The complaint was demurred to on the grounds (1) that it did not state facts sufficient to constitute a cause of action; (2) that it did not state facts sufficient to constitute a cause of action in this, "that it appears from said complaint that the plaintiff has not legal capacity to sue; *second*, that it appears upon the face of said complaint that the last payment made upon the note, set out in the first paragraph thereof, was made on the 10th day of January, 1881, by P. N. Newell, and that the cause of action, if any, accrued on said 10th day of January, 1881, in favor of said P. N. Newell, and that the cause of action in favor of said P. N. Newell, if any, is barred by the statute of limitations, and that the cause of action, if any, was barred by the statute of limitations, at the time of the pretended demand and the making of the note for $1,000 by plaintiff to P. N. Newell, on the 1st day of March, 1884, alleged in said complaint; that said complaint is ambiguous, unintelligible, and uncertain in this, that it does not sufficiently appear from said complaint whether or not the note referred to in the eighth paragraph thereof was ever paid by plaintiff; that it does not sufficiently appear from said complaint that the plaintiff ever paid any money whatever for, or on account of, defendant; that it does not sufficiently appear from said complaint that the plaintiff's cause of action alleged in said complaint is not barred by the statute of limitations; that there is a defect in parties plaintiff to said action, in this, that it appears from said complaint that P. N. Newell should be made plaintiff to said action, instead of the plaintiff herein; that said complaint does not, nor does any paragraph thereof, severally state facts sufficient to constitute a cause of action." The demurrer was overruled, and the defendant answered, objecting to the complaint that it did not state facts sufficient to constitute a cause of action; that the plaintiff had no legal capacity to sue; that the cause of action, if any, accrued on the 10th of January, 1881, in favor of Newell, and that it is barred by the statute of limitations under the provisions of sections 337 and 339 of the Code of Civil Procedure; denying that the time of payment of the note to Stevens was extended to the 1st of July, 1880, or that he neglected to pay the note, or any part of it; and alleging that before the note became due he had mortgaged certain real property to the sureties on his note to Stevens, sufficient in value for the payment and satisfaction of the note, and that subsequently he conveyed to Newell, one of the sureties, a portion of the premises thus mortgaged of the value of $1,400, which the sureties afterwards sold and applied the proceeds to the payment of the Stevens note. He further claimed that the payments alleged to have been made by Newell were from the proceeds of the property mortgaged and conveyed to the sureties. He denied that he had only paid $1,075 of the amounts paid by Newell on the Stevens note, and alleged that he paid the whole of what Newell paid, and that nothing is due from him to Newell. All the other allegations of the complaint are denied. For further defense the answer set up that if Stone contributed anything towards the repayment of Newell for what he had paid out for and on account of the defendant, such payment was entirely voluntary, and without any consideration good in law, and that the plaintiff ought not to recover against him because of his discharge in insolvency on the 24th day of December, 1879, by the county court of Santa Barbara county, Cal. The answer was afterwards, upon leave of the court, amended so as to defend the action on the ground that, so far from neglecting or refusing to pay the Stevens note, the defendant, before the note became due, on the 5th day of August, 1878, executed and delivered to the plaintiff and Newell a deed absolute in form, but by way of a mortgage, conveying to Stone and Newell certain real estate in Santa Barbara county, fully described in said deed in trust, to sell and dispose of the property conveyed, and to apply the proceeds in satisfaction of the Byron Stevens note, on which Stone and Newell were the defendant's sureties; that the conveyance thus made was accepted by Stone and Newell in trust for the purposes above specified, and was, at Stone's request, recorded on the 13th of August, 1878, in the proper office. It is further alleged that the property so conveyed was more than sufficient in value for the payment and satisfaction of the note to Stevens, and interest; that it was worth $5,000, and that plaintiff and Newell, after its conveyance to them, and before the 1st day of March, 1884, disposed of a large portion of it for the sum of $3,500, and that at the time of the commencement of this action there remained a portion of the property thus conveyed undisposed of and held by the sureties of the value of $500. A demurrer was filed to this amendment, on the grounds—*First*, that it did not state facts sufficient to constitute a cause of action; *second*, that, in so far as it refers to any mortgage or deed of trust, it does not state any fact constituting any defense. "Said instrument, if a mortgage, has become extinguished by lapse of time, and could not have been enforced when this action was commenced, nor could it be now enforced." This demurrer was overruled, and the cause was tried without a jury, upon the issues made by the complaint and answer as amended. The plaintiff had judgment as prayed for. From that and an order refusing a new trial this appeal is prosecuted.

One of the reasons urged by the defendant why the judgment cannot stand is, to use his own language, "that the plaintiff could not sue the defendant on his implied promise on the note, because his remedy on the note was merged in a superior remedy, *i. e.*, the mortgage given by defendant to his sureties." In support of this proposition he argues that the remedy in *assumpsit* on an implied contract originally vested in the sureties against their principal, became merged on their accepting a mortgage security therefor, and their only remedy was an action for foreclosure. The fact which he relies on to uphold his legal proposition is that the mortgage given to all four of the sureties was never legally satisfied, because Byron Stevens, the payee of the note which the defendant and sureties had executed, was not a party to the satisfaction of the mortgage, and that, as the mortgage was not satisfied, the deed in form, which the court found to be in trust, but not a mortgage, was a mortgage, and was supplementary to the first mortgage, and the remedy of foreclosure of it could only be pursued. But Stevens has been paid from the proceeds of the property deeded to the sureties, so far as it was sold, whether it was a mortgage, or, as the court found, a deed in trust only for a specific purpose which was carried out, and he is not here complaining of the satisfaction of the mortgage. The person who does complain, and who seeks to have the mortgage declared unsatisfied, was a party to its satisfaction, and is excluded by his action in the premises from disputing its proper and legal satisfaction.

The further contention is made that the finding of the court, that the action is not barred by the statute of limitations, is against law. To support this claim the appellant seems to argue that when Stone executed and delivered his promissory notes, which were agreed to be taken as an absolute payment and reimbursement to Newell of Stone's share of the money paid out to Stevens by Newell, he (Stone) was under no legal obligation to do so; that he could have invoked the statute of limitations against Newell for this contribution. This seems to be based upon the proposition that although Stone was absent from the state during most of the time that Newell was making payments to Stevens, who was also a non-resident, yet that the statute began to run in favor of Stone as soon as Newell paid the first installment of interest, $360, on the note, when Stone was in the state, and continued to run, notwithstanding his absence from the state after that time. Code Civil Proc. § 351. The court found, upon sufficient evidence, that Stone, about the 1st of August, 1878, removed from the state of California to the state of New York, where he remained until December, 1883. Up to the time of Stone's removal Newell had not paid more than his share as surety, and all that he paid after that time, for which Stone was liable for contribution, was paid during Stone's absence from the state. Unless, therefore, this action was not brought until after the time had elapsed, prescribed by sections 337 and 339 of the Code of Civil Procedure, for the barring of the action after Stone's return, he (Newell) was not precluded from recovery by those statutes. Section 351, Code Civil Proc. Stone's right of action accrued on the 1st of March, 1884, when he reimbursed Newell for his expenditures by executing the promissory notes, which were taken as absolute payment for the liability of Stone to Newell for Stone's share of the money paid to Stevens, the payee of the note. Brandt, Sur. § 199. The statute did not begin to run against Stone until the 1st of March, 1884. He filed his complaint on the 17th day of September, 1885, less than two years after the statute began to operate, and was not barred. Newell's right of action against Stone was not barred, because the latter did not return to California until Dceember, 1883, and Stone paid Newell by notes on the 1st of March, 1884.

In this connection the appellant claims that the payment by Stone's notes to Newell of Stone's *pro rata* of the money which Newell had paid to Stevens for the defendant was no payment or reimbursement affecting defendant on account of his liability on the Stevens note. But it seems to have been held in this and in most of the other states that the acceptance of a promissory note in satisfaction and payment of a debt due from one individual to another is payment of the first debt. Griffith v. Grogan, 12 Cal. 323, and cases cited. When Newell paid the money for the defendant as his surety in satisfaction of the Stevens note he had the right to be reimbursed by the defendant for what he expended in that behalf. Sections 2847, 2848, Civil Code; Estate of Hill, 67 Cal. 244, 7 Pac. Rep. 664. He had also the right to be reimbursed by Stone for whatever amount Stone, as co-surety, was liable to pay Stevens as his proportion, and which had been paid by Newell to Stevens. When Stone paid Newell his liability to him, by the execution of the promissory notes taken in absolute payment and satisfaction of the debt, then Stone had the right, as a surety for Hammell, to look to him for reimbursement, because then Stone occupied towards him *pro tanto* the same relation that Newell did in paying Stevens such amount, for Stone had paid to Newell, not only what he was bound to contribute to reimburse him, but also so much of what Newell had paid for the defendant, and to that extent Stone then stood towards the defendant as if he had originally paid so much of the debt to Stevens. Newell had the right, in the first instance, to give his note to the creditor, Stevens, in full satisfaction for the debt of the defendant, and could then have sued him without having paid the note. Brandt, Sur. § 181. Stone, having paid to Newell, to his satisfaction, by note, his *pro rata* contribution of what Newell had paid for the defendant to the creditor, had a right to be reimbursed to that extent by Hammell for the actual payment in money of that sum by Newell to Stevens. The matter stood just as if Stone, instead of Newell, had paid Stone's proportion in money to the creditor for Hammell, and Stone has the same right as Newell had when he paid the debt in money.

But it is claimed that Newell, at the time Stone executed the notes, had no right of action against Stone for contribution, because he had not exhausted the securities in his hands, had not sold all the land included in the deed in trust, and applied the proceeds to the payment of the Stevens note; that his failure to do this exonerated Stone from any liability to reimburse Newell for what he had paid Stevens. The authorities cited in support of this proposition are not in point. There is no evidence in the record but what Newell realized, as far as he could reasonably do so, all that could fairly be obtained from the sale of the property held in trust, and that, after applying it all to the payment of the Stevens note, he was out of pocket as much money as would have made Stone's share in contribution amount to what his notes called for. There is no negligence, laches, or fraud shown in the matter, and Stone was liable to contribution when he gave his notes.

We perceive nothing of merit in the point made that Newell paid the debt voluntarily to Stevens without any liability to do so. The principal creditor, as it seems to us, could have sued the sureties whenever the note became due and remained unpaid. There was no necessity for him before doing so to have had the land held by the surety, Newell, as trustee, sold and the proceeds applied to the payment of his debt, even if it could have been done under the trust deed, for, as the record shows, this was done in good faith, and without any delay, by Newell, and the proceeds applied to the payment of the Stevens note.

The further point is made that the discharge of Hammell in insolvency discharged him of all indebtedness to Byron Stevens, the holder of the promissory note which the sureties executed with the defendant, and that the finding or decision of the trial court, that the insolvency court had no jurisdiction over Stevens, is against law, and that the discharge of the defendant in insolvency is a bar to the recovery of the plaintiff in this action. In its twelfth finding of fact, which is, we think, warranted by the evidence, the trial court found "that Byron Stevens, the payee of the said note mentioned in the first finding hereof, was not a resident of the state of California, and was absent therefrom during all the proceedings in the Matter of the Insolvency of James Hammell, and did not in any way submit either himself or said promissory note to the jurisdiction of the court in which such proceedings were had." This being so, Stevens was not affected in his rights by the discharge in insolvency as pleaded. Rhodes v. Borden, 67 Cal. 7, 6 Pac. Rep. 850, and cases cited. This discharge in insolvency left Newell and Stone still responsible to Stevens.

At the time of the insolvency proceedings Stone could not have brought suit against Hammell, because then Stone had paid out nothing as surety, and until he satisfied and paid Newell there was no breach of the implied promise of Hammell to reimburse him. Brandt, Sur. § 199. If Stone had no debt against Hammell which was provable in insolvency, it cannot be that he is barred of recovery by the proceedings and discharge in insolvency which took place prior to the time when his debt and right to sue Hammell accrued. In a case involving the same principle which is invoked here, it was said: "The debt was not made certain until after the defendant's discharge. It is like the case of a surety paying a debt after the discharge of the principal. The debt must be certain and fixed at the time of the insolvent's assignment." Buel v. Gordon, 6 Johns. 126.

We perceive nothing in the point that Newell should have been made a party. He had paid the note and been paid by Stone his contribution. Stone then had the right of action upon an implied contract against the principal, Hammell, for reimbursement. The court found, upon evidence which is not challenged by any specifications of particulars of its sufficiency, that Hamilton, one of the sureties, died insolvent in 1878, and contributed nothing towards the payment of the note in the first instance by Newell, or repayment to him as a co-surety. But the objection is made that a certain record of the probate court proceeding offered and admitted in evidence was not competent, relevant, or material. We think that the evidence tended to show the financial standing and insolvency of Hamilton, and was properly admitted. The evidence was sufficient to support the findings attacked, and, perceiving no prejudicial error, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

80 Cal. 229

PEOPLE v. GOGGINS. (No. 20,527.)

(*Supreme Court of California.* Aug. 29, 1889.)

LARCENY—INDICTMENT.

Under Pen. Code Cal. § 959, providing that the indictment or information is sufficient if it can be understood therefrom that the act or omission charged is clearly and distinctly set forth in such a manner as to enable a person of common understanding to know what is intended, an indictment charging the felonious stealing of "fifty sheep, the property of Townsend & Carey," is not fatally defective as not designating any owner of the property alleged to have been stolen, especially where defendant pleads guilty.

Commissioners' decision. In bank. Appeal from superior court, Mendocino county; ROBERT MCGARVEY, Judge.

J. A. Cooper, for appellant. *George A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was indicted for the crime of grand larceny, and pleaded guilty to the charge. From the judgment rendered, he appeals. His argument is that the judgment should be reversed because the indictment failed to charge him with any crime whatsoever. It alleges, among other things, that the defendant "did willfully, unlawfully, and feloniously steal, take, and drive away fifty sheep, the property of Townsend & Carey," etc. The defendant claims that it does not appear therefrom that Townsend & Carey were partners in business, or a corporation; that there is no specific allegation to whom the sheep belonged; that in pleading guilty to the charge contained in the indictment he did not confess himself to have committed any offense.

The sufficiency of indictments or informations in California are to be tested by statutory enactments. Section 959 of the Penal Code provides that "the indictment or information is sufficient if it can be understood therefrom * * * Subsec. 6. That the act or omission charged as the offense is clearly and distinctly set forth in ordinary and concise language, without repetition, and in such a manner as to enable a person of common understanding to know what is intended." It must be presumed that the defendant was a person of common understanding. Would not such an individual have known from the language of the indictment that he was charged with the larceny of fifty sheep, the personal property of two individuals comprising a partnership of Townsend & Carey? And when he pleaded guilty, was he not intending to confess that he stole fifty sheep from the partnership composed of the two individuals just mentioned?

The case of People v. Henry, 19 Pac. Rep. 831, was one where the defendant was charged with the "felonious entry of some building of the San Diego and Coronado Water Company, with the intent then and there to commit larceny." It was contended in that case "that as the information does not state whether the San Diego and Coronado Water Company is a corporation or a partnership, and does not give the names of any persons composing the corporation or partnership, there is, in a legal sense, an entire absence of any allegation as to the party intended to be injured." There, as here, the cases of People v. Schwartz, 32 Cal. 160, and People v. Bogart, 36 Cal. 245, were cited "as conclusive of the question." The appellate court held in that case that the information sufficiently designated the owner of the building burglarized.

In People v. Barnes, 65 Cal. 16, 2 Pac. Rep. 493, which was an action upon a bail bond, "one Wilson was arrested on a complaint charging him with grand larceny in stealing 'two head of cattle, of the value of $25 each,' the cattle being the property of Page Bros." The defendants claimed that the bond was void; that no offense was alleged in the complaint; that "Page Bros." was not a statement of the name of the owners of the property alleged to have been stolen. The appellate court held that the point was not well taken; that the bond was not void; and that the offense of larceny was sufficiently charged in the complaint.

By parity of reasoning it may be said here that the indictment was not fatally defective and void as designating no owners of the property alleged to have been stolen. There was, perhaps, a somewhat obscure statement of the names of the owners, in the sense that they were not designated as a partnership or a corporation, but it is plain that, to a person of common understanding, it would appear that the property stolen was owned by two persons, Townsend and Carey, who did business in that name, for such is the common manner upon signs, letter-heads, signatures to documents, etc., in which firms of individuals are commonly designated. Especially should this be held to be the case where one charged with the larceny of fifty sheep admits by his plea of guilty that he has feloniously carried away such sheep, and that they were the personal property of persons who were known by the name of Townsend & Carey, the ordinary way of designating a partnership. It is hardly possible that the defendant was not fully aware of the nature of the crime charged against him in the indictment, and the persons who were the owners of the property he was alleged to have stolen. But while this is so, it is to be regretted that an indictment so easy to frame properly, should have been drawn, as was the one in hand, liable to be assailed most sharply. We advise that the judgment be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment is affirmed.

80 Cal. 296

PEOPLE v. ELLIOTT. (No. 20,495.)

(*Supreme Court of California.* Aug. 31, 1889.)

CRIMINAL LAW—CHANGE OF VENUE—MURDER—EVIDENCE—INSTRUCTIONS.

1. Under Pen. Code Cal. §§ 1033, 1035, allowing change of venue in a criminal case on application of defendant, on the ground that a fair and impartial trial cannot be had in the county in which the action is pending, and providing that, if the court is satisfied of the truth of defendant's representation, an order must be entered for the removal of the action to a county free from a like objection, the application is addressed to the discretion of the court, and, when supported by defendant's affidavit alone, a denial of the change will not be reversed on appeal.

2. An application for the issuance of subpœnas for witnesses to prove a ground for a change of venue is properly denied, where such application is supported only by the statement of defendant's attorney not made under oath, especially where it does not appear that the clerk had, on application, refused to issue the subpœnas, or that defendant could not procure the attendance of such witnesses.

3. Where it appears that accused was brought before the committing magistrate on the 28th day of April, and that by his consent the examination

was set for and held on the 7th day of May, and it does not appear that he expressed a desire to have counsel appointed, the information will not be set aside on the ground that he was not given time to procure counsel and none was furnished him by the court at the preliminary hearing.

4. Where defendant, on trial for murder, was divorced from his wife, who lived upon a ranch belonging to her, and was allowed to visit his child in the custody of its mother, evidence of the wife that deceased, who was her uncle, at the time of his death was upon said ranch for the protection of herself and child from defendant, is irrelevant and prejudicial to defendant.

5. Where it is attempted upon cross-examination of a witness to show a discrepancy between her testimony and that given by her at the preliminary examination, and there is no such discrepancy, a statement by the court to that effect is not prejudicial error.

6. Under Pen. Code Cal. § 1105, providing that "upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation * * * devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable," where the proof for the prosecution tends to show a killing in self-defense, an unqualified instruction that after proof of the homicide the burden of proving mitigating circumstances is upon the defendant, is erroneous. THORNTON, J., dissenting.

7. An instruction that defendant must show such mitigating circumstances by "a preponderance of evidence" is erroneous. THORNTON, J., dissenting.

In bank. Appeal from superior court, Inyo county; JOHN A. HANNAH, Judge.

Information against W. T. C. Elliott for murder. Conviction and sentence; motion for new trial denied, and defendant appeals. Pen. Code Cal. §§ 1033, 1035, provides that a criminal action may be removed from the court in which it is pending on motion of the defendant, on the ground that a fair and impartial trial cannot be had in the county in which the cause is pending, and if the court is satisfied that the representation of the defendant is true, an order must be made for the removal of the action to the proper court of a county free from a like objection.

John R. Kittrell and *Thos. E. Hayden*, for appellant. *George A. Johnson*, Atty. Gen., for the People.

WORKS, J. The defendant was charged with the murder of one John B. White, convicted, and sentenced to death. His motion for a new trial was denied and he appeals. The following points are made in support of this appeal: (1) That the court below erred in overuling the demurrer to the information; (2) that the court erred in denying the defendant's motion for a change of venue; (3) that the court erred in not allowing the defendant subpœnas for witnesses to prove the grounds of his motion to change the venue; (4) that the defendant was not duly committed by a magistrate; (5) erroneous rulings of the court in the admission and exclusion of evidence; (6) improper statements made by the court in the presence of the jury with respect to the testimony of certain witnesses; (7) that the court erred in certain of its instructions given to the jury; (8) that the verdict was against and contrary to the evidence.

1. Counsel for appellant have not called our attention, in their brief, to any defect in the information, and we have discovered none. The information must therefore be held to have been sufficient.

2. The motion for a change of venue was properly denied for the reason that it was based upon the ground of bias and prejudice existing against the defendant in the county in which he was charged, and was supported by the affidavit of the defendant alone. Such an application is addressed to the discretion of the court below, and a denial of the change will not be reversed unless it clearly appears to this court that such discretion has been abused. Pen. Code, §§ 1033, 1035; People v. Fisher, 6 Cal. 154; People v. Mahoney, 18 Cal. 180; People v. Graham, 21 Cal. 261; People v. Congleton, 44 Cal. 92; People v. Goldenson, 76 Cal. 328, 19 Pac. Rep. 161. No such abuse of discretion is shown by the record.

3. The application to the court for the issuance of subpœnas for witnesses to prove the grounds of the application for change of venue was not supported by any legal showing, and was for that reason properly denied. It was based upon the mere statement of one of the attorneys for the defendant. The record states: "Counsel for defendant stated to the court, then in session, that he had talked with a number of persons in business of public official character, which brought them in daily or frequent contact with persons from all parts or sections of Inyo county, who had stated that everywhere in said county there was a widespread conviction that the defendant had, in cold blood and without justification or provocation, killed and murdered John B. White, an old, universally acquainted and esteemed citizen of Inyo county; that great excitement and bitterness existed against defendant, W. T. C. Elliott, and that a widespread disposition to execute him by lynch law prevailed throughout Inyo county, and that an impartial trial of defendant could not be reasonably anticipated; but that such persons refused to give their affidavits voluntarily to that effect, but that if brought before the court under process of subpœna would candidly state such facts as they knew and their unbiased opinions, and prayed the court to order subpœnas to be issued and served upon a number of credible persons occupying responsible offices or public places of business that defendant's counsel would name to the court."

These facts were not supported by the affidavit of the defendant, or any one else, in support of the application, and although the statement of counsel may have been entirely worthy of credit, the showing was not such as the court was bound to act upon. Besides, it does not appear that any such order was necessary. Subpœnas are not usually issued on the order of the court, but as a matter of course, on application to the clerk. There was no showing that a subpœna had been applied for and refused, or that the defendant was unable to procure the attendance of witnesses. While great care should be exercised by the lower courts, especially in capital cases, to see that the defendant has a fair and impartial trial, and that every facility to that end is afforded him, he has no right to ask the court to act, except upon a legal showing, under oath, of the facts necessary to call for such action.

4. It is contended that the defendant's motion to set aside the information should have been granted. The motion was based upon two grounds, viz., that the warrant issued by the examining magistrate was insufficient, and that the defendant was not given time to procure counsel and none was furnished him by the court at the preliminary hearing.

The last of these only is urged here. Conceding that the constitutional provision which makes it the duty of the court to appoint counsel for a defendant who is unable to employ one applies to preliminary examinations, it is shown by the affidavit of the district attorney that the defendant was brought before the committing magistrate on the 28th day of April, 1888, and was then and there informed by said magistrate of his right to counsel at all stages of the proceedings, and of the nature of the charge against him; that by consent of the defendant the examination of the case was set for Monday, the 7th day of May, 1888, at 10 o'clock A. M., and that on said day said examination was had. This certainly showed that the defendant was given ample time to procure counsel, and there is nothing in the record tending to show that he expressed any desire to have one appointed. We do not think the ground stated was one on which the information could properly have been set aside, but, if so, it was not sufficiently shown that any such ground existed.

5. The evidence was to the effect that the defendant killed the deceased by stabbing him with a butcher-knife. It also appears that the defendant's wife had lately procured a divorce from him; that she and her children by a former marriage were the owners of a ranch, upon which there was a dwelling-house and a small cabin; that, by the decree of divorce, the wife was given the custody of their child, with the privilege to the defendant of visiting it three times a week, which he did, and he was given the right to occupy the cabin on his wife's ranch for two months; that the deceased was an uncle of the defendant's wife and had, since the divorce, been staying with his niece a part of the time; that a few days before the death of the deceased he, without sufficient provocation, brutally attacked and beat the defendant with a club, inflicting a painful wound on the head; that at that time, while the defendant was smarting from the effect of the blow, he threatened to kill the deceased, and afterwards endeavored to borrow a revolver, saying that the deceased had beaten him once, and he wanted to be prepared for him; that the time for which the defendant was allowed by the decree of the court to occupy the cabin was about to expire, and the deceased showed great anxiety for him to get out, and announced his purpose of removing him therefrom at once; that the defendant came to a man who was working on the ranch and said to him, "I have stabbed White in the cellar; go up and look and see how he is getting along. I think he is badly hurt;" that the man went to the cabin in a few minutes and found the deceased lying a few feet from the cabin, on the road, dead, with a knife wound in his chest; that the defendant passed on and notified others of the occurrence in substantially the same words, and requested that an officer be sent for to take him in charge.

The claim of the defendant at the trial was that the deceased attacked him in the cellar of his cabin while he was in the act of cutting some meat that was hanging there, for his dinner, and that he stabbed him with the knife he was using, while it was claimed on the other side that the defendant had laid in wait and killed the deceased while he was passing along the road. There was no witness to the killing except the defendant. He testified, "I ran from the cellar door." "Question. What occurred there? Answer. I was in the act of taking the meat down and I heard a step on the cellar steps. I turned to look and I saw the last foot of some one stepping off the lower step. I saw the side of the man approaching and Mr. White shoved the door open. Q. How did he shove the door open? A. I can't say whether with his hand or with a stick. Q. What was then said or done? A. He said, 'What are you doing here? Get out of this cabin or I will beat you to death, you son of a bitch.' Q. What did he do then? A. I said, 'Let me out,' and sprang for the door. Q. What did he do or say? A. He threw up his cane, and as I made the spring I drew my left arm in guard and struck with my right. Q. What did you strike with? A. With the knife that I had picked up. Q. What then occurred? A. Mr. White then ran out of the cellar, and I too. Q. Where did he go? A. He ran out and turned down north the road or lane. Q. What did you do? A. I ran from the cellar door. Q. Show where you ran? A. From the cellar door east down this way to where I saw Kinney plowing. Q. What did you say then? A. I told Kinney that White had attacked me in the old cellar and that I had cut him, and for him to go and see him, as I was afraid that I had cut him badly." There was contradictory testimony of physicians on the question whether White could have traveled from where the defendant claimed to have stabbed him to the place where his body was found, after having received the wound from which he died. With this brief summary of the evidence we pass to a consideration of the questions presented as to the rulings in the admission and exclusion of evidence.

The divorced wife was a witness for the prosecution. She had testified to the striking of the defendant by White and the threats then made by the former, and in explanation of the presence of White at the house, during his stay there, she was asked, "What was the business of John B. White, the deceased, on the Baker ranch when he made his last visit there, at the time he was killed?" This was objected to, on the ground that it was immaterial and irrelevant, and that it was hearsay, as she could only know it from declarations of White. Counsel announced that they desired to show that White was not a trespasser on the ranch, but was there for a lawful purpose and a legitimate and chivalric one. The objection was overruled, and the witness answered, "He was there for the protection of me and my child against W. T. C. Elliott," the defendant. The defendant moved to strike out the answer for the same reasons, and the motion was denied. These rulings were erroneous. The evidence was entirely irrelevant. The case presented no question as to the right of the deceased to be on the ranch of Mrs. Elliott, and it could hardly be contended that it was necessary for him to attack the defendant in his cellar in order to protect Mrs. Elliott and her child. Nor can it be said that the testimony was harmless. The fact that it was necessary, or even supposed to be necessary, to protect the former wife and infant child of the defendant, as against him, could not but prejudice the minds of the jury, and as we regard the verdict of the jury, which must result in the severest penalty, as scarcely warranted by the evidence, we cannot say that the substantial rights of the defendant were not affected by this ruling.

It is further contended that the court did not allow the witness Fannie Elliott to be fully and freely cross-examined. We cannot concur in this view with the record before us. We trust that the cases are rare in which so much time is allowed to be taken up with immaterial and useless questions, on cross-examination, many of which were repeated over and over again without apparent reason. If the court erred at all in this respect it was in allowing the witnesses, including Mrs. Elliott, to be too freely cross-examined.

In the cross-examination of this witness it was attempted to show that there was a discrepancy between her testimony at the trial and that given by her at the preliminary examination. In the course of the examination of the witness on this point the court said, "I cannot see any discrepancy in her testimony upon the preliminary examination and her testimony to-day." To this remark the defendant excepted, and contends that it was error. Certainly a statement of this kind by the court was improper, but we, like the court below, cannot see the discrepancy, and for that reason must hold that the statement did the defendant no harm.

There are other points made relating to the evidence. We have given them careful attention, and without extending this opinion by noticing them in detail, we hold that none of such rulings were erroneous.

The court instructed the jury as follows: "The killing being proved, the burden of proving circumstances of mitigation to justify or excuse the homicide will devolve on the accused. Up to the moment when the killing is proved the prosecution must make out its case beyond a reasonable doubt. When the killing is proved it devolves upon the defendant to show any circumstances in mitigation to excuse or justify by a preponderance of evidence on his part. That is, the killing being proved, the defendant must make out his case in mitigation to excuse or justify by some proof stronger in some appreciable degree than the proof of the prosecution. It must be in some degree, no matter how small, stronger than the proof of the prosecution on the other side. You are not bound to decide in conformity with the declarations of any number of witnesses, which do not produce conviction in your minds, against a less number, or against a presumption or other evidence satisfying your minds." This instruction was erroneous The Penal Code provides: "Sec. 1105. Upon a trial for murder, the commission of the homicide by the defendant being proved, the burden of proving circumstances of mitigation, or that justify or excuse it, devolves upon him, unless the proof on the part of the prosecution tends to show that the crime committed only amounts to manslaughter, or that the defendant was justifiable or excusable." The latter clause of the section was entirely omitted from the instruction. The most important testimony of the prosecution was that of the admissions of the defendant that he had killed the deceased, and such admissions tended strongly to show "that the crime committed only amounted to manslaughter, or that the defendant was justifiable or excusable." Therefore it was important that the instruction, which cast the burden of proof on him, should be qualified in accordance with the section of the Code on which it was based. People v. Arnold, 15 Cal. 476, 482; People v. Ah Kong, 49 Cal. 7; People v. West, Id. 611; People v. Smith, 59 Cal. 607; People v. Langton, 67 Cal. 428, 7 Pac. Rep. 843. The instruction was erroneous, for the further reason that it cast upon the defendant the burden of proving circumstances of mitigation or that justified or excused the commission of the homicide by a preponderance of the evidence, when it was only necessary that he should introduce evidence sufficient to raise a reasonable doubt as to his guilt or the mitigating circumstances. People v. Bushton, ante, 127.

It is contended that the verdict was contrary to the evidence. We have read the evidence carefully, and must confess to some surprise that a verdict of murder in the first degree, with the death penalty, should have been returned, but we are not prepared to say that the jury were absolutely wrong in their conclusion. It has a tendency, however, to convince us that the motion of the defendant to remove the cause to another county for trial was well founded, and should have been granted.

Judgment and order reversed, and cause remanded for a new trial.

We concur: Beatty, C. J.; McFarland, J.; Sharpstein, J.; Paterson, J.; Fox, J.

Thornton, J. I concur in the judgment on the ground that the court below erred in allowing the question quoted in the foregoing opinion to be put to the witness Fannie Elliott and in admitting her answer thereto. In my opinion, the instructions held to be erroneous in the foregoing are not erroneous. People v. Hong Ah Duck, 61 Cal. 387, People v. Raten, 63 Cal. 421.

(80 Cal. 271)

Banning *et al.* v. Banning. (No. 12,932.)

(*Supreme Court of California.* Sept. 2, 1889.)

Deeds—Acknowledgment—Married Woman.

Evidence that a party to a deed is a married woman, and was not present before the notary who took her acknowledgment through a telephone when she was three miles distant, is not admissible to dispute the official certificate of the notary in due form, in the absence of any allegations of fraud, duress, or mistake.

Commissioners' decision. In bank. Appeal from superior court, Los Angeles county; H. K. S. O'MELVENEY, Judge.

Action by H. Banning, William Banning, and J. B. Banning against Mary H. Banning for partition of land. Judgment for plaintiffs, and defendant appeals.

Houghton, Silent & Campbell and *J. S. Chapman*, for appellant. *Smith & Patton* and *F. H. Howard*, for respondents.

VANCLIEF, C. Action for partition of land. The complaint is in the most general form, alleging that the parties own the land as tenants in common, and specifying the undivided portion to which each party is entitled. The answer denies that either of the plaintiffs has any estate in the land, and alleges that the defendant is the sole and exclusive owner and in the exclusive possession thereof. In addition to her answer the defendant filed what she denominated a cross-complaint, which, in substance, was only a repetition of her answer. The plaintiffs unnecessarily answered this so-called cross-complaint by repeating the substance of their complaint, and further alleging, among other things, that they derived title to the undivided portion of the land claimed by each of them directly from the defendant. Upon these pleadings a trial was had, and, on August 2, 1888, the court made and signed written findings upon all the issues in favor of the plaintiffs, and especially found that "the aforesaid interests of the plaintiffs are all and each of them deraigned from the defendant by conveyances from the defendant to the plaintiffs respectively, by her duly signed, acknowledged, and delivered to the plaintiffs respectively." After the aforesaid findings were written and signed, the court, at the request of the defendant, made and signed additional findings on a separate paper, which was filed August 3, 1888; and the original findings of August 2d were also filed on August 3d, on which day the interlocutory decree in favor of plaintiffs, from which this appeal is taken, was filed.

The appeal rests upon the judgment-roll alone, including the additional findings; and appellant's counsel contend that the findings do not support the judgment, for the reason that they do not show that defendant executed the deeds to the plaintiffs by which plaintiffs claim title. The special and only ground of objection to the sufficiency of the execution of those deeds is that at the time the deeds were acknowledged the defendant was a married woman, and was not visibly, and therefore not personally, present before the notary at the time he took her acknowledgment through a telephone, she then being three miles distant from him, as appears by the additional findings. The answer to this objection is that, in the absence of fraud, duress, accident, and mistake, the certificate of the notary in due form of law is conclusive of the material facts therein stated. The facts stated in the additional findings were not admissible as evidence to dispute the official certificate of the notary; and, if admitted, should have been disregarded, as they evidently were, by the trial court. It is admitted that the certificate of the notary is in due form; and it is not alleged or pretended by the defendant that she did not voluntarily sign and deliver the deeds; nor that she did not voluntarily, and without the hearing of her husband, acknowledge the execution of them through the telephone, after having been informed by the notary of their contents; nor that any deception or fraud was practiced to induce her to execute the deeds; nor even that the plaintiffs had notice of the manner in which it is alleged that she acknowledged the execution through the telephone. These particulars are not stated for the purpose of maintaining that, under any circumstances, an acknowledgment of a deed may be taken through a telephone, but for the sole purpose of showing that there is no pretense of fraud, duress, or mistake.

In De Arnaz v. Escandon, 59 Cal. 489, the court below had found that the defendant, a married woman, had acknowledged a deed through an interpreter, who did not correctly interpret the contents of the deed, but misrepresented the deed as being a mortgage to secure the payment of $3,000, when in fact it was an absolute deed. This court said: "But it is not alleged, found, or claimed that the plaintiff had any notice of those facts. It is clear, therefore, that the notary's certificate is conclusive as to the facts stated in it." Citing Jones, Mortg. § 538; Grant v. White, 57 Cal. 141; Baldwin v. Snowden, 11 Ohio St. 203.

In Grant v. White, supra, this court said "We do not see that fraud or imposition was practiced upon her at the time of the execution of the mortgage. * * * We think the rule, regarding the execution of instruments by married women, is correctly stated by Mr. Jones, in his work on Mortgages, § 538." In the section referred to, Mr. Jones says: "As to statements of fact contained in a certificate of acknowledgment which is regular in form, such, for instance, as the fact that the grantor appeared and acknowledged the execution of the instrument, they can only be impeached for fraud. Evidence which is merely in contradiction of the facts certified to will not be received." To the same effect is the decided weight of authority in other states. I think the judgment should be affirmed.

We concur: **BELCHER, C. C.; HAYNE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(80 Cal. 367)

DALY v. SOROCCO *et al.* (No. 13,119.)

(*Supreme Court of California.* Sept. 3, 1889.)

QUIETING TITLE—FINDINGS.

1. In an action to quiet title a finding that plaintiff was not the owner of the property in controversy, and was not entitled to possession thereof, is a finding of the fact in issue, and is sufficient without a finding of the facts respecting such ownership.

2. As the right to maintain the action is based wholly on the ownership and right to possession, a failure to find on certain other issues is not cause for reversal.

In bank. Appeal from superior court, Plumas county; F. D. SOWARD, Judge.

John Gale and *F. B. Whiting*, for appellant. *Goodwin & Goodwin*, for respondents.

WORKS, J. Action to quiet title, and for an injunction. The complaint contained the usual allegations of ownership and right to possession in the plaintiff, and certain other facts, the only object or purpose of which must have been to obtain the injunction prayed for. The answers of the defendants put in issue the allegations of the complaint, and certain affirmative matters were pleaded. The court found that the plaintiff was not the owner of the property in controversy at the time the action was commenced, and was not entitled to the possession thereof. There were certain other special findings immaterial to the question presented on this appeal.

The appellant contends that the finding that the plaintiff was not the owner of the property was a finding of a conclusion, and that the facts showing that he was not the owner should have been found. If so, the plaintiff's complaint was bad also. It alleged the ownership as a fact, and the finding was as broad and as specific as the allegation of the appellant's pleading. But the finding was sufficient. Where a party alleges his ownership of real estate in an action of this kind, a finding that he was or was not such owner is a finding of a fact,—the fact in issue,—and the evidence going to prove such ownership need not, and should not, be pleaded or found. Payne v. Treadwell, 16 Cal. 247; Smith v. Acker, 52 Cal. 217; Frazier v. Crowell, Id. 399; Murphy v. Bennett, 68 Cal. 528, 9 Pac. Rep. 738.

The appellant further contends that the cause should be reversed because the court failed to find upon certain other issues presented. But his right to maintain the action was based wholly on his ownership and right to possession, and these being found against him, it was immaterial to him whether the court found as to the other facts or not, as the judgment must have been against him whatever the other findings might have been. Under such circumstances the failure to find on certain issues is not cause for reversal. McCourtney v. Fortune, 57 Cal. 617; Murphy v. Bennett, supra.

Judgment affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

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80 Cal. 483

SANSOME v. SUPERIOR COURT. (No. 20,452.)

(*Supreme Court of California.* Sept. 11, 1889.)

BILL OF EXCEPTIONS—SETTLEMENT AND SIGNING.

A trial judge is not justified in refusing to "settle" a bill of exceptions on the ground that it is inaccurate, untrue in many respects, deficient in statement, and contains a mere skeleton of the testimony, where he does not direct petitioner to make amendments, and the adverse party offers none.

In bank. On petition for *mandamus*.

John Sansome sues for a writ of mandate to compel B. F. Myres, Judge, superior court, Placer county, to settle a bill of exceptions.

L. L. Chamberlain and *A. L. Hart*, for petitioner. *F. P. Tuttle*, Dist. Atty., and *John M. Fulweiler*, for respondent.

WORKS, J. A statement of this case will be found in 77 Cal. 353, (Sansome v. Myres, 19 Pac. Rep. 577,) where the allegations of the respondent's answer are stated. We there held that the answer was sufficient. Subsequently the issues arising upon the petition and answer were referred for trial and determination to Hon. W. C. VAN FLEET, judge of the superior court of Sacramento county, with directions to report his findings to this court, which he has done. The findings are as follows: "(1) That said proposed bill was noticed for settlement on the 17th day of April, 1888, and was on said day called up by petitioner's counsel before said respondent, judge, for settlement, but was at the request of the district attorney continued to the 24th day of April, without at that time any examination or discussion of its contents. On said 24th day of April, petitioner's counsel again called said proposed bill to the attention of respondent, at which time the district attorney, through his assistant, objected to the settlement of said bill, on the ground that it was not a fair and truthful statement of the proceedings at the trial, and was a mere skeleton thereof. These objections were verbally made during the argument by counsel in which he went over said proposed bill, and pointed out what he conceived to be the defects and objectionable features thereof. During a reply to this argument, by the petitioner's counsel, the proceedings were interrupted by other business of the court, and the further hearing of said matter was continued by respondent to the 1st day of May. On that date, counsel for the prosecution being absent, the matter was again postponed, and no further consideration thereof had until the 8th day of May. At this last date the prosecution renewed their objection to the settlement of said bill, and after some argument by both parties, the respondent refused to settle said bill, and made his indorsement thereon, wherein he set forth his reasons for said refusal. Said indorsement will be found attached to said original proposed bill, which is hereafter referred to, and made part of these findings. The prosecution did not at any time present amendments to said proposed bill, but contended that it was a mere skeleton, and that neither they nor the respondent were called upon to amend the same, or make it truly present the facts; and that it was petitioner's duty to present to respondent a fair and truthful bill for settlement. The petitioner, contending that said bill was good and sufficient in substance, did not at any time ask permission to correct or amend the same; nor did the respondent at any time make any direction or suggestion to the petitioner's counsel to take said proposed bill and amend or change it in any respect; and the statement in the answer of respondent herein that continuances of the settlement were had to enable petitioner to present a full and fair bill is not sustained by the evidence, but is repudiated by the respondent. (2) That the document marked 'Exhibit B,' hereunto attached and made part of these findings, is the original proposed bill of exceptions as the same was presented by petitioner herein to the respondent for settlement, together with the respondent's indorsement at the end thereof showing his refusal to settle said bill; and that the document marked 'Exhibit C,' hereunto attached and made part hereof, is a transcript of the reporter's notes of the testimony of the proceedings had and taken at the trial of the case of People v. Sansome, and upon which said proposed bill of exceptions is based. (3) NOTE—Petitioner desired a finding upon the questions raised by respondent's answer as to whether the proposed bill is a fair one or merely a skeleton. This I refused for the reasons stated on page 16 of Exhibit A, and because I conceived that question can only be answered by an inspection of the record which is before this honorable court, and involved, to my mind, if not a question of law purely, at least a mixed question of law and fact, upon which it was not my province to pass." The reasons of the respondent for refusing to settle the proposed statement were stated in his indorsement on the same, which was as follows: "The within bill of exceptions being this day finally submitted to me for settlement, I hereby refuse to settle the same upon the ground that it is inaccurate, and, in many respects, untrue, and contains but a meagre and partial statement of the facts and proceedings leading up to, and connected with, and upon which the rulings of the court therein were had that are complained of, and, also, a mere defective skeleton of the testimony and evidence submitted to the jury, and upon which they rendered their verdict of guilty."

We do not regard these as sufficient grounds for refusing to settle a statement. If anything was omitted from the statement, or any matter was incorrectly stated, it was the duty of the district attorney to propose such amendments as would correct the omissions or errors. His failure to do his duty in this respect did not justify the respondent in arbitrarily refusing to act in the matter. As was said in the former decision in this case, it was not the duty of the judge to prepare a statement, but it was his duty to see that one was properly prepared, and then sign it. If the attorney for the petitioner had omitted anything material the judge should have directed and required him to insert it; or if matter was incorrectly stated he should have required him to correct it, if the district attorney had neglected his duty by failing to propose the necessary amendments, which he seems to have done. If the petitioner had refused or neglected to so correct the proposed statement as directed, the judge would, no doubt, have been justified in refusing to settle the same, but not otherwise. This the findings show was not done. The respondent refused in the first instance to settle the statement, not to sign it. This we think he had no right to do. To so hold would place it in the power of the trial judge to deprive a litigant of his right of appeal by simply refusing to perform a plain duty. We must not be understood as intending to justify the too prevalent habit on the part of some attorneys of presenting an imperfect statement, thereby casting upon opposing counsel and the court the labor of piecing out, and making complete, a statement that should have been made perfect by the appealing party in the first instance. Such a course, whether it results from a design to gain an undue advantage, or from indolence, should be severely condemned, and the party practicing it should be required by the judge to make and present a proper statement.

It is evident that the proposed statement in this case was prepared by a novice. It is unskillfully drawn, but we cannot say that it was prepared with a view to obtain an undue advantage in this court. It may be, as is contended, that the evidence was not set out as fully as it should have been, but as the evidence was all taken down in short-hand, the defect can be remedied without serious inconvenience to the respondent. In the preparation of a statement, the evidence should be condensed and put in narrative form. To set out the questions and answers in full is unnecessary, and only increases the labor of this court, and the expense of the appeal.

We think the petitioner is entitled to have his statement settled as prayed for, and that the peremptory writ should issue. It is so ordered.

We concur: SHARPSTEIN, J.; FOX, J.

MCFARLAND, J. I concur in the judgment upon the grounds—*First*, that if the document presented was not in reality a bill of exceptions that fact should have been called to the attention of the attorney presenting it; the judge should have informed him that for such reason the document would not be considered as a bill of exceptions, and that he must prepare a real bill within a reasonable time; and, *second*, that the document presented in the present instance was not so entirely defective as to justify the treatment which it received. But I do not subscribe to the doctrine (apparently stated in the majority opinion) that no matter how fraudulent and worthless a document may be that is presented and called a "bill" or "statement," still the judge, or opposing counsel, must either prepare a bill himself, or suggest in detail what the bill should be. In such a case the judge has a right to say to the attorney for appellant: "This thing which you give me is a fraud; I will not consider it; I will give you a reasonable time within which to prepare something that will be, not a mere name, but a real bill within the meaning of the Code; and, if you do not do so, I will take no further action in the matter."

BEATTY, C. J., (*concurring*.) In addition to what has been said by Mr. Justice WORKS, in whose conclusion and views I concur, I wish to say that in my opinion the fault imputed to the proposed bill of exceptions in question here, viz., that it is too meager, is one that is entitled to some indulgence. The great and crying evil is not that such drafts are too short, but that they are generally too long, and that being allowed substantially on the scale and in the form in which they are presented, the counties are burdened with the expense of transcribing or printing masses of rubbish which serve merely to cumber the records, and waste the time of this court. We have decided that the judges of the superior courts are justified in refusing to settle a bill of exceptions, where the draft proposed contains a full transcript of the short-hand notes of the trial, (People v. Sprague, 53 Cal. 423,) and over and over again we have called attention to section 1175 of the Penal Code, which provides: "A bill of exceptions must contain so much of the evidence only as is necessary to present the questions of law upon which the exceptions were taken; and the judge must, upon the settlement of the bill, whether agreed to by the parties or not, strike out all other matters contained therein." Possibly some good has been accomplished by these admonitions, but the evil referred to, if ameliorated, is by no means cured. For this reason, I repeat that if counsel in a particular case happens to commit the unusual error of making his draft too brief, the fault is one that merits some indulgence, especially as it cannot result in any very serious inconvenience to the judge who is called upon to settle the bill of exceptions. In our practice the motion for a new trial is always made before judgment (Pen. Code, § 1182) and without any preliminary statement of the evidence or specifications of error. People v. Fisher, 51 Cal. 319. If one of the grounds of the motion is that the verdict is contrary to the evidence, that ground will generally be abandoned after the motion is overruled in all cases where there is a substantial conflict of evidence upon the material issues, and there will be no exception to the order on the ground that the evidence is insufficient. If, however, the defendant insists upon presenting the question of the sufficiency of the evidence to this court upon appeal, he is forbidden to make a complete transcript of the reporter's notes into his proposed bill of exceptions, and must put the testimony of the witnesses in narrative form with as little repetition as possible. In attempting to do this every lawyer, even the most experienced, is liable to err on one side or the other, and usually, as we have seen, his error is in the direction of unnecessary prolixity. In such case it is made the duty of the judge who settles the bill of exceptions to strike out all redundant and superfluous matter, as well as to see that what remains conforms to the truth. This necessarily involves a careful reading and comparison of the draft with the reporter's notes or other record of the proceedings, and it follows, of course, that the longer the draft the greater is the amount of labor imposed upon the judge. If on the other hand it happens, as in this case, that the draft of the bill contains no adequate statement of the evidence, it is a very simple matter, involving a trifling amount of labor, to remedy the defect. If the omissions are comparatively slight the judge, with the assistance of the district attorney, may suggest the necessary amendments. If the omissions are serious and extensive counsel may be required to present a full statement of the evidence for the people, or to abandon his exception on the ground of insufficiency of the evidence. If he refuses or neglects to do either then the judge would be justified in adding to his statement of the evidence a general statement that other evidence was introduced on the part of the people tending to prove all the allegations of the indictment or information, which is all that would be necessary to render the exception harmless.

As to other grounds of exception, the statement of evidence necessary to present them fairly is usually short, and even when it is unfairly set out in the draft no great amount of labor is ordinarily required to amend it. It is better in my opinion that the judge, with the advice and assistance of the district attorney, should perform such labor than refuse to settle the bill of exceptions upon the ground that counsel preparing the draft has attempted to practice a fraud upon the court, unless the evidence of such design is far more gross and manifest than it can be said to be in this case.

I concur: Paterson, J.

80 Cal. 281

Hubbard v. Dusy *et al.* (No. 12,983.)

(*Supreme Court of California*. Sept. 2, 1889.)

Boundaries—Evidence.

1. Upon an issue as to the location of a line of the government survey, evidence of the location of monuments is not overcome by field-notes of the original survey, taken at the time of the erection of said monuments or subsequent thereto.

2. As between complicated descriptions of a line dividing two sections or quarter sections, that one is to be adopted which is most in conformity with the monument established by the government survey.

3. As between different monuments, those best identified should prevail, independent of anything in the field-notes of the original or any subsequent survey.

4. Where it is doubtful which of two lines of monuments is the true government line, other things being equal, that one is to be so considered which most nearly conforms to the field-notes.

McFarland, J., dissenting.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

Ejectment by H. Hubbard against Frank Dusy and William M. Cooledge. Judgment for plaintiff, and defendants appeal.

Wharton & Short, for appellants. *S. J. Hinds*, for respondent.

Per Curiam. Action of ejectment tried by a jury. Verdict and judgment for plaintiff. Defendants appeal from the judgment, and from an order denying their motion for a new trial.

The determination of the issue depended solely upon the true location of a line of the government survey between townships 14 and 15 S., M. D. B. and M., it being admitted that the plaintiff owned the demanded premises described in his complaint as "the S. ½ of the S. E. ¼ of section 31, township 14 S., range 22 E., M. D. B. and M., lying immediately north of and adjoining the N. E. ¼ of section 6, township 15 S.," but denied that it included the land in dispute, it being claimed by defendants that the land in dispute is a part of N. E. ¼ of section 6, township 15.

The statement on motion for new trial shows that evidence was introduced and witnesses examined tending to prove the allegations of the complaint, and that the land in dispute was within the south half of the quarter section owned by plaintiff; but does not state the evidence or testimony thus tending to prove plaintiff's case. The statement also shows that evidence was introduced on the part of the defendants tending to prove the denials and allegations of their answer, and that the land in dispute was in the N. E. ¼ of section 6, township 15, "including a duly certified copy of the original field-notes of the United States government survey of the south boundary line of township 14 S., range 22 E., M. D. M.;" but contains no other statement of the evidence tending to prove the defense. The only questions presented for decision relate to the propriety of the instructions given to the jury, as to the effect of the field-notes of the government survey as evidence of the true location of the township line.

At request of plaintiff's counsel the court gave to the jury, among others, the following instructions: *First.* "Evidence has been introduced by plaintiff tending to prove the existence of a monument fixed by the United States survey at the S. E. corner of section 31; and, also, evidence tending to prove a like monument at the S. W. corner of the land claimed by Mr. Hubbard on the middle south line of said section 31. Now the court instructs you that if you believe from the evidence that these two monuments have been established by plaintiff, and the disputed land is north of said monument, as claimed by plaintiff, then said evidence is not overcome by any field-notes of the original survey taken at the time said monuments were found to have been erected; nor will such evidence be overcome by the field-notes or courses or distance of any subsequent survey. When there are complicated descriptions of a line dividing two sections or two quarter sections of land, that one must be adopted which is most stable and certain, and which is more in conformity with the monument established by the United States government survey, and which would be least likely to mistake or be affected by error. *Second.* Monuments left by the United States survey on the grounds are the best evidence as to where the land should be, and any monument so established can only be antagonized by evidence of other monuments. As between different monuments, the jury should look to the evidence identifying them, and those monuments best identified should prevail, independent of anything even in the field-notes of the original or any subsequent survey." At the request of the defendants' counsel, the court gave among others the following, except that the third, as requested, did not contain the words "other things being equal," which were inserted by the court as an amendment to the instruction, as requested. "*First.* The court instructs you that you are to find where the true corners are located on the line in dispute, not from any isolated part of the testimony, but from a full and careful consideration of all of the testimony relative thereto. *Second.* I further instruct you that in the absence of monuments the field-notes would govern and determine the true line. *Third.* I further instruct you, in case there are two lines of monuments, or supposed monuments, so located as to render it doubtful which is the true line of government monuments, then, other things being equal, the monuments, or line of monuments, most nearly conforming to the field-notes would be most likely to be, and would be considered to be, the true government corner or corners."

Counsel for appellants contend that the court erred in giving the first and second instructions reqested by plaintiff, and in refusing the third instruction as requested by defendants, and in giving it as amended by the court, for the reason that each of these instructions denied to the field-notes of the government survey proper and lawful effect as evidence tending to prove the location of said township line as actually surveyed by the government of the United States.

We have examined the instructions complained of, and are of opinion that they fairly and correctly directed the jury as to the law bearing on the case. Judgment and order affirmed.

I dissent: McFarland, J.

(80 Cal. 538)

People v. Fitzpatrick. (No. 20,551.)

(*Supreme Court of California.* Sept. 13, 1889.)

Receiving Stolen Goods—View—Objections Waived—Instructions.

1. Though an order on a trial for receiving stolen property, that the jury be taken to view an animal alleged to be one of the cattle stolen, is not within Pen. Code Cal. § 1119, authorizing similar orders whenever, in the opinion of the court, it is proper that the jury should view the "place" in which a material fact occurred, and though such inspection was not conducted as a part of the regular trial, those objections cannot be raised for the first time on appeal.

2. An instruction under which the jury might have found defendant guilty, though he had not received all the cattle mentioned in the indictment, is not erroneous, as the value of the property is not a material element of the offense.

In bank. Appeal from superior court, Fresno county; M. K. Harris, Judge.

G. G. Goucher and *L. J. Maddux*, for appellant. *George A. Johnson*, Atty. Gen., for the People.

McFarland, J. The defendant was convicted of the crime of receiving personal property (several head of cattle) knowing the same to have been stolen; and he appeals from the judgment and from an order denying a new trial.

1. What, at first glance, seems to be the most important contention made by appellant is that the court erred in ordering the jury to be conducted to a *corral*, to view a certain steer alleged to have been one of the cattle stolen. The court seems to have thought that the order was permissible under section 1119 of the Penal Code. But that section only provides that a similar order may be made "when, in the opinion of the court, it is proper that the jury should view the place in which the offense is charged to have been committed, or in which any other material fact occurred;" and as a steer is not a "place," it is quite evident that the order made in the case at bar is not within the provision of that section of the Code. If, therefore, the proper objection to the proceeding had been made by appellant, a very serious question would have arisen. It is

true that the order of the court recites that "the reporter, clerk, deputy sheriff, judge of the court, and the defendant, will accompany the jury in this view, and the defendant's counsel;" but it does not appear that they did so, or that the court assembled at the place where the steer was, as an organized court, and conducted the examination in the usual way, as a part of the regular trial. The order appointed Samuel Miller, one of the witnesses, "to show and point out said animal to the jury." There does not appear to have been any opportunity for counsel to examine or cross-examine Miller, or to call the attention of the jury to the particular features of the brands and marks on the animal about which there was a conflict of evidence. The record merely states that "the jury inspected the steer." It is difficult to see, therefore, how the proceeding can be taken out of the rule that a jury must base its verdict upon evidence regularly introduced before it during the trial, and must not receive evidence out of court; although it seems to have been countenanced in People v. Bonney, 19 Cal. 446.

But the appellant did not object upon the ground that the proceeding itself was irregular, illegal, or unauthorized, and the attention of the court was not called in any way to that view of the subject. The ground of the objection to the order was that "the animal in question has not been shown to be in the same condition it was when the animal is alleged to have been received by the defendant." To which counsel for the prosecution responded: "We don't claim the brand is the same; but that the ear-marks and dewlap is the same." The order for the view having then been made, counsel for defendant said: "To which order the defendant excepts on grounds heretofore stated in objecting to the motion." He then asked the court as to the scope of the investigation, and the court replied that the order was that "the jury inspect this steer, and they can examine all parts of him. That is the extent of the order of the court." Whereupon counsel for the defendant said: "To which we will except, and I will ask the court to instruct the jury not to inspect the brand, as it has been shown to have been changed." The court denied the motion, and defendant excepted. These are all the objections and exceptions upon the point. If the attention of the court below had been called to what is now claimed to have been the vice of the proceeding, the ruling might have been different; but the objections which were then made were untenable, and we do not think that, under the circumstances, the appellant should be heard to make here for the first time the point which he now urges. It may be remarked that sending a jury out to view premises, even when clearly within section 1119, Pen. Code, is a hazardous proceeding, and frequently leads to difficulties; and it would be well for trial courts not to make use of the power therein given except in cases which seem to imperatively call for it.

2. There was no error in the instructions given to the jury; and they were quite favorable to defendant. The contention of appellant on this point is that, under the instructions, the jury might have found the defendant guilty, although it had not been proved that he had received all the cattle mentioned in the indictment. But that was not error. The character or grade of the statutory crime with which appellant was charged did not depend upon the value of the property received by him; and it was not necessary to prove either that he had received all the property stated in the indictment or that the part which he did receive was of a particular value. Bish. Crim. Proc. § 723.

3. Appellant objected to testimony of witness Miller as to defendant's manner at the time of his arrest. But all that Miller said was that when defendant was arrested "he got very mad;" "he got boisterous;" and "stamped, and said it was a disgrace to be arrested, and he had a very creditable people, much more so than I had." It is unnecessary to inquire into the admissibility of this testimony, for we do not see how it could possibly have been injurious to appellant.

4. There are no other points necessary to be noticed in detail. Miller showed sufficient knowledge about the brands and cattle marks to testify upon the subject, although not familiar with particular brands used in certain counties. The testimony to impeach the witness Fagan was properly admitted. The testimony of Miller as to William Carter was admissible, as it tended to prove that the cattle had been stolen. The evidence was sufficient to support the verdict, and we see no material error in the record.

The judgment and order affirmed.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

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3 Cal. Unrep. 137

McDANIEL v. CUMMINGS. (No. 13,173.)

(*Supreme Court of California*. Sept. 12, 1889.)

SURFACE WATER—UNOBSTRUCTED FLOW.

Under Civil Code Cal. § 801, providing that the right of receiving water from or discharging it upon land, and "the right of having water flow without diminution or disturbance of any kind," may be attached as easements to other lands, the owner of upper land is entitled to the natural and unobstructed flow of the surface water on and across adjoining land, and if the common-law rule is otherwise it is abrogated by Pol. Code Cal. § 4468, providing that the common law is the rule of decision "so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state."

In bank. Appeal from superior court, Colusa county; E. A. BRIDGFORD, Judge.

H. M. Albery, for appellant. *Edwin Swinford* and *John T. Harrington*, for respondent.

WORKS, J. The appellant being the owner of lands above and adjoining the lands of the respondent, the surface water from the lands flowed, naturally, on and across the lands of the latter. To prevent such flow the respondent constructed a dam on the line of his lands, thereby obstructing the waters and backing them onto the appellant's lands to his damage. This action was brought to enjoin the respondent from thus obstructing the flow of the water as stated. A temporary injunction was issued, but was subsequently dissolved by the court below on the ground that, by the law of this state, the respondent had the right to obstruct and prevent the flow of the waters across his lands, although, by so doing, he overflowed and injured the lands of appellant. This court has held directly to the contrary in a well-considered case. Ogburn v. Connor, 46 Cal. 347.

We are informed by the opinion of the learned judge of the court below, set out in the transcript, that he proceeded on the theory that by section 4468 of the Political Code the common law is made the rule of decision in this state, and that by the common law this action could not be maintained. But, conceding that such is the common-law rule, the section of the Code referred to only makes the common law the rule of decision "so far as it is not repugnant to or inconsistent with the constitution of the United States, or the constitution or laws of this state."

Section 801 of our Civil Code provides: "The following land burdens, or servitudes upon land, may be attached to other lands as incidents or appurtenances, and are then called 'easements.' * * * 9. The right of receiving water from or discharging the same upon land. * * * 11. The right of having water flow without diminution or disturbance of any kind." The appellant had the right, as an incident to his lands, to have the surface waters that might accumulate thereon flow on and across the respondent's lands, as they were accustomed to flow naturally; and the common law, conceding it to be as contended by the respondent, is clearly in conflict with this plain provision of the Code, and can have no application to the question presented.

We are of the opinion that the rule laid down in Ogburn v. Connor, supra, is eminently just and right, and that it should not be disturbed. Order reversed.

We concur: BEATTY, C. J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.; FOX, J.; MCFARLAND, J.

(80 Cal. 544)

PEOPLE v. JOSELYN *et al.* (No. 20,508.)

(*Supreme Court of California.* Sept. 18, 1889.)

STATE COURTS—JURISDICTION—MISDEMEANORS.

The superior court of the city and county of San Francisco has no jurisdiction to try a conspiracy with intent to murder, as that is a misdemeanor. Following Green v. Superior Court, 21 Pac. Rep. 307.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Davis Louderback and *Alex Campbell*, for appellants. *George A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendants were charged by indictment with the commission of a misdemeanor, in that they conspired, combined, and agreed together, feloniously to kill and murder a certain W. B. Drew. The defendants demurred to the indictment upon the ground, among others, that the superior court of the city and county of San Francisco, in which they stood indicted, and by which they were to be tried, was without jurisdiction to consider and determine their cause. The demurrer was overruled, and a trial had before a jury. The defendants were convicted as charged. From the judgment therein rendered, and an order denying them a new trial, they have appealed.

The principles of law involved in this case, as affecting the jurisdiction of the superior court of the city and county of San Francisco to try an offense such as the one in hand, were fully discussed and plainly declared in the case of Green v. Superior Court, 21 Pac. Rep. 307, and the conclusion reached in favor of the defendants' contention that the superior court of the city and county of San Francisco had no jurisdiction to try a misdemeanor. It follows, therefore, that the judgment and order should be reversed, and we so advise.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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80 Cal. 510

SILVESTER *et al.* v. COE QUARTZ MINE Co. (No. 13,109.)

(*Supreme Court of California.* Sept. 11, 1889.)

MINES—MECHANICS' LIENS—EVIDENCE.

1. Under Code Civil Proc. Cal. § 1183, giving to material-men a lien on property for the construction, repair, or alteration of which they have furnished materials, those who have furnished materials for the construction of a hoisting and pumping works building, pipes, gallows frame, and track, under a single contract with a mining company, have a lien on the whole mine, and not on the several structures merely, since they form a part of the mine itself.

2. In order to secure the lien, notice of it need not be given within 30 days after the completion of each of the several structures, but after the completion of the entire work.

3. A statement in the certificate of a recorder that a lien was duly sworn to is conclusive evidence of that fact.

4. An indorsement by a recorder upon a notice of lien is at least *prima facie* evidence of its filing and the date of its recording.

5. In an action against an owner of property for materials furnished to a contractor it is not sufficient to prove that the materials were sold to be used on the property, but it must be shown that they were actually used thereon.

6. A notice that a property owner will not be responsible for materials furnished contractors is not posted conspicuously enough to relieve from liability when placed in a closed building which is locked up for a greater part of the time.

In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action by Henry Silvester, George W. Whiteside, and P. Johnson against the Coe Quartz Mine Company. One of the findings of fact was that a notice by the mine company that it would not be responsible for materials furnished contractors was posted in a closed building, the door of which was for a large portion of the time kept locked. Judgment was rendered for plaintiffs, and defendant appealed.

Charles W. Kitts, for appellant. *A. & E. J. Burrows*, for respondents.

WORKS, J. This action was brought by three plaintiffs, jointly, to foreclose their separate material-men's liens on the mining claim of the defendant for materials furnished for repairs on said claim. The work on the mining property was done by a contractor, who was to erect hydraulic power hoisting works and pumping works building, gallows frame and track, lay down a water-pipe to supply water to the mine and to pump out the mine to the third level. There was but one contract to do all of the work named for a certain number of the shares of stock of the company, and the contract was not recorded. The evidence shows that the materials sold by the plaintiffs were sold to be used in the repairs of said mine, and, with the exception hereinafter mentioned, were used therein, some being used in one of the improvements mentioned and some in another. The court finds, generally, that the materials "were used in and on said premises in the alteration thereof." The appellant contends that the statute does not give to material-men liens upon mining claims, but only "upon each separate structure, and convenient space around the same, and not for materials supplied, and used generally for the alteration and repair of a mining claim," and upon this basis it is argued that, the notices of the liens being against the mine, and not the structures erected in repairing the same, they were invalid; and, further, that, as some of the structures were completed more than 30 days before the notices were filed for record, they were inoperative. We cannot concur in this view. The lien given by the statute is upon the mining claim, as a whole, and not upon the separate pieces of work done in its repair. Code Civil Proc. § 1183. The mine is a structure within the meaning of the statute. Helm v. Chapman, 66 Cal. 291, 5 Pac. Rep. 352. The work done in this case became and was a part of the mining claim, and the whole claim, including the added improvements, was subject to the lien. Civil Code, § 661. Therefore the notice of lien, as against the mining claim, was valid, and the contract for the several items of improvement being entire, the notice given within 30 days after the completion of the whole work was in time. It is objected that the findings were not sufficiently full on some of the issues, but we regard them as sufficient.

It is claimed that the court erred in admitting the several notices of liens in evidence, for the reason, as stated above, that no such lien was given by statute, and for the reasons that they were not shown to have been filed in the recorder's office, recorded, or verified. The first of these objections we have answered. As to the others, the record contains the notices of the several liens, with the names of the claimants in each attached, and substantially the following, immediately after the signature as it appears in the transcript: "Duly sworn to. Indorsed: Recorded at request of Peter Johnston, September 5, 1887, in book 4 of Liens, pages 443, 444, records Nevada county, Cal. John A. Rapp, Recorder." We are bound by the recital in the statement that the notices of liens were duly sworn to, and the recorder's indorsement on the paper is *prima facie* evidence at least of their filing and the date of their recording, which fully answers the other objections made to their introduction in evidence.

Objections are made to some of the rulings of the court on questions of evidence, and the findings are criticised, but these objections are unfounded. The findings were sustained by the evidence, except as to a part of the claim of the plaintiff Johnston. It appears that certain track iron furnished by Johnston to the contractor, to be used in repairing the mine, was not used in such repairs. It is not enough, in an action against the owner of the property, for material furnished a contractor, to show that such material was sold to be used in the structure to be erected. It must appear that it was used therein. As to this item of material, therefore, Johnston was not entitled to recover. The amount of this material is stated in the briefs to have been $62.27. If this be the correct amount, and no further evidence is offered on the point, the court below will modify its findings and judgment accordingly, but if the amount is not certainly fixed by the evidence the court may take further evidence if it be necessary to ascertain the exact value of the material not used and make the necessary modification.

It is claimed by the appellant that it was relieved from liability by the posting of a notice that it would not be responsible for materials furnished the contractors; but, conceding that such a notice, properly posted, would prevent the attachment of the lien, the court below found, upon sufficient evidence, that the plaintiffs had no actual knowledge that such a notice had been posted, and that it was not posted in a conspicuous place, as required by the statute which meets this point. There is no error appearing in the record except the one stated above. The judgment and order appealed from are affirmed as to all of the respondents except Johnston, and as to him the court below is instructed to modify the judgment as above indicated unless the parties, or either of them, desire to offer additional evidence on the one question whether the material named was actually used in the repairs of the mining claim, or, if not used, as to its value, and modify the judgment in accordance with the facts proved.

We concur: Beatty, C. J.; Fox, J.; Thornton, J.; Paterson, J.; Sharpstein, J.; McFarland, J.

(80 Cal. 507)

De Costa v. Comfort. (No. 13,048.)

(*Supreme Court of California.* Sept. 11, 1889.)

Allowance of Attorney's Fees.

In an action by a mortgagee against a third person to recover the amount of a note secured by a chattel mortgage, on the ground that defendant tortiously converted the mortgaged property, the mortgagee can recover attorney's fees and interest on the whole, though it appears that part of the property was sold by mortgagor to defendant with an agreement that he would satisfy the mortgage out of the proceeds of sale.

In bank. Appeal from superior court, San Joaquin county; J. G. Swinnerton, Judge.

Action by A. De Costa against A. M. Comfort. Judgment was rendered for plaintiff and defendant appeals.

Baldwin & Campbell, (*Edward I. Jones*, of counsel,) for appellant. *Carter & Smith*, for respondent.

WORKS, J. This action was brought by the respondent against the appellant to recover the amount due him on a note given by one Hughes, and secured by a chattel mortgage, on the ground that the appellant had converted the mortgaged property to his own use. The court found for the respondent, and rendered judgment in his favor for the amount due under the mortgage, including interest and attorney's fees, as provided for therein. The appeal is from the judgment, and comes to us on the judgment roll.

The appellant contends that, the action being for a tort, the plaintiff could not recover the attorney's fee, nor the interest from the time of the alleged conversion. We think otherwise. The property taken by the appellant was subject to the payment of the full amount due on the mortgage, and he having converted the same to his own use must be held personally liable for the same amount. It would be a strange doctrine that would allow the mortgagor to relieve his property of a part of the debt for which he has pledged it by smuggling it into the hands of a third party, and that such third party could escape liability for the full amount by saying that his taking of the property was in the nature of a tort.

It is further contended that the taking by the appellant was not tortious. The court finds that the appellant, learning that an attachment was about to be issued against the property, which consisted of a lot of grain, informed Hughes of the fact, and requested him to transfer the same to him; that he did thereupon transfer to him 800 sacks of the wheat at $1.30 per 100 pounds; that the appellant paid Hughes $5 on the wheat, and at the time agreed that the price of the wheat, after paying plaintiff's mortgage, should be applied to a certain note due by one of Hughes' creditors to the appellant, and that he took into his possession 373 sacks of the wheat not sold to him, making in all 1,173 sacks, weighing 157,493 pounds; that the appellant sold the whole of the wheat to a certain corporation, and, with the consent of Hughes, paid the purchaser an amount due it, presumably from Hughes, and himself received the balance, amounting to $1,113.46. As to the 373 sacks, this was a tortious taking of the property, as there was no purchase of it from Hughes. As to the wheat actually transferred by Hughes to the appellant the court finds that it was under an express agreement that the respondent's mortgage should be first satisfied out of the proceeds to be derived from its sale, and the money due the respondent was converted to the appellant's use, if not the wheat. If it were not a tortious taking, the appellant, by his promise, bound himself to pay the respondent his money when the wheat was sold, and should be held to this promise. Whether the taking be regarded as a tort or not, the findings clearly show a liability on the part of the appellant to the respondent in the full amount of the judgment. There is no merit in this appeal. Judgment affirmed, with 20 per cent. damages.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.; THORNTON, J.

(80 Cal. 542)

BRYANT v. LANGFORD *et al.* (No. 12,931.)

(*Supreme Court of California.* Sept. 16, 1889.)

ASSIGNMENT FOR BENEFIT OF CREDITORS.

When an assignee fails to give bond as required by Civil Code Cal. § 3467, the assignor cannot annul the assignment, but may have the assignee removed.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by M. E. Bryant against B. F. Langford, R. E. Wilhoit, and Charles Bamert. Judgment was rendered for defendants and plaintiff appeals.

Joseph H. Budd, (*James H. Budd*, of counsel,) for appellant. *J. C. Campbell*, for respondents.

WORKS, J. This is an action by the appellant to set aside a deed of assignment of certain real estate, made by him to the respondents for the benefit of his creditors. The sole ground alleged in the complaint for setting aside the deed is that the assignees failed to give the bond required by section 3467 of the Civil Code, the amount of such bond having been fixed by the judge of the superior court. The court below correctly sustained a demurrer to the complaint. The failure to give the bond did not affect the validity of the deed. The execution and delivery of the deed vested the title to the property in the assignee. A failure on the part of the assignor to file an inventory, or a failure to record the deed, renders the assignment void as "against creditors of the assignor and against purchasers and incumbrancers in good faith and for value," and until the inventory and affidavit have been filed, and the assignee has given the required bond, such assignee has no authority to dispose of the estate or convert it to the purposes of the trust. Civil Code, §§ 3461-3468. But the title passes as between the assignor and assignee, and the assignment is irrevocable. Forbes v. Scannell, 13 Cal. 288; Warner v. Jaffray, 96 N. Y. 256. If the assignor has any remedy, it is to have the assignees removed, and he certainly has this remedy, as he, as well as his creditors, is interested in the giving of the bond and the due performance of the trust by the assignees. Judgment affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; THORNTON, J.

(80 Cal. 545)

JOHNSON v. MCCONNELL. (No. 13,120.)

(*Supreme Court of California.* Sept. 17, 1889.)

ANIMALS—SHEEP-KILLING DOGS.

1. Under Civil Code Cal. § 3341, subsec. 2, providing that any one finding a dog, not on the premises of its owner, worrying, wounding, or killing any sheep, may at the time kill the dog without liability for damages, it is necessary, in order to justify the killing of a dog, to prove that it was actually worrying, wounding, or killing, and a finding that the sheep were running about the field in a greatly agitated and frightened manner, pur-

sued by the dog, which was apparently worrying and injuring them, and that the effect of chasing was to greatly worry and injure them, is not sufficient. BEATTY, C. J., and MCFARLAND and THORNTON, JJ., dissenting.

2. In said section the words "at the time" do not import that the killing of the dog must be in the very act of worrying, etc., but it may be done after an extended pursuit of the dog.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Action by T. W. Johnson against Thaddeus McConnell. Judgment was rendered for defendant, and plaintiff appeals.

Taylor & Holl, for appellant. *Grove L. Johnson*, for respondent.

WORKS, J. This action was brought by the appellant against the respondent to recover the value of three dogs alleged to have been maliciously killed by the latter. The respondent admitted the killing, but justified it on the ground that the dogs were at the time in the act of worrying sheep belonging to his mother, and in his charge. As to the fact tending to show such justification the court found as follows: "On the 1st day of February, 1887, the defendant was in the employment of his mother, Mrs. Ellen M. Wilson, and engaged in attending to and caring for the sheep upon the ranch in Sacramento county. A portion of said sheep consisted of a band of ewes, about three hundred in number, which were at the time heavy with lamb, and had been segregated from the rest of the sheep and put in a field by themselves, for the purpose of giving them more careful attention and protection during the lambing season. This field was at the time a part of Mrs. Wilson's land, and in her possession, and it was some three miles from the residence of the plaintiff. On the date named, defendant, while at some distance from said field, discovered said ewes running about the field, followed by three or four dogs, which seemed to be chasing them. Thinking said sheep in danger, the defendant immediately went to his house, a quarter of a mile distant, and, procuring a repeating rifle, returned to said field. He found the ewes still running about the field in a greatly agitated and frightened manner, pursued by four dogs, which were apparently worrying and injuring them; and the defendant, thinking that said ewes were being so worried and injured, and in danger of being killed by said dogs, at once proceeded to and did shoot and kill three of said dogs; that is to say, defendant immediately started after said dogs, when the latter, perceiving him enter the field, turned and ran, when defendant pursued and shot three of them in quick succession and as soon as he could get in range of them, but not until they had gotten something like a quarter to a half mile from where defendant first started after them. None of the dogs were on the land or premises of the plaintiff when killed." The court further found that the defendant had never seen the dogs, and did not know to whom they belonged; that he killed them because he believed that it was the only effectual method of preventing them from returning and injuring the sheep, and not with any malicious or wrongful intent or feeling; that the effect of the chasing of the sheep was to greatly worry and injure them, which was known to defendant when he pursued and killed the dogs; that they were in fact injured and worried thereby; that the plaintiff was the owner of the dogs; that they were never known to molest sheep before this; that they were valuable hunting dogs, trained and educated, and were worth $225. On these findings the court concluded in favor of the defendant, and rendered judgment accordingly. The plaintiff moved for a new trial, which was denied, and he appeals.

It is extremely doubtful from the evidence whether the dogs were in fact chasing or worrying the sheep at all, or whether they were not hunting in the field where the sheep were, and thereby frightened them, and the court below does not find that they were, but that they seemed to be chasing them, and were apparently worrying and injuring them, and that the defendant believed that they were so doing, and believed at the time of killing them that it was the only effectual method of preventing them from returning and injuring the sheep. There is no finding that the dogs were in fact worrying the sheep, or that the defendant had reasonable cause to believe they were, except so far as this may be inferred from the finding that they were apparently doing so. Our Code provides: "Any person, on finding any dog or dogs, not on the premises of its owner or possessor, worrying, wounding, or killing any sheep, Angora or Cashmere goats, may, at the time of so finding said dog or dogs, kill the same, and the owner or owners thereof shall sustain no action for damages against any person so killing such dog or dogs." Subsection 2, § 3341, Civil Code. Dogs are property, for the malicious destruction or injury of which an action for damages will lie. 1 Suth. Dam. 802; State v. McDuffie, 34 N. H. 523; Dodson v. Mock, 32 Amer. Dec. 677; Wheatley v. Harris, 70 Amer. Dec. 258, and note. At common law, and in some of the states, they are not the subject of larceny. State v. Doe, 79 Ind. 9; Ward v. State, 48 Ala. 161. But even in those states it is held that they are the subject of a criminal prosecution for malicious trespass. State v. Doe, supra; Kinsman v. State, 77 Ind. 132; Parker v. Mise, 27 Ala. 480; Ward v. State, supra. In this state they are declared to be property, and made the subjects of larceny, (Pen. Code, § 491;) and, while it has been said that they have nearly always been held "to be entitled to less regard and protection than more harmless domestic animals," it is equally true that there are no other domestic animals to which the owner or his family can become more strongly attached, or the loss of which will be more keenly felt. As to these dogs the plaintiff testified: "These dogs were trained animals. The setter was trained by a regular dog-trainer, Mr. Schultius. The setter dog was a good retriever. If I dropped anything, I could send him back for it any ordinary distance, —half a mile or so. If I left my coat on the other side of the field when I went to dinner, he would bring it to me. He encouraged my greyhounds to go out and hunt rabbits, and would start the rabbits for the greyhound. He was a good deer dog, just as well-trained as a deer dog, and would drive deer in the direction of the hunter. He would go around them and bring them up to where I was, when I was out hunting with him. The St. Bernard was a good watch dog. He went with my children and took care of them almost like a human being. He would go with the other dogs, and if they caught a rabbit close he would bring it to the house. I have known him to bring as high as two or three in one day to the house. My boys could pack anything on him if they were out. If they killed more game than they could pack, they would pack it onto his back. The greyhound was a fast dog. We had him trained. We had trained him to go with the other dogs and catch the rabbits and protect our vineyards. In the country where I live there are a great many rabbits,—'Jackass rabbits' they are called. These animals are very destructive to vineyards. They would eat the young vines and entirely destroy vineyards. Before I got my dogs my vines were almost entirely destroyed in a single year. I replanted my vineyard, and I got these dogs, and they run and destroyed rabbits to such an extent that I could hardly find a rabbit within half a mile of my place." While it should be the policy of the law to protect the flocks of the sheep-owner, such dogs as these should not be killed without good cause. Do the findings show that good cause existed in this case? The Code provision relied upon allows a dog to be killed by any person at the time of finding him, not on the premises of his owner, worrying, wounding, or killing any sheep. The terms of this statute cannot well be misunderstood. It is not sufficient that the party killing the dog shall believe he is worrying, wounding, or killing sheep. He must be actually doing the wrongful act to authorize the taking of his life. If the defendant acted on appearances, and believed the dogs were worrying the sheep, he acted at his peril, and was bound to prove that they were doing so in fact. The court having failed to so find, the judgment is not supported by the findings.

It is contended by the appellant that in order to justify the killing it was necessary to show that they were killed in the very act of worrying the sheep. The Code provides that it must be at the time; but we are inclined to give the statute the strict construction contended for. If it had been shown that the dogs were found by the defendant worrying the sheep, and that he had immediately followed them up and killed them, without allowing them to escape or get out of his sight, we think the killing would have been justifiable. But the court below seems to have laid stress upon the fact that the killing was done to prevent the dogs returning and injuring the sheep as a justification of the act. We do not so regard it. The only ground upon which the act is made justifiable by the statute is that the dogs were caught in the act of worrying the sheep, and then and there killed. Carpenter v. Lippitt, 77 Mo. 242, and Marshall v. Blackshire, 44 Iowa, 475, are relied upon by the respondent. The Missouri statute, under which the decision referred to was rendered, was entirely different from ours. It made it lawful for any person to kill a dog which had killed or maimed a sheep, at any time, and without restriction of any kind. The act rendered the dog forever after an outlaw, and made him the lawful prey of any and all persons. The Iowa statute provides: "It shall be lawful for any person to kill any dog caught in the act of worrying, maiming, or killing any sheep or lambs or other domestic animals." Code 1886, § 1485. In Marshall v. Blackshire, supra, the court below charged the jury: "*Sixth.* If he caught the dog in the act of killing or worrying his chickens, he was justified in killing him. The fact that his chickens were afraid of the dog, and ran from it, would not authorize the killing unless the dog was worrying or killing them. To 'worry' means to run after, to chase, to bark at. *Seventh.* It was not necessary that the dog should have been, at the very instant of the shooting, in the act of worrying or killing the defendant's chickens, in order to justify the shooting of it, but if the dog had been worrying or killing the defendant's chickens upon his premises, and at the time he was killed his conduct was such as to create in the mind of the defendant a reasonable apprehension of continued or renewed worrying or killing, and while under such apprehension, exercising the care and prudence which reasonable men usually exercise under like circumstances, he shot the dog, the shooting was rightful, and the plaintiff cannot recover." The court, in passing upon this instruction, said: "It is claimed the fifth and sixth instructions given by the court are clearly erroneous, because the principle is recognized that the dog can only be killed if caught in the act of worrying the chickens. The conclusive answer to this is that such is the statute, and when these instructions are read in connection with the seventh, we are of the opinion quite as favorable a rule was laid down as defendant was entitled to. It is true, the dog was a trespasser; but this fact alone would not justify the killing of him any more than a horse or cow." We think this case fully sustains the views we have expressed. The findings fail to show any justification for the act of the defendant in destroying the plaintiff's property, and for that reason the judgment and order appealed from are reversed and the cause remanded.

We concur: SHARPSTEIN, J.; PATERSON, J.; FOX, J.

McFARLAND, J., (*dissenting.*) The court finds that the defendant, in the first instance, "discovered the ewes running about the field followed by three or four dogs, which seemed to be chasing them." He went to the house, a quarter of a mile distant, for his gun. When he returned, having consumed time enough to walk half a mile, "he found the ewes still running about the field in a greatly agitated and frightened manner, pursued by four dogs, which were apparently worrying and injuring them." It is further found that "the effect of the chasing of the sheep was to greatly worry and injure them, which was known to defendant when he pursued and killed the dogs; that they were in fact injured and worried by said chasing and running." It was also found that defendant did not kill the dogs from any malicious feeling, but to protect the sheep. I think that this plainly brings the defendant within the protection of the statute. He was not compelled to wait until the dogs had actually seized the sheep to see if they were only in the playful exercise of an "educated" trait of character, or if the taste of blood would have aroused a barbaric instinct, derived from their wolfish ancestors, which would have overcome the discipline of their semi-civilization. The rule that a man's intentions must be gathered from his conduct applies still more forcibly to dogs, and if a dog be found chasing sheep in a field of his owner's neighbor, the common judgment of mankind is that his intent is bad. In Marshall v. Blackshire, 44 Iowa, 475, the court, in a case very similar to the case at bar, defines "worry" as follows: "To worry means to run after, to chase, to bark at;" and what the court finds in the case before us constitutes, in my opinion, "worrying" within the meaning of our statute. I think that the judgment should be affirmed.

BEATTY, C. J. I concur with Justice McFARLAND.

THORNTON, J. I concur in the foregoing opinion.

(80 Cal. 333)

SOUTH YUBA WATER & MIN. CO. v. ROSA.
(No. 12,914.)

(*Supreme Court of California.* Sept. 2, 1889.)

CORPORATIONS—ACTIONS BY—RIPARIAN RIGHTS.

1. In an action by a corporation, failure of the complaint to allege compliance with Civil Code Cal. § 299, which provides that no corporation now in existence, or hereafter formed, shall maintain or defend any action in relation to its property until it has filed a copy of the copy of its articles of incorporation with the clerk of the county in which such property is situate, does not render it demurrable where it contains no averment on the subject; and such defense must be specially pleaded.

2. Such section does not apply to foreign corporations.

3. Under act Cong. July 26, 1866, § 9, (14 St. at Large, c. 262,) providing that whenever, by priority of possession, rights to the use of water have vested, and are recognized by local customs and laws, the owners of such rights shall be protected therein; and act Cong. July 9, 1870, § 17, (16 St. at Large, c. 235,) providing that "all patents granted, or preemption or homesteads allowed, shall be subject to any vested and accrued water-rights,"—defendant's riparian rights, as a homestead claimant of public lands, in the waters of a creek flowing partly through his land, are subject to an appropriation thereof by plaintiff, made long before defendant's homestead right accrued.

Commissioners' decision. In bank. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Action by South Yuba Water & Mining Company, a corporation organized under the laws of New York, and doing business in Nevada county, against Delovico G. Rosa, to restrain defendant from diverting the waters of a certain creek, and for damages. Civil Code Cal. § 299, provides that no corporation now in existence, or hereafter formed, shall maintain or defend any action in relation to its property until it has filed a certified copy of the copy of its articles of incorporation with the clerk of the county in which such property is situate. Act Cong. July 26, 1866, § 9, (14 St. at Large, c. 262,) provides "that whenever, by priority of possession, rights to the use of water * * * have vested and accrued, and the same are recognized and acknowledged by the local customs, laws, and the decisions of the courts, the possessors and owners of such vested rights shall be maintained and protected in the same." An amendatory statute (act Cong. July 9, 1870, 16 St. at Large, c. 235, § 17) provides that "all patents granted, or pre-emption or homesteads allowed, shall be subject to any vested and accrued water-rights, or rights to ditches and reservoirs used in connection with such water-rights," as may have been acquired under the original act. Judgment for plaintiff, and defendant appeals.

J. I. Caldwell, for appellant. *T. S. Ford*, for respondent.

VANCLIEF, C. The plaintiff is a foreign corporation, organized under the laws of the state of New York, and sues as the owner of a water ditch situated in Nevada county, in this state, extending from Rock creek to plaintiff's reservoir near Blue Tent, a distance of about four miles, to recover damages for diverting therefrom the waters of the North branch of Rock creek, which discharges its waters into the main channel of Rock creek above the head of plaintiff's ditch; and also to enjoin the defendant perpetually from diverting any water from Little Rock creek. The plaintiff had judgment for $30 damages, and a perpetual injunction as prayed for; and the appeal is from the judgment, and from an order denying defendant's motion for a new trial.

The findings show that the plaintiff and its grantors have owned the ditch for more than 25 years prior to the commencement of this action, and that Little Rock creek has contributed to its supply of water continuously during all that time, except when interrupted by the defendant. It appears that Little Rock creek flows in a natural channel a distance of about 1,000 feet through land possessed and claimed by defendant as a homestead, under a settlement thereon, made in 1883, and for which he holds the receipt of the register of the United States land-office, for the fees and compensation of register and receiver for the entry of the land as a homestead, under section 2290, Rev. St. U. S., but has received no patent therefor. Under this title, and his possession, he claims the rights of a riparian owner to the waters of Little Rock creek.

The defendant filed a general demurrer to the complaint, which was overruled, but which he contends should have been sustained because it was not alleged that plaintiff had complied with section 299 of the Civil Code concerning the filing of a copy of the copy of its articles of incorporation in the office of the county clerk of Nevada county, in which county plaintiff's ditch is situated; and on the trial the defendant objected to any evidence until a compliance with section 299, Civil Code, should be proved; and also, at the close of evidence on the part of the plaintiff, moved for a nonsuit upon the same ground, which was denied. Where the complaint contains no averment upon the subject, it is not a valid ground of demurrer that it does not affirmatively allege a compliance with the provisions of section 299 of the Civil Code; and, in such case, the failure to comply with that section can be made available as a defense only by specially pleading it in the answer. Phillips v. Goldtree, 74 Cal. 151, 13 Pac. Rep. 313; Railroad Co. v. Pursell, 18 Pac. Rep. 886. As a defense it is only matter in abatement of the action, and if not specially pleaded it is waived. In this case it is not pleaded at all.

Moreover, we are of opinion that section 299 of the Civil Code does not apply to foreign corporations. If a foreign corporation were incorporated by special act of a foreign legislature, or under a general act not requiring a copy of its articles to be filed with a secretary of state, it is manifest that it would be impossible for it to comply with section 299 of our Civil Code, in the absence of any law of this state requiring or even authorizing a foreign corporation to file a copy of its articles, or of its legislative act of incorporation, in the office of the secretary of this state. "The secretary of state," mentioned in section 299 of the Civil Code, means the secretary of this state, and not the secretary of a foreign state; and the phrase "every corporation now in existence" was intended to embrace only corporations formed in this state, whether formed under the provisions of the Civil Code, or under the provisions of statutes existing prior to the Civil Code; and to exclude any doubt that the section was intended to be applicable to all corporations organized in this state before the enactment of the Civil Code. Whether or not it is expedient that foreign corporations should be required to deposit record evidence of their incorporation in every county of this state where they have property, in like manner as domestic corporations are required to do, is matter for consideration of the legislature alone.

The findings of fact by the trial court are amply sustained by the evidence and stipulations of counsel; and upon these findings it is clear that under the acts of congress of July 26, 1866, and July 9, 1870, the riparian rights of the defendant, as a homestead claimant, are subject and subordinate to the prior appropriation of the waters of Little Rock creek by the plaintiff, since it appears that the land upon which plaintiff's ditch is situated, and over which said creek runs, are public lands of the United States, except such right or title as the defendant acquired by his homestead settlement and proceedings in the United States land-office above stated, long subsequent to the appropriation of the waters in question by the plaintiff. Cave v. Crafts, 53 Cal. 135; Osgood v. Water & M. Co., 56 Cal. 571; Farley v. Irrigating Co., 58 Cal. 142; Himes v. Johnson, 61 Cal. 259; Ware v. Walker, 70 Cal. 591, 12 Pac. Rep. 475.

I think the judgment and order denying the motion for new trial should be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying the motion for a new trial are affirmed.

PEOPLE v. MANCHEGO. (No. 20,530.)

(*Supreme Court of California.* Sept. 2, 1889.)

RAPE—ASSAULT—EVIDENCE—INSTRUCTIONS.

1. On trial for assault with intent to commit rape, an instruction that, if defendant assaulted and laid violent hands on prosecutrix, with intent not to actually ravish, but by force to overcome and seduce her, he would be guilty of simple assault, is proper.

2. Such instruction, and a verdict thereon, is warranted by evidence that defendant induced prosecutix to meet him at an appointed place, where he seized her, threw her down, and performed certain indecent and violent acts upon her person, which she resisted, and then screamed, whereupon he released her.

Commissioners' decision. In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

W. B. Dillard, for appellant. *George A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was charged with an assault with intent to commit rape. He was convicted of simple assault. From the judgment and an order refusing a new trial he has appealed. The points made for the reversal of the judgment are: *First.* That the court erred in its last instruction to the jury. *Second.* That there was no evidence to support the instruction complained of, or the verdict of the jury. The instruction is: "I charge you, gentlemen, that, if the defendant assaulted the prosecutrix here, and laid violent hands upon her, although his intent may not have been to ravish or rape her, yet, if his intent was by this force to overcome and seduce her, he may be guilty of an assault; and if you find that he did lay hands upon her violently, with the purpose, not of actually and by force ravishing her, but by force to overcome her to some extent, you will be justified, if you find those facts, to find him guilty of simple assault. Simple assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."

It was said in the case of Com. v. Merrill, 14 Gray, 417: "The facts in the present case resemble those proved in Rex v. Nichol, Russ. & R. 130, where it was shown that a teacher took very gross and indecent liberties with a female scholar under his control, of tender years, without her consent; and it was held that he was rightfully convicted of an assault." "There was ample proof of gross indecency and lewdness, and of an attempt, by long-continued and urgent solicitations and inducements, to lead the prosecutrix to consent to the wish of the prisoner to have sexual intercourse with him. These facts would have been sufficient to warrant a jury in finding the defendant guilty of an assault." 1 Russ. Crimes, (8th Amer. Ed.) 752. "Obviously, there is a manifest distinction between an assault to commit a rape and an assault with intent to have an improper connection. Any such violent or indecent familiarity with the person of a female against her will, where the latter is the extent of the purpose and intent of the aggressor, is an aggravated assault, and should be punished as such." Pefferling v. State, 40 Tex. 493. The instruction to which exception is taken did not inform the jury that the defendant would be guilty of a simple assault if his intent was merely to seduce the prosecutrix with her consent. It was to the effect that if he violently laid hands on her with the intent by force to overcome and have an improper connection with her, but not of forcibly ravishing her, he would then be guilty of simple assault; and under the authorities it was correct.

The prosecutrix was a girl who was about thirteen and a half years old at the time of the alleged assault, and was an orphan residing with her grandmother. The defendant was married to her step-mother, and she had known him for eight years. The defendant induced her to meet him, by leaving a note for her in a book on a table at her aunt's, where she was then staying. The place of meeting was in a dry creek bottom, where the note directed her to go. There he took hold of her, threw her down, and performed certain indecent and violent acts upon her person, unnecessary to describe, which she resisted, and then screamed, when he let her go, and went away on horseback.

We think the evidence warranted the instruction and the verdict, and advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(80 Cal. 385)

WIXSON *v.* DEVINE. (No. 12,788.)

(*Supreme Court of California.* Sept. 2, 1889.)

RES JUDICATA.

1. In an action for the diversion of a stream, a prior judgment restraining defendant from interfering with plaintiff's dam, or with "his turning out any of the waters from Kentucky ravine, after said water shall have reached plaintiff's dam, so long as the quantity shall not exceed 25 inches," does not estop defendant from proving a prior appropriation by him above plaintiff's dam.

2. Where, on appeal from the judgment in such action, the only question involved was the admissibility of evidence to show a prior appropriation by defendant below plaintiff's dam, a statement in the opinion of the court, that such prior judgment precluded defendant from claiming any right to 25 inches of said stream at the point of plaintiff's diversion, "or at any point above," is merely *obiter*, and not conclusive, as "the law of the case," on rehearing.

In bank. On rehearing. For opinion on appeal, see 20 Pac. Rep. 367. For opinion on former appeal, see 7 Pac. Rep. 776.

Van Clief & Wehe, for appellant. *Smith & Ford* and *S. B. Davidson*, for respondent.

BEATTY, C. J. The question in this case is whether the judgment in a prior action is an estoppel in this. In the first action Wixson sued Devine and wife for tearing out his dam, and interfering with his diversion of 25 inches of the stream at his dam. In his answer in that action Devine claimed to have appropriated all the water of the stream prior to any appropriation by Wixson, but he did not show at what point or points he had made a diversion of the water. On the trial he attempted to show a prior appropriation by diversion below the point of plaintiff's dam of all the water flowing in the stream at that point. In this he failed, the court finding that plaintiff's appropriation was prior to and superior to any appropriation of Devine below plaintiff's dam. The defendant then offered to show that he had made a still earlier appropriation above plaintiff's dam. This offer was objected to, and the objection sustained by the court, upon the ground that in that action it was immaterial what appropriation defendant had made, or what right of diversion he had above plaintiff's dam, as such right of diversion was in nowise affected by plaintiff's dam, and could not justify the defendant in tearing out the dam, or interfering with the plaintiff's right to divert so much of the water of the stream as came down to that point. In entire and perfect consistency with this ruling, which, considering the subject of the action, was clearly correct, the only judgment rendered was for one dollar damages, with an injunction restraining defendant from interfering with plaintiff's dam, flume, or ditch, or with his "turning out any of the waters from Kentucky ravine, after said water shall have reached plaintiff's dam, so long as the quantity shall not exceed 25 inches."

There were no express findings of fact, and none can be implied from the judgment, except such as are logically necessary to sustain it. Now, the only facts necessary to sustain the judgment, are that Wixson had constructed a ditch of 25 inches capacity, heading above his dam, which by completion, or by relation to his notice of intention, gave him a prior right, as against Devine, to that quantity of water at that point, whenever so much happened to come down to him, as it frequently might, notwithstanding an earlier appropriation by Devine of the entire low-water flow of the stream above. We must take notice of the fluctuating volume of mountain streams, and of the fact that prior appropriators, when they have no use for the water,—as frequently happens,—allow it to pass down the stream to the advantage of subsequent appropriators, or riparian owners below. We know, therefore, that every demand of this judgment, and every fact which it implies, are consistent with a prior appropriation by Devine above plaintiff's dam and ditch,—an appropriation which at low, or even ordinary, stages of water, might leave a surplus of less than 25 inches to flow down to plaintiff's dam. Now, in this present action, plaintiff claims a first right to 25 inches of the stream, and that the defendant is precluded from proving a prior appropriation above plaintiff's dam, because it is said the judgment in the first action is an estoppel upon that point. But if, as we have endeavored to show, nothing in the judgment implies any fact inconsistent with such prior appropriation, we cannot see upon what principle it can be held an estoppel.

But it is said that on a former appeal in this case we held it an estoppel, and that such has become the law of the case. See 67 Cal. 341, 7 Pac. Rep. 776. We have recently, in Sharon v. Sharon, 22 Pac. Rep. 26, had occasion to consider this doctrine of the law of the case, which means, as we understand it, that the court having erroneously decided some matter of law, will always stand by the error in that case, though it will not allow it to be a precedent in another, and we there determined that the doctrine had nothing to commend it to the favor of the court, and that its application would not be extended beyond the cases in which it had been held to apply. It has never, that we are aware, been held to apply to expressions in an opinion which are merely *obiter*, and we venture to say that, beyond some expressions of that sort, there is nothing in the former opinion of this court affecting the question presented on this appeal. On the first trial of this case the judgment in the former action was admitted in evidence, and the opinion of the judge who tried the case was excluded. Both of these rulings were in favor of the plaintiff, and they were not the subject of review on his appeal. There was no occasion, therefore, for this court on that appeal to say anything as to the correctness or incorrectness of those rulings. But, aside from this, it is also true that what was said, however binding it may be deemed, does not touch the question involved in this appeal. We are of the opinion that the judgment in the first action was admissible as evidence to prove one of the issues in this case, *i. e.*, the construction of plaintiff's dam and ditch prior to the commencement of the former action. It may be conceded that the judge's opinion delivered in the former case was properly excluded for the reason assigned, viz., that it was not authenticated. But when the court proceeded to say, (67 Cal. 346, 7 Pac. Rep. 779,) "the record of the judgment introduced in evidence precludes the defendant from setting up any right to twenty-five inches of water in Kentucky ravine, at the point of plaintiff's diversion, or at any point above, so as to interfere with his enjoyment thereof at his dam and ditch," we dissent entirely from the correctness of the conclusion, and do not feel bound by it under the doctrine of the "law of the case, for the sufficient reason that the statement was merely *obiter;* and we say this because the error assigned by plaintiff on that appeal, the only error which brought the effect of the former judgment as evidence under review, and the only error assigned as ground for reversal of the judgment, was the admission of testimony tending to prove a prior appropriation by Devine below plaintiff's dam, a matter as to which we admit that the former judgment was an estoppel. For these reasons we conclude the superior court erred in denying to defendant the right to prove a prior appropriation above plaintiff's dam, and in refusing to allow him to show that his right to such prior appropriation had not been litigated in the former action. We think the judgment should be reversed, and it is so ordered.

We concur: WORKS, J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.

(80 Cal. 359)

GIBSON v. BOARD OF SUPERVISORS OF TRINITY COUNTY. (No. 13,153.)

(*Supreme Court of California.* Sept. 2, 1889.)

ELECTIONS — ISSUANCE OF BONDS — CONTESTS — JURISDICTION — EVIDENCE — PARTIES.

1. Pol. Code Cal. §§ 1265, 1266, requiring the county clerk to preserve packages of ballots unopened for 12 months, except where there is a contest in court, includes not only elections for officers, but any election which may be contested in a court.

2. Where the statute provides (Laws Cal. 1883, p. 311) that the ballots, on an election to determine the issuance of bonds, shall be printed "For the issue of bonds, or "Against the issue of bonds," ballots "For the issue of bonds" are sufficient, without adding the word "Yes."

3. Const. Cal. art. 11, § 18, specially providing for an election to determine the policy of creating a bonded indebtedness, prohibiting the issuance of bonds without consent of a certain number of voters, and providing no method of enforcing such provision, by implication confers upon the court of chancery jurisdiction to determine the validity of such election.

4. A tax-payer is a sufficiently interested party to maintain an action to contest the official declaration of the result of an election to determine the issuance of bonds.

5. In such action the ballots are not only competent and material evidence, but evidence of a very high order.

In bank. Appeal from superior court, Trinity county; T. E. JONES, Judge.

James W. Bartlett, for appellant. *D. G. Reid*, for respondent.

MCFARLAND, J. On October 2, 1888, the board of supervisors, appellant herein, made an order in due form submitting to the electors at the general election to be held November 6, 1888, the question of the issuance of county bonds to the amount of $14,000, for the purpose of building certain bridges. At said election more than two-thirds of the qualified electors voting thereat voted in favor of the issuance of said bonds; but at several precincts a large number of ballots cast for the issue of said bonds were not counted by the election officers, so that, at the canvass of the board of supervisors of the votes returned, it appeared that there was not a two-thirds majority in favor of the bonds, as required by the constitution and the statute. Thereupon the board made an order declaring that the proposition to issue the bonds was lost. Plaintiff, who is a citizen and tax-payer in the county, then brought this action against the board, averring the true facts about said election, and praying that said last-named order of said board be annulled, that the true result of said election be declared, and for such other and further relief, etc. The defendant demurred upon the grounds that the court has no jurisdiction of the subject of the action, that plaintiff has no "legal capacity to sue or institute this action," and that the complaint does not state facts sufficient to constitute a cause of action. The demurrer was overruled; and, after a denial by the court of a motion to strike out a part of the complaint, the defendant answered, admitting all the averments of the complaint, except only the averment that there had been a two-thirds majority for the bonds, which averment is denied. The court found all the averments of the complaint to be true, and entered judgment decreeing that the issuance of the bonds was carried, that the said order of the board be annulled and set aside, and directing the board to make an order declaring that the issuance of the bonds was adopted. From this judgment the board appeals upon the judgment roll and a bill of exceptions.

1. Appellant contends that two errors

were committed by the court during the course of the trial. The court ordered the county clerk to produce the ballots voted at the election; and they were offered and received as evidence, over appellant's objections that they were "irrelevant, immaterial, and incompetent, and on the further ground that the court has no power to recount the ballots in this proceeding." It is clear, however, that, in a contest over the result of an election, the ballots are not only competent and material evidence, but evidence of a very high order. The real objection which appellant makes in the brief, on this point, is that the court had no power to order the clerk to bring in the packages of ballots, or to order them opened, because sections 1265 and 1266 require the clerk to keep them unopened for 12 months, and then destroy them, unless there is a contest in a court about an election; and that the election referred to in said sections means only an election for officers. But the said sections are broad enough, we think, to include any election which may be contested in a court; and, moreover, that question could arise only upon a refusal of the clerk to bring the ballots into court.

The court counted in the affirmative all the ballots which had printed on them the words, "For the issue of the [bridge] bonds;" and appellant contends that this was also error. The election officers, in the precincts above mentioned, had refused to count or return any ballots which had those words on alone,—upon the theory, it seems, that there ought to have been a double affirmative; that is, that the ballots should have been, "For the issue of the bonds. Yes." (We suppose that upon the same theory the negative votes should have been, "Against the issue of the bonds. No.") The statute provides (St. 1883, p. 311) that "the ballots shall be printed, 'For the issue of bonds,' or, 'Against the issue of bonds;'" and human ingenuity cannot invent a plausible pretext for refusing to count ballots so printed. The exception to this action of the court is therefore without merit.

2. But the main defense set up by appellant is that no court, by any form of action or proceeding, legal or equitable, has any jurisdiction or authority to inquire into the result of an election on a question of the issuance of bonds; that the whole matter is beyond the scope of judicial investigation. It is said that there can be a contest in a court over the election to an office simply because the statute provides a procedure for such a contest; but that, as there is no such procedure provided for a contest about any other kind of election, and as the subject is in its nature beyond the cognizance of courts, therefore there is no judicial jurisdiction of any kind to determine any question rising out of such election. If that position be correct, then its consequences are far reaching and alarming. In the present case the errors of the election officers were against the issue of the bonds, and the amount of the bonds was comparatively small. But a case entirely different from the one here presented might easily arise, involving interests of immense magnitude, and to such a case the same rule would have to be applied. Suppose that interested parties should successfully contrive to have presented to the people of a county or city a proposition to issue bonds for an unworthy purpose, and to a ruinous extent, and that, although the people really defeated the project at the polls, certain election officers, either through intentional fraud, or by a gross mistake, refused to return a large number of votes cast in the negative, so that the returns would show the proposition to have been carried, would there be no remedy,—no power to execute the real will of the people? There certainly would be no such remedy in the hands of the supervisors; for they can only estimate the votes returned, and have no power to count the ballots. The will of the people, then, can be carried out by the courts, with their power to compel evidence and thoroughly investigate, or not at all. Without discussing generally the wide subject of what "rights of persons" and "rights of things" may be enforced in courts by means of ordinary or extraordinary actions and proceedings therein, it is sufficient to say here that the constitution of the state (section 18, art. 11) has specifically provided for an election to determine the policy of creating a bonded indebtedness, and prohibited the issuance of bonds without the consent of two-thirds of the voters of the county; and that whenever there is such a constitutional provision, and no machinery provided by law for enforcing it, the constitution, by necessary implication, confers upon the court of chancery jurisdiction to protect and enforce the will of the people by suitable and proper procedure. This principle has been declared and followed in numerous cases where constitutions have provided for the removal of county-seats; and we see no distinction, with respect to the point under discussion, between those cases and the one at bar. In Boren v. Smith, 47 Ill. 482, which involved an election for a county-seat, and where the jurisdiction of the court was attacked, the supreme court of Illinois says: "Our constitution has declared that such a vote shall be taken before a county-seat can be removed; and in making that provision it is manifest that it was designed that the will of the majority of the legal voters of the county should control. It would defeat that object, and render this fundamental provision inoperative, if the sense of the majority of the legal voters, constitutionally expressed, might be overcome by illegal voters or other fraudulent means; and, as the constitution and the law have failed to afford a specific remedy to prevent this provision from being defeated, it is eminently proper that equity should afford the requisite relief in such cases. As there is no law in England similar to this provision of our constitution, and the organic laws of other states are believed to have no such provision, it is not to be expected that precedents may be found upon which to base the jurisdiction of a court of equity. But if our courts of equity were, in the absence of legislative action, to refuse relief, this constitutional provision could, by fraud, be rendered inoperative, and wholly defeated. The de-

cree of the court below is affirmed." In People v. Wiant, 48 Ill. 263, the court also says: "In this case the law has provided no means of contesting the election, or correcting the vote then given; and if frauds were committed, and the returns do not, for that reason, show what was the expressed will of the voters of the county, the design of the law, and the intention and desire of the majority of the county, would be defeated, unless the courts can afford a remedy. This is a case unlike a mere contest of two individuals as to which shall exercise the powers and perform the duties of an office. In that case the individuals are immediately interested, and the public remotely; but in this case it is a matter of public concern to the people of the county. In that the law has afforded an ample remedy, by conforming to the statute authorizing them to contest the election, to determine which is entitled to the office; while in this, no means are provided by the statute for carrying into effect the will of the majority under the law, when apparently thwarted by fraud, accident, or mistake. Hence the necessity of equity to entertain jurisdiction and afford relief." And in Dickey v. Reed, 78 Ill. 262, it is said: "Where courts of equity in this state have taken jurisdiction of contested county-seat election cases, it has been upon the express ground that the constitution had provided that county-seats should not be removed, except upon a vote of a majority in favor of removal, and that the legislature, in providing for such elections, failed to provide any means of contesting them; and, to protect the rights of the majority intended to be secured to them, it was held that the fundamental law, by implication, conferred the power on courts of chancery to hear and determine such cases." Numerous other authorities could be cited from sister states; but the point has been practically decided by this court. Calaveras Co. v. Brockway, 30 Cal. 325, was a contest over an election for a county-seat. The court took jurisdiction of the case, and held that "the determination of the board of supervisors that a place voted for received a majority of the votes cast at a special election for a county-seat is *prima facie* evidence of the fact so determined, but is not conclusive; and, if the fact was not as determined, it may be attacked for fraud or mistake, and the true result ascertained." As before stated, we see no difference in principle between an election to determine a county-seat and an election to determine whether a bonded indebtedness shall be increased; and in our opinion the court below had jurisdiction of the subject of the action in the case at bar.

3. Counsel for appellant states, although he does not argue, the point that plaintiff, in his capacity of tax-payer, had no right to institute the action. It is clearly the law that if the action of the board had been the other way,—that is, if they had declared the proposition to issue the bonds carried, when in fact it had not been,—plaintiff could have maintained the action. Schumacker v. Toberman, 56 Cal. 508; Andrews v. Pratt, 44 Cal. 309; Maxwell v. Supervisors, 53 Cal. 389; Foster v. Coleman, 10 Cal. 278. That is, a tax-payer can, beyond doubt, restrain any illegal action which would increase the burden of taxation. It is not so clear, however, when he can compel affirmative action; although it was held in Hyatt v. Allen, 54 Cal. 353, that he can by *mandamus* compel an assessor to assess property subject to assessment. It is not necessary here to determine whether or not plaintiff would be entitled to maintain *mandamus* against the board of supervisors to compel them to issue the bonds. We think, however, that, as a property owner and tax-payer, he is sufficiently a party interested to prevent an untrue, public, official declaration of the result of an election on a proposition to issue bonds, and to have the true declaration made, whether the real result of the election be for or against the issuance of such bonds. No other proper party plaintiff to such an action has been suggested. Judgment affirmed.

We concur: WORKS, J.; THORNTON, J.; PATERSON, J.

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80 Cal. 490

RICHARDSON *et al.* v. LOUPE. (No. 12,273.)

(*Supreme Court of California.* Sept. 12, 1889.)

PARTITION—JURISDICTION—PARTIES—REFEREES.

1. Code Civil Proc. Cal. pt. 2, tit. 10, c. 4, confers upon the district court jurisdiction to partition real estate between tenants in common; section 760 provides that it may determine the interests of the original co-tenants, and partition the property as if they were sole parties to the proceeding; and sections 1675–1686 limit the jurisdiction of probate courts, in partition proceedings, to the settlement of estates of decedents, and their final distribution among heirs and devisees. *Held*, that the district court has power to partition an estate in common, though the estate of one of the original co-tenants is in course of administration in the probate court.

2. Persons who have purchased lands from the original tenants in common, and hold it in severalty, are not proper or necessary parties to a suit to partition the balance of the estate in common.

3. Under Code Civil Proc. Cal. § 411, providing that service of summons against a minor may be by delivering a copy "to such minor personally, and also to his father, mother, or guardian," a return showing personal service upon both minor and guardian is sufficient to confer jurisdiction, especially after appearance of the guardian.

4. Code Civil Proc. Cal. § 797, provides that the court, with the consent of the parties, may appoint a single referee in partition; and section 795 provides that the guardian of an infant may consent to a partition without action. *Held* that, where the decree recited that the appointment of a single referee was with the consent of the parties, the proceedings were valid.

5. Where the heirs and representatives of a decedent petition that his interest in an estate in common be set off to them as an entirety, and they be left as tenants in common, as authorized by statute, a decree setting apart such interest to "the estate of" decedent is not void for uncertainty.

6. The sole duty of a single referee appointed to make partition after an interlocutory decree, under Code Civil Proc. Cal. §§ 763, 797, is to apportion the lands according to such decree, and make report, and he does not act judicially.

7. An interlocutory decree, reciting that it was made by agreement of parties, and the report of a referee, not filed until April 21st, were, by order of court, filed *nunc pro tunc* as of March 13th and March 20th, their respective dates. *Held*, that such proceedings were valid, in the absence of fraud.

Department 1. Appeal from superior court, city and county of San Francisco; M. A. Edmonds, Judge.

J. C. Bates, for appellants. *Van Ness & Roche*, for respondent.

Fox, J. This is an action to quiet title to the undivided one-half interest in 11 separate blocks and parts of blocks of land in the outside lands of San Francisco, part of that portion of said "Outside Lands," so-called, commonly known as the "Sharp and Sproul Tract." The record shows that John Sproul died in January, 1869, leaving a widow, Mary Ann Sproul, and three daughters, Elizabeth, Mary, and Matilda, his heirs at law. The daughters are the plaintiffs in this cause. At the time of his death John Sproul and George F. Sharp were the owners as tenants in common of the said Sharp and Sproul tract, each owning an undivided half thereof. In due time, and under regular proceedings, the widow, Mary Ann Sproul, was appointed administratrix of the estate of John Sproul, deceased, and by other regular proceedings she was also appointed general guardian of the persons and estates of the said daughters, who were then minors. Prior to his death, Sproul had sold out of the said tract certain lots and blocks or parts of blocks thereof to third persons, Sharp joining in such conveyances, but Sproul receiving to his own use the entire proceeds of such sales; in consideration of which, Sharp and Sproul had entered into an agreement in writing reciting the facts, and providing that, upon final partition of the tract, said Sharp should receive, in addition to the undivided one-half of what remained unsold, an amount which should be equal and sufficient in extent, quantity, and value to the lands which had been so conveyed by Sharp for the benefit of Sproul. After the death of Sproul, Sharp, in writing, renounced all claim under this last-named agreement, except so far as related to certain lands sold and conveyed to one Sampson and one Reynolds. For these latter he was still to receive an equivalent upon final partition. In 1870, all the unsold portions of the Sharp and Sproul tract were deeded by lots and blocks by the city and county of San Francisco to said George F. Sharp, and to Mary Ann Sproul, administratrix of the estate of John Sproul, deceased, saving and excepting, of course, such lots, blocks, and other portions as were reserved for public use under the ordinances and acts authorizing such conveyances. The plaintiffs claim title as heirs of their father and grantees of their mother. The defendant denies that the plaintiffs have any right, title, or interest in the lots and blocks described in the complaint, or any part thereof, and claims to be himself the owner in fee of said lots and blocks so described, and of the whole thereof, and of all interest therein, deraigning his title under said Sharp; and it is conceded that defendant has acquired and holds whatever interest Sharp had in the property described in the complaint herein at the time of his death, which occurred October 17, 1882. Defendant also pleads, as against the claim of plaintiffs, that the same is barred by the provisions of section 318, Code Civil Proc. The court found in favor of defendant upon all the issues, and gave judgment accordingly. Motion for new trial was made on the ground of errors of law, and also that the evidence was insufficient to justify the findings. The motion being denied, plaintiffs appeal, both from the judgment, and from the order denying the motion for new trial.

Upon the trial of the cause, the plaintiffs having rested their case upon proof of the facts as hereinbefore recited, and of conveyance from their mother to them of her interest in the premises, the defendant, for the purpose of making out his defense, offered in evidence a judgment roll in the case entitled "George F. Sharp, Plaintiff, vs. Mary Ann Sproul, Administratrix, et al., Defendants," in the district court of the late nineteenth judicial district of the state of California, in and for the city and county of San Francisco. This was an action brought for the partition of the Sharp and Sproul tract, complaint filed December 10, 1873, while the Sproul estate was in course of administration, and pending in the probate court. The defendants were "Mary Ann Sproul, administratrix of the estate of John Sproul, deceased, Mary Ann Sproul, Elizabeth Sproul, Mary Sproul, and Matilda Sproul, and Mary Ann Sproul, guardian of the persons and estates of Elizabeth Sproul, Mary Sproul, and Matilda Sproul, minors." To the introduction of this judgment roll in evidence the plaintiffs objected, on 26 separately stated grounds, all of which, however, go to the question of the jurisdiction of the court to hear and determine the case, and render any judgment therein, or to the regularity and sufficiency of the proceedings had to render any judgment of partition therein valid or binding. The objection was overruled, and the judgment roll admitted in evidence, to which ruling plaintiffs excepted, and this is now assigned as error of law, and the evidence thus introduced is claimed to be insufficient to justify the findings based thereon. The first point made against the admission of this record is that the district court had no jurisdiction to make partition of the premises described in the complaint in the cause, because the estate of John Sproul, deceased, was then in course of administration, pending and undetermined, in the probate court, and that court alone had jurisdiction to make partition of the estate. This point is not well taken. The probate court never had jurisdiction to make partition of real estate, except in the course of the settlement of the estates of deceased persons, and for the purpose of distribution to the heirs or devisees of such estates. See Code Civil Proc. §§ 1675–1686, as the same stood prior to 1880, and sections 261–273 of the former practice act. It is a mistake to suppose, from anything found in those sections, that the probate court had any power or jurisdiction over the interest of any persons who might be owners as tenants in common with the estate or its distributees, and who did not deraign their title through the estate. Section 1678, to which we are cited, in no manner supports the contention of plaintiffs in that behalf. It is expressly confined to persons who have purchased from heirs, legatees, or devisees their interest in the estate, and then places them simply in the shoes of their grantors in the matter of such partition and distribution. On the contrary, at that time, the district court, only, had jurisdiction to make partition of real estate between tenants in common therein; and this, according to the provisions of part 2, tit. 10, c. 4, Code Civil Proc. And section 760, a part of that chapter, made express provision for exactly such cases as this, and provided that in such a case the court might "first ascertain and determine the shares or interest respectively held by the original co-tenants, and thereupon adjudge and cause partition to be made, as if such original co-tenants were the parties, and sole parties in interest, and the only parties to the action, and thereafter may proceed in like manner to adjudge and make partition separately of each share or portion so ascertained and allotted, as between those claiming under the original tenant to whom the same shall have been so set apart, or may allow them to remain tenants in common thereof, as they may desire." The record offered shows that this was exactly what was done in that case. The court did ascertain and determine the respective interests of the original co-tenants, Sharp and Sproul, and made partition between them; then, at the request of the defendants, left them to remain tenants in common of the Sproul allotments, the same being subject to administration in the Sproul estate, and to final distribution therein, by partition or otherwise, as the probate court should determine.

Objection is also made to the sufficiency of the complaint, in that cause, to give the court jurisdiction to make partition; but an examination of the complaint shows it to be full, in every particular required by the chapter on partitions, setting out, not only the interests of the respective original co-tenants, but also the interests of the respective heirs of the Sproul estate.

It is also objected that the supplemental agreements hereinbefore referred to, providing that, upon final partition, Sharp was to have set apart to him an equivalent for certain lands theretofore sold for the benefit of Sproul, were not made part of the complaint, and called to the attention of the court; but this is a false call on the part of the plaintiffs in this action, for those agreements are both made a part of the complaint in the partition suit, and considered by the court, in making the partition.

It is also objected that all the parties were not joined, necessary to give the court jurisdiction to make the partition, for that Sampson and Reynolds were not made parties thereto. Sampson and Reynolds were not tenants in common with the others in any part of the tract sought to be partitioned. They were purchasers from Sharp and Sproul of certain lots or blocks in the Sharp and Sproul tract, and held them in severalty, free from any claim or interest of either Sharp or Sproul. Their properties were not included in the land to be partitioned, and they were neither necessary nor proper parties to the partition suit.

It is also objected that the summons was insufficient to give the court jurisdiction to make the partition, but an inspection shows it to have been full and complete.

It is also objected that legal service of the summons was never made, so as to give the court jurisdiction over the persons of the defendants. The objection is as to the service upon the minors, who are claimed to have been at that time under 14 years of age. The provision of the statute at that time, as to service in such case, was as follows, (section 411, subd. 3:) "If against a minor under the age of fourteen years, * * * to such minor personally, and also to his father, mother, or guardian; or, if there be none within this state, then to any person having the care or control of such minor, or with whom he resides, or in whose service he is employed." The return of the sheriff in that case shows that he personally served the minors, naming each of them, on the 10th day of December, 1873, and on the 12th day of the same month personally served Mary Ann Sproul, administratrix of the estate of John Sproul, deceased, Mary Ann Sproul, Mary Ann Sproul, guardian of the persons of Elizabeth Sproul, Mary Sproul, and Matilda Sproul, minors, and also Mary Ann Sproul, guardian of said minor defendants, by delivering to each of said defendants personally, in the city and county of San Francisco, a copy of said summons; the summons so served upon Mary Ann Sproul being attached to a copy of the complaint in said action. We are unable to see wherein the return fails to show sufficient service upon the defendants. Besides, the appearance of the general guardian was sufficient to give the court jurisdiction of the persons of the defendants. Smith v. McDonald, 42 Cal. 484.

It is also claimed that the final decree is void for uncertainty on its face, because it set apart defendants' interest to the estate of John Sproul, deceased. All the defendants in that action were heirs and representatives of the estate of John Sproul, deceased, one of the two original co-tenants. As such, they asked in their answer that partition be not made between themselves, but that the interest of their ancestor be set off as an entirety, and they be left as tenants in common therein as before. The statute authorized this to be done, and it was so done. As the estate was then in course of administration, it was a very proper thing to do. There was no error in such a course, and no uncertainty as to whom, or in whose favor, the allotment was made. In view of our express statute, the long list of authorities cited by counsel on this point are not applicable, except that of Hill v. Den, 54 Cal. 6, which is directly in point in support of the course pursued by the court in the case under consideration.

It is also claimed that the proceedings in partition were void because a single referee was appointed, and because he, acting in a judicial capacity, acted without notice to the parties, and they had no opportunity for a hearing before him. As to the appointment of a single referee, that is expressly provided for in the statute. By section 797 it was provided that the court might appoint a single referee, in proceedings in partition, by the consent of the parties; and the decree recites in this case that it was done by the consent of the parties. To this it is replied, however, that minors could not consent. By section 795, Code Civil Proc., it was provided that the general guardian of an infant could consent to partition without action. This being so, and the general guardian having authority to appear for the minors in an action for partition, it would seem that, in the action, the guardian might consent to a mere course of procedure authorized by statute, and coming within the purview of the action itself.

As to the other point of the objection, counsel has evidently got confused between the two classes of referees who might be appointed in cases of partition. Sections 761 and 762 provided for the appointment of referees to take certain evidence, and report certain facts, affecting the question of title, for the information of the court, before the interlocutory decree. Such referees acted judicially in the taking of testimony, and the investigation of the facts; and of their sittings notice had to be given, and the parties were entitled to an opportunity be heard before them. But such was not this case. The only referee appointed in this case was one appointed, under sections 763 and 797, to make partition, after interlocutory decree. His sole duty was to apportion and allot these lots and blocks between the original co-tenants, according to their respective interests as found and determined by the court, quantity and quality relatively considered, and make report of his proceedings, specifying the manner in which he had executed his trust, and describing the property divided, and the shares allotted to each party. All this was done. The statute did not require that he should report a valuation of the whole, or of any allotment, or for any hearing of the parties before him. If any contest arose as to the relative value of the several allotments, or as to the justice of his report in any other respect, the settlement of such dispute was to be had before the court, which had full power to confirm, change, modify, or set aside his report. See sections 764-766.

Objection is also taken to the record, because of the apparent haste in, and of the order of, procedure. The answer was filed March 13, 1874, 90 days after the service of summons. It would seem, from the course of procedure, that in the mean time the parties had agreed between themselves upon the manner of partition, as they might have done if no action had been commenced, and now, in the action, were carrying out their agreement with the court, as well as the guardian, to protect the interests of the minors. Be that as it may, the defendants all appeared and answered, and, among other things, asked that partition be not made between themselves, but only between the original co-tenants. On the same day the court made and signed its interlocutory decree, determining the interests of the parties according to the allegations and admissions of the pleadings, reciting all the jurisdictional facts, and also showing that, inasmuch as the general guardian of the minors was herself interested personally in the subject-matter of the partition, Francis G. Newlands, Esq., had been appointed attorney specially to protect the interest of said minors; that it had been agreed by all the parties that it was inexpedient that certain lots and blocks designated and described therein should be then partitioned, and that they should be omitted from the partition; also that it was inexpedient that partition should be made as between the defendants at that time, and that partition should only be made as between the original co-tenants; also that a single referee, naming him, should be appointed. By some oversight this interlocutory decree was not filed until April 21st, when it was filed *nunc pro tunc*, by order of the court, as of March 13th, the day it bore date. The report of the referee was filed on the same day, April 21st, *nunc pro tunc* as of March 20th. The final decree is dated April 20, and recorded May 5, 1874. All this, instead of proving fraud, as claimed by the defendants, but verifies the supposition that the parties, being properly in court, had agreed among themselves, had submitted their agreement to the court, and the court, finding it lawful and proper, had carried it into effect in the judgment, and according to the forms of law, and that in doing it the papers had remained in the hands of the judge until he had reached and signed his final decree. While counsel broadly intimates that there was fraud in these proceedings, he nowhere intimates, and it is not claimed, that there was injustice in them. We see nothing in them showing evidence of fraud, to which the court itself must have been a party, if there was any. The proceedings were not in conflict with the statute, and nothing was done which the parties had not full power to agree to, and the court had not full power to decree and do. The final decree of partition was valid and binding between the parties, and allotted to the plaintiff therein, under whom the defendant in this case deraigns his title, the property described in the complaint herein. There was no error in the ruling of the court, in this cause, admitting the judgment roll in evidence.

That decree operated to sever the unity of possession, (Wade v. Deray, 50 Cal. 376; McBrown v. Dalton, 70 Cal. 94, 11 Pac. Rep. 583;) and each became entitled by the judgment to the exclusive possession of that part which was allotted to him. In the subsequent distribution of the Sproul estate in the probate court, the part which had been allotted to the Sproul estate was distributed to the plaintiffs herein and their mother, but no part of the property described in the complaint in this cause was distributed or mentioned in said decree of distribution. From the date of said decree of partition, the lands described in the complaint herein were assessed to Sharp, and he paid the taxes thereon until his death, and thereafter the taxes were paid by his executor until the sale to this defendant, immediately after which this suit was brought.

All the specifications of insufficiency of evidence, and of errors of law, herein, are addressed to the proceedings in partition already considered, and there is little left now to be considered on this appeal, except to say that the court below found that all the plaintiffs herein were barred by the provisions of section 318, Code Civil Proc., except the plaintiff Matilda S. Filmer. The court was right in that finding, so far as it goes; but the said Matilda is also barred by said section, so far as relates to the interest acquired from her mother, for the statute had run against the mother before she conveyed to her daughters. As they are all concluded, however, by the decree of partition, and the fee-simple title coming down to defendant under it, he is not required to rest his defense as against any of them on the statute of limitations alone. Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.

(80 Cal. 275)

WEST COAST LUMBER CO. v. NEWKIRK *et al.* (No. 13,026.)

(*Supreme Court of California.* Sept. 2, 1889.)

MECHANICS' LIENS—PLEADING—HARMLESS ERROR.

1. Under Code Civil Proc. Cal. § 1187, providing that a contractor's claim of lien shall contain, *inter alia*, the name of the owner or reputed owner of the realty, if known, where such name is not known, the claim need aver nothing on that subject.

2. Under Code Civil Proc. Cal. § 1192, providing that certain buildings constructed on land with the knowledge of the owner thereof shall be held to have been constructed at his instance, and the land shall be subject to a lien therefor, unless the owner shall give proper notice that he will not be responsible for such construction, the giving of such notice is matter of defense, and need not be denied in the complaint, in an action to foreclose such a lien.

3. Code Civil Proc. Cal. § 1185, provides that, if the person causing the construction of a building on land does not own the fee-simple thereof, then only his interest in such land shall be subject to the contractor's lien for such building, and section 1192 provides that, when the construction of a building upon land is known to the owner of any interest therein such interest shall be subject to the contractor's lien. *Held* that, where the construction is at the instance of a leaseholder, with the knowledge of the owner of the fee, not only the leasehold interest, but also the fee, is subject to such lien.

4. Testimony to show the manner in which books were kept, and that they are correct, is admissible, where the books themselves are properly in evidence.

5. Improper allowance of a question, the answer given thereto having been admitted by the pleadings, is not prejudicial error.

BEATTY, C. J., dissenting.

In bank. Appeal from superior court, San Diego county; E. PARKER, Judge.

John M. Lucas and *Hunsaker, Britt & Lamme*, for appellant. *Oscar Trippett*, for respondent.

THORNTON, J. Action to foreclose the lien of a material-man. Judgment for plaintiff. Motion for a new trial by the defendant Roberts, which was denied. Appeal by the same defendant from the judgment and order denying a new trial. Defendant Roberts demurred to the complaint. The demurrer was overruled. It is argued that the court below erred in so ruling. It is said on behalf of appellant that there is no averment in the complaint that there was a statement in the claim of lien filed that the reputed owner of the fee was not known, and for this reason the demurrer should have been sustained. It is provided in section 1187 of the Code of Civil Procedure that the claim of lien filed with the recorder shall contain, *inter alia*, "the name of the owner, or reputed owner, if known," of the property to be charged with the lien. The complaint charges that the claim filed stated the name of E. B. Newkirk as the owner of said house, and a reputed owner of a leasehold interest in said realty, and stating in said lien that the owner of the fee of said real estate was not known. This averment shows a compliance with the requirement of the statute above quoted. It is substantially an averment that it was stated in the claim filed that neither the name of the real owner nor of the reputed owner was known to the plaintiff when he filed his lien. The plaintiff is only required to state the names mentioned, if known. If the names are not known, the claim filed is sufficient if it is silent on this subject.

It is further urged as a reason why the court erred in overruling the demurrer that it is not averred in the complaint that the appellant did not give notice that she would not be responsible for the materials furnished by the plaintiff. It is further said that it is not alleged that Roberts had notice of the construction of the building.

We are of opinion that it is averred in the complaint that Roberts had notice of such construction. The allegation is "that such building was constructed upon the said land with the knowledge of each of said defendants." Roberts was one of the defendants referred to in this allegation. We do not think it necessary that it should be averred that the owner of the realty did not give notice that he would not be responsible for the construction of the building. Such notice, under section 1192 of the Code of Civil Procedure, if given, is matter of defense, to be set up by defendant. The averments of the complaint above referred to are, in our judgment, sufficient.

It is further argued that the complaint does not state a cause of action against appellant, for the reason that it is alleged in the complaint that she is the owner of the fee of the land upon which the building was constructed, and that defendant Newkirk, who caused the building to be constructed, is the owner of a leasehold interest therein, and it is provided in section 1185 of the Code of Civil Procedure that, if the person who caused the building to be constructed owned less than a fee-simple estate in such land, then only his interest therein is subject to such lien. The above, it is true, is the provision of section 1185 of the Code of Civil Procedure, but it is also provided in section 1192 of the same chapter that every building or other improvement mentioned in section 1183 of this Code, constructed upon any lands with the knowledge of the owner, or the person having or claiming any interest therein, shall be held to have been constructed at the instance of such owner or person claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest therein shall, within three days after he shall have obtained knowledge of the construction, alteration, or repair, or the intended construction, alteration, or repair, give notice that he will not be responsible for the same by posting a notice in writing to the same effect in some conspicuous place upon said land, or upon the building or other improvement situated thereon.

It is clear that the foregoing provisions of sections 1185 and 1192 must be reconciled, if they can be consistently, with a fair construction of the words used in each section; and in our judgment this can be done within the rule just above stated. We think that the provisions referred to may and should be read as follows: "If the person who caused the building to be constructed owned, when the work was commenced or the materials for the same were furnished, less than a fee-simple estate in the land to be charged with the lien, then only his interest in the land is subject to such lien; provided, however, that if the building was constructed with the knowledge of the owner of the fee of such land, or the person having or claiming any interest therein, such building shall be held to have been constructed at the instance of such owner or person having or claiming any interest therein, and the interest owned or claimed shall be subject to any lien filed in accordance with the provisions of this chapter, unless such owner or person having or claiming an interest shall, within three days after he shall have obtained knowledge of the construction, give the notice above referred to.

In our view, the two sections, when reconciled, as they may be in the mode just pointed out, make the estate of the owner of the fee, (Roberts,) as well as the estate of the owner of the leasehold interest herein, subject to the lien sought to be enforced in this action. Our predecessors, in Phelps v. Mining Co., 49 Cal. 336, so construed like provisions in the act of 1868. This act was entitled "An act for securing liens of mechanics and others," and was approved March 30, 1868. The provisions of section 1185 of the Code of Civil Procedure are found in section 2, and the provisions of 1192 of the Code of Civil Procedure in section 4, of this act of 1868. St. 1867–68, pp. 589, 590. In the case cited the defendant corporation above named was the owner, and one Gilbert Douglass was in possession as lessee of the owner for an unexpired term of the land sought to be charged with the lien. The lessee, Douglass, caused the materials to be furnished for the repairs of the mill. The corporation knew that the work was being done, and gave no notice that it would not be responsible. In an action brought by the plaintiffs, who had furnished the materials, to enforce their lien, the court held that while the corporation was not personally responsible, under the act above cited, for the value of the materials, that its estate in the land as well as the estate of the lessee might be sold for the lien. 49 Cal. 338, 339. See, also, Fuquay v. Stickney, 41 Cal. 583, and Moore v. Jackson, 49 Cal. 109. The two cases last cited sustained the view of the statute taken in Phelps v. Mining Co., in 49 Cal., as well as the conclusion which we have herein reached.

There was no error in refusing defendants' motion to strike out a part of the testimony of C. A. Baker. This testimony was only introduced to show the mode in which the books were kept, and that they were correct. These books were properly admitted in evidence. Landis v. Turner, 14 Cal. 573. The defendant was not injured by the allowance of the questions put to the witness Baker in these words: "State whether or not you knew at the time this lien was filed on lot 1, block 755, of New San Diego, the property on Columbia street, who was the reputed owner of the real estate in fee-simple?" It was averred in the complaint that at the time the lien was filed the plaintiff did not know who was the owner or reputed owner of the fee of the real estate involved herein. This was not denied in the answer. The witness, to the above question, answered that he did not know. It was entirely unnecessary under these circumstances to put the question, but, the question having been put and answered, as admitted by the pleadings, we cannot see that defendant sustained any injury Conceding that the allowance of the question was error, still, as defendant was not injured by it, it is no ground of reversal.

The court did not err in admitting in evidence the claim of lien, nor in admitting the lease from Roberts to Newkirk. The objection to the claim of lien that it did not state that the name of the reputed owner of the fee was not known has been heretofore disposed of. If there is no finding that defendant did not give the notice spoken of in section 1192 of the Code of Civil Procedure, it must be regarded that no such notice was ever given. As such fact does not appear, it must be taken not to have existed. The evidence was sufficient to justify the finding that the materials were furnished by plaintiff to be used in the building mentioned in the complaint. The cartage complained of was a portion of the cost of the materials furnished, and, if allowed at all, was allowed as a part of the value of the materials.

We find no error in the record, and the judgment and order are affirmed, with directions to the court below, on the going down of the *remittitur*, to allow plaintiff, under section 1195 of the Code of Civil Procedure, a reasonable fee for the services of its attorney in this court. Ordered accordingly.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; PATERSON, J.

I dissent: BEATTY, C. J.

WORKS, J., took no part in the decision of the above cause.

WEST COAST LUMBER CO. v. NEWKIRK *et al.* (No. 13,027.)

(*Supreme Court of California.* Sept. 2, 1889.)

In bank. Appeal from superior court, San Diego county; E. PARKER, Judge.

John M. Lucas and *Hunsaker, Britt & Lamme*, for appellant. *Oscar Trippett*, for respondent.

PER CURIAM. The same questions arise in this case as in the case of the same title, numbered 13,026, ante, 231. On the authority of that case the judgment and order herein are affirmed, with directions to the court below, on the going down of the *remittitur*, to allow plaintiff, under section 1195 of the Code of Civil Procedure, a reasonable fee for the services of its attorney in this court. Ordered accordingly.

WORKS, J., took no part in the decision of the above cause.

(80 Cal. 381)

In re BROWN'S ESTATE. (No. 13,096.)

(*Supreme Court of California.* Sept. 2, 1889.)

EXECUTORS AND ADMINISTRATORS—APPOINTMENT—NON-RESIDENTS.

Code Civil Proc. Cal. § 1354, provides that "where a person absent from the state * * * is named executor, * * * if there is no other executor, letters of administration with the will annexed must be granted," and § 1388 empowers the court to examine "on oath the party applying, and any other persons," as to the value of the property, to determine the penalty of the bond required of an executor. *Held*, that a non-resident, named as executor in a will, may apply for and receive letters testamentary, and it is unnecessary that he be actually in the state when the order for issuance of the letters is made.

Commissioners' decision. In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Clinton L. White, for appellant. *Chauncey H. Dunn* and *Taylor & Holl*, for respondent.

BELCHER, C. C. Emeline V. Brown died on the 16th of February, 1888, and at the time of her death was a resident of the city of Philadelphia, in the state of Pennsylvania. She left real property situate in the city of Sacramento, in this state, of the value of about $15,000. She left a duly-executed will, disposing of all her property to certain legatees, who were non-residents of this state. In her will George A. West was named as sole executor. The will was duly admitted to probate on the 21st of February, 1888, in the orphans' court of Philadelphia, and letters testamentary were issued to said West. On the 6th of October, 1888, a copy of the will and the probate thereof, duly authenticated, was filed in the superior court of the county of Sacramento, and E. A. Burr, a resident of that county, filed a petition asking that letters of administration with the will annexed be issued to him. Subsequently, S. B. Smith, the public administrator of the county, filed his petition that letters of administration upon the estate with the will annexed be issued to him. And thereafter George A. West, named in the will as executor thereof, filed his petition, stating that he desired to act as executor of the will in the state of California, and asking that letters testamentary be issued to him. The petitions were heard together, and an order was made admitting the will to probate, and directing the issuance of letters of administration with the will annexed to S. B. Smith, the public administrator. The petition of West was denied, because of his being a non-resident of the state. The finding on that point is as follows: "The petitioner, George A. West, was, at all the times named in his petition, and now is, a resident of the state of Pennsylvania, and is not now in the state of California, but is absent therefrom, and has not been therein at any time pending said proceedings." And from the facts found the court concluded the law to be "that said George A. West is not eligible to appointment as executor of said will in this state, and has no authority to nominate an administrator of said estate, and his petition in that regard should be denied." In due time West moved the court to set aside the order denying his petition and granting that of Smith, and for a new trial, on the ground that the decision was not justified by the evidence. The motion was made on a brief statement of the case, and one of the specifications therein was as follows: "The evidence is insufficient to justify that portion of the finding of fact of the court as follows: 'But is absent therefrom, and has not been therein at any time pending said proceeding,' in this,—that the evidence shows that George A. West had never been a resident of the state of California or personally present therein; but that he duly filed his petition for the issuance to himself of letters testamentary, submitted to the jurisdiction of the court, and would have and will appear in person, and qualify as such executor, within a reasonable time after his appointment." The court granted the motion, and Smith appealed from the order.

The record presents but a single question for decision, viz.: Is a person who is named in a will as the executor thereof, but who is a non-resident of this state and has never been therein, for that reason alone incompetent to be appointed executor of the will here? The question must be solved by an examination of the provisions of the Code of Civil Procedure relating to proceedings in probate courts. Section 1369 declares that no person is competent or entitled to serve as administrator who is "not a *bona fide* resident of the state." Section 1350 declares what classes of persons are incompetent to serve as executors, but omits the clause above quoted from section 1369. It then provides that, "if the sole executor or all the executors are incompetent, or renounce or fail to apply for letters, or to appear and qualify, letters of administration with the will annexed must be issued," etc. Section 1354 provides that, "where a person absent from the state * * * is named executor, if there is another executor who accepts the trust and qualifies, the latter may have letters testamentary, and administer the estate until the return of the absentee, * * * who may then be admitted as joint executor. If there is no other executor, letters of administration with the will annexed must be granted; but the court may, in its discretion, revoke them on the return of the absent executor." And section 1388 provides that every person to whom letters testamentary are directed to issue must, before receiving them, execute a bond in an amount fixed by the court; and to determine the penalty of the bond the court must ascertain the value of the property "by examining on oath the party applying and any other persons."

It is admitted by counsel for appellant that under these provisions a non-resident person may be appointed, and may serve as executor in this state, but it is contended that he must be in the state at the time of his appointment, and must personally submit himself to the jurisdiction of the court.

We think a non-resident may apply for

and receive letters testamentary in this state. His application may be made by himself in person or by attorney, and, if made by attorney, he is constructively present. If required by the court, he must appear and testify when the penalty of his bond is fixed, and, at any rate, must appear and qualify within a reasonable time. If he fails to make application for letters, or to appear and qualify within proper time, letters of administration with the will annexed will be issued to some other person. Where, however, he has made application for letters, either in person or by attorney, it is not absolutely necessary that he be actually in the state when the order is made directing the issuance of letters. If a bond is required, the court may delay for a time fixing the penalty of it, or may fix it by examining on oath other persons, and, if the property requires immediate care, a special administrator may be appointed. Of course the appointee must come here within a reasonable time, and personally submit himself to the jurisdiction of the court, and personally conduct the settlement of the estate. What we have said above is in harmony with the provisions of section 1354, supra. The words, "a person absent from the state," used in that section, mean, as we interpret them, a person both actually and constructively absent; that is to say, a person who is out of the state, and has made no application for letters. In this case West was not thus absent. The court, therefore, properly granted his motion for a new trial, and the order should be affirmed.

We concur: HAYNE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(80 Cal. 308)

Drinkhouse v. Spring Valley Water-Works. (No. 12,416.)

(*Supreme Court of California.* Sept. 3, 1889.)

Venue—Actions for Injury to Realty.

A suit to enjoin the building of a dam which it is alleged will flood plaintiff's land is such an action for injury thereto as must be tried in the county where the same is situated under Code Civil Proc. Cal. § 392, providing that actions for injury to real property must be tried in the county where the subject of the action is situated.

Department 1. Appeal from superior court, city and county of San Francisco; James G. Maguire, Judge.

Code Civil Proc. Cal. § 392, provides that actions for injury to real property must be tried in the county where the subject of the action is situated.

Ben Morgan and *A. Ruef*, for appellant. *Kellogg & King*, *Wm. F. Herrin*, and *Charles N. Fox*, for respondent.

Beatty, C. J. This is a suit to enjoin the defendant from building a dam which plaintiff alleges defendant has commenced and is now constructing, and asserts its intention of completing, and which, it is alleged, will when completed permanently flood a certain tract of land in San Mateo county, in which plaintiff has a leasehold estate. The action was commenced in San Francisco, and in due time the defendant moved to transfer the cause for trial to the county of San Mateo, on the ground that the proper place for the trial thereof was in the county in which the real property subject to the threatened injury was situated. The superior court granted the motion, and this appeal is from the order transferring the cause.

The only question presented for our consideration is whether this is an action for injury to real property within the meaning of subdivision 1, § 392, of the Code of Civil Procedure. If it is, the county of San Mateo is the proper place of trial, and the order of the superior court was correct. That the sole object and purpose of the action is to prevent a threatened injury to real property is clear, but the appellant contends that section 392 only comprehends actions for damages for injuries past and completed. We see no reason in the language of the statute or in the policy it was intended to conserve for making this distinction of limiting its operation to one class of actions for injuries to real property. The injury is the same whether threatened or completed, and the privilege accorded to the plaintiff to prevent the injury by injunction ought not to be held to give him the right to have the trial in a county where the cause would not have been triable if he had waited the completion of the injury before seeking redress. Order affirmed.

We concur: WORKS, J.; PATERSON, J.

(80 Cal. 572)

MUNSON v. BOWEN. (No. 12,587.)

(*Supreme Court of California.* Sept. 21, 1889.)

PLEADING.

A complaint which, after stating a good cause of action, proceeds to anticipate the defense, violates a plain rule of pleading, but is good against a general demurrer.

Department 1. Appeal from superior court, city and county of San Francisco.

Page & Eells, for appellant. *Joseph M. Nougues*, for respondent.

WORKS, J. This is an action for the recovery of money. Demurrer to the complaint was overruled, and, the defendant failing to answer, judgment was rendered against him, and he appeals.

The appellant contends that the complaint was insufficient, and that the court below erred in overruling the demurrer thereto. The complaint, after stating a good cause of action, proceeded to anticipate an expected defense. By thus violating a plain rule of pleading, the pleader rendered his complaint uncertain and ambiguous. But we think it was good against the general demurrer that was interposed. The point made against it is that it shows a former adjudication of the question presented in this case, but we think that it does not. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.

(80 Cal. 317)

MORGAN *et al.* v. LONES. (No. 13,110.)

(*Supreme Court of California.* Sept. 2, 1889.)

HUSBAND AND WIFE—WIFE'S SEPARATE PROPERTY.

1. A woman before her marriage had a possessory title to, and was in possession of, certain public land. After her marriage the United States government conveyed the tract of which said land formed a part to the board of town trustees, "in trust for the use and benefit of the occupants thereof." Subsequently thereto the husband made application that said land be conveyed to the wife, which was done, and the required sum was paid by the husband. *Held*, that the wife, under the conveyance from the government, had an equitable interest, which was her separate property, and was not made community property by the husband's advancing money to obtain the legal title thereto.

2. It is immaterial, as regards the character of the property, whether such conveyance by the government was made before or after the marriage, where it appears that she, or those from whom she claimed possessory title, had settled upon and occupied the land prior to her marriage.

Commissioners' decision. In bank. Appeal from superior court, Nevada county, J. M. WALLING, Judge.

For report on appeal by plaintiffs, see 20 Pac. Rep. 248.

P. F. Simonds, for appellant. *Caldwell & Little*, for respondents.

HAYNE, C. This was an action to quiet title as to several lots in Nevada City. As to some of the lots the court gave judgment for the defendant, and as to the other lots the court gave judgment for the plaintiffs, from which judgment the present appeal is taken by the defendant. The evidence is not brought up. The defendant contends that upon the findings the judgment should have been for him.

The material facts shown by the findings are as follows: The plaintiffs' testatrix, one Mary J. Lones, was the wife of the defendant. Before her marriage she had a "possessory title" to, and was in possession of, the lots in controversy on this appeal. The land was then public land, and the title was in the United States government. After the marriage the tract covered by the town was conveyed by the government to the board of town trustees, "in trust for the several use and benefit of the occupants thereof," and subsequently thereto the husband made application that said lots be conveyed to the wife, which was done. The sum necessary to be paid to the municipal authorities was paid by the husband out of his separate property. The difference between this case and that made on the other appeal (20 Pac. Rep. 248) is that here the wife was in possession under "possessory title" before the marriage, while there the husband entered into possession under deeds from prior occupants after marriage. Upon that state of facts it was held that under no view that could be suggested was the property the separate property of the wife. We think, however, that as to the lots involved in this appeal a different conclusion results. It is true, as argued for the defendant, that mere possession of public land gives no right as against the government. But the government has chosen to convey the land to trustees in trust for the occupants, and we think that the wife was one of the beneficiary class. She had, therefore, an equitable interest, which was her separate property. This was held in the case of Eversdon v. Mayhew, 65 Cal. 163, 3 Pac. Rep. 641. The only difference between that case and this is that there the patent to the municipal authorities had issued before the marriage. Here it was issued after the marriage. But we do not think that this alters the case. The question is, what was the class of persons whom the townsite acts were intended to protect? The act itself (quoted on the former appeal) designates such class as consisting of those by whom said lands have been "settled upon and occupied." It must be taken from the findings that either the wife or those from whom she acquired her "possessory title" had settled upon and occupied said lands before her marriage. The circumstances, therefore, which entitled her to the bounty of the government had occurred before the marriage, and, this being so, we think that the conveyance of the government title to the town authorities was for her benefit, and that the fact that she married before the patent to the board of trustees had issued is immaterial.

The wife being the owner of the equitable estate as her separate property, the husband could not turn it into community property by advancing from his own funds the sums necessary to obtain the legal title from the municipal authorities. Fuller v. Ferguson, 26 Cal. 566; Noe v. Card, 14 Cal. 600. If there is any expression in the former opinion in conflict with this proposition, it is inaccurate, and was not intended to assert the contrary of what is here stated. The question as to whether the property is the separate property of the wife is the only one discussed by counsel. We therefore advise that the judgment appealed from be affirmed.

We concur: Foote, C.; Gibson, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

(80 Cal. 338)

Welsh v. Plumas County. (No. 12,953.)

(*Supreme Court of California.* Sept. 2, 1889.)

Toll-Roads—Injunction.

1. A right of way for a toll-road is such an interest in the land covered by it as will enable its owner to bring an action against a county declaring the road to be a public highway, under Code Civil Proc. Cal. § 738, which provides that an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim.

2. Though such right of way be a mere incorporeal hereditament, yet a complaint which shows that plaintiff is the owner of the right of way for the toll-road, and entitled to collect tolls thereon, and that defendant interferes with his enjoyment of his property by depriving him of his tolls, presents a sufficient case for an injunction, under Code Civil Proc. Cal. § 731, which provides that anything which is an obstruction to the free use of property may be enjoined.

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. Clough, Judge.

Action by P. R. Welsh against the county of Plumas. Judgment was rendered for defendant, and plaintiff appeals.

Hundley & Gale, for appellant. *C. E. McLaughlin*, for appellee.

Gibson, C. This is an appeal from a judgment entered upon the declination of plaintiff to amend his amended complaint, a general demurrer thereto having been sustained. The amended complaint presents these facts: An act entitled "An act to authorize the construction of a wagon road from the Cold Spring House, in Butte county, to Greenville, in Plumas county," approved March 17, 1866, authorized James R. Baylan, A. Miller, A. Wood, their associates and assigns, to construct and keep in repair a good wagon road, commencing at the points named in the title of the act, said road to be completed within one year from the passage of the act. The act granted the right of way over and along the route of the road, provided no public road then in use between the points designated should be used, unless by permission of the board of supervisors of Plumas county, and also the right to collect such tolls upon the road, after its completion, as might be directed by the board of supervisors. Pursuant to this act the grantees therein and their associates accepted the grant, and within the time specified in the act laid out and constructed a good wagon road, and have ever since kept the same in good repair. In the laying out and construction of the road they did not, except by permission of the said board of supervisors, granted by a resolution entered on its minutes, occupy any public road then in use between the points designated in the title of the act. On the 25th day of September, 1866, and after the completion of the road, the board of supervisors of Plumas county passed an order, and entered the same on its minutes, fixing the rates of toll to be charged and collected on the wagon road by the said grantees, their associates and assigns. Plaintiff, by virtue of legal conveyances in writing from the original grantees named in the act, is the owner of the wagon road as successor and assignee from the said grantees, and is entitled to have and receive the tolls, and to enjoy all the rights and privileges, pertaining or incident thereto. Ever since the completion of the road the plaintiff, his predecessors and grantors, have been the owners, and in possession, of the wagon road, and received and collected tolls therefrom, until the board of supervisors of Plumas county, at a regular meeting on the 4th day of May, 1887, by an order entered on its minutes, without notice to plaintiff, declared the Cold Spring House and Greenville toll-road, by which name the wagon road was known, to be a public highway, and since that date defendant has claimed to be the owner of the road, and denies the right of plaintiff to charge and collect tolls thereon. This claim of defendant is without right, and it has no estate, right, title, or interest in the road or any part thereof. By reason of these acts of the defendant all persons traveling on the road refuse to pay toll, or to recognize the right of plaintiff to collect the same, whereby he has been deprived of the full use and enjoyment of his property, without due process of law, and without compensation made or tendered to him.

These facts, respondent contends, do not show any estate or interest in the land covered by the wagon road, but simply a franchise to collect tolls thereon, and therefore this action will not lie under section 738 of the Code of Civil Procedure, which provides that "an action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim;" and that, even assuming that the facts show an estate or interest in the land covered by the wagon road, it also appearing that the board of supervisors, as the officers of defendant, acted beyond the scope of their authority, such action is therefore void, and cannot injure plaintiff.

Has the plaintiff such an interest in the wagon road as will enable him to maintain this suit? We think he has. The act of March 17, 1866, does not prescribe how the acceptance of the grant by the grantees should be manifested, but, as they built the road within the time mentioned in the act, they acquired whatever passed by the legislative grant. Rush v. Jackson, 24 Cal. 308. The principal thing granted by this act was the privilege or franchise of collecting tolls upon a wagon road between the points designated in the act, for an indefinite period, for the private advantage of the grantees and their assigns, in consideration of building and maintaining, at their own expense, the wagon road for the benefit of the public. In order to enjoy this private advantage it was necessary to build and maintain the wagon road, and the plaintiff's predecessors and assignors, having built and maintained it, thereby acquired the right of way for the road over the land embraced within it. This right of way is private property, but for a public use, and is incident and necessary to the privilege of collecting tolls thereon, and constitutes an interest in the land upon which the wagon road rests. Appeal of Railroad Co., 32 Cal. 500. This case decided that a legislative grant of a right of way for a street railroad through a street in the city of San Francisco, with the privilege of collecting a certain specified fare from the passengers riding thereon, gave the appellant corporation such an interest in the street as to make it liable for its proportion of the cost of improving the street. A wagon road may be mortgaged or hypothecated to obtain funds for the construction or repair of such road, (Civil Code, §§ 522, 523;) and may, with the franchise, be sold upon execution, (Id. § 388.) The right of way for the wagon road held by plaintiff may be terminated by forfeiture for abuse of his franchise in collecting illegal tolls, (see Id. § 514;) or by condemnation by the county, (Pol. Code, § 2643, subd. 4;) or by purchase by the county, (Id. § 2800;) or by expiration or non-user of the franchise, (Id. § 2619.) In either of these events the board of supervisors, having the general supervision of highways in their county, would be required, by proper ordinance, to either cause the road to be recorded as a highway free to the public, or, if not necessary for the use of the public, to abolish or discontinue it. Id. §§ 2643, 2681; County Government Act, approved March 14, 1883, (St. 1883, p. 303, § 25.)

It is therefore clear that the board of supervisors have the power to act in relation to the property in controversy, but, as it does not appear that plaintiff's franchise was terminated in any of the ways above stated, the board of supervisors, in declaring the wagon road a public highway, and denying plaintiff's right to collect the proper tolls thereon, which, as we have seen, they can do under certain circumstances, asserted a claim, for and on behalf of the defendant, to plaintiff's interest in the land embraced within the wagon road that is adverse to plaintiff's interest therein, and prevents the free use and enjoyment of his property, which adverse claim he has a right to have determined in this form of action under section 738, Code Civil Proc. If plaintiff's franchise has expired or been determined by forfeiture or otherwise, whereby the defendant can properly declare the wagon road a free highway, it can set it up in its answer to plaintiff's complaint for adjudication.

Again, treating plaintiff's right of way for the toll-road as a mere incorporeal hereditament, which does not carry an estate in land, still, as his complaint shows that he is the owner of the right of way for the toll-road, and in and entitled to the possession thereof, for the purpose of collecting tolls thereon, and that the action of the defendant, through its officers, the board of supervisors, interferes with and obstructs the free use and enjoyment of his property, by depriving him of his tolls, a sufficient case in equity is presented to sustain an injunction against the defendant, enjoining it from interfering with or obstructing the use of plaintiff's property, by asserting an adverse claim thereto, and denying his right to collect tolls. Id. § 731; Conniff v. San Francisco, 67 Cal. 45, 7 Pac. Rep. 41.

We therefore advise that the judgment be reversed, and the cause remanded, with instructions to the court below to overrule the demurrer to the amended complaint, with leave to defendant to answer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and the cause remanded, with instructions to the court below to overrule the demurrer to the amended complaint, with leave to the defendant to answer.

(80 Cal. 564)

GILMAN v. BOOTZ. (No. 12,278.)

(*Supreme Court of California.* Sept. 21, 1889.)

APPEAL—RECORD.

Intermediate, non-appealable orders cannot be reviewed on an appeal from the judgment, where no bill of exceptions has been filed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Moses G. Cobb, for appellant. *J. F. Castlehun*, for respondent.

HAYNE, C. This is an appeal from a judgment of dismissal for want of prosecution. From papers printed in the transcript it is to be surmised that the defendant moved to dismiss the action for want of prosecution; that this motion was granted; that thereafter the plaintiff moved to have the order for dismissal set aside; that this latter motion was denied, and that thereafter a judgment of dismissal was recorded. The appeal is not from the orders, but is from the judgment. The appellant seeks to have the orders reviewed as intermediate, non-appealable orders, affecting the merits, etc., but in order so to review them it is essential that there should be a bill of exceptions, (Douglas v. Dakin, 46 Cal. 51; Stoddart v. Burge, 53 Cal. 398; Welsh v. Allen, 54 Cal. 211; Hayne, New Trials & App. § 262;) and there is no bill of exceptions. Even if the orders were themselves the subject of appeal, and an appeal had been taken from them, it would have been necessary to identify the papers used on the hearing, (Pardy v. Montgomery, 77 Cal. 326, 19 Pac. Rep. 530;) and there was no such identification. We therefore advise that the judgment be affirmed.

We concur: Foote, C.; Gibson, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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80 Cal. 565

Schmidt v. Bauer. (No. 12,588.)

(*Supreme Court of California.* Sept. 21, 1889.)

Negligence—Dangerous Premises.

1. In an action for personal injuries, it appeared that plaintiff was in defendant's saloon, and asked him the way to the urinal; that in the direction defendant pointed there was a stairway leading down to the urinal, and on the wall the word "Toilet" was painted; that in the same general direction there was a door leading to a porch, from which a stairway led down into the back yard, and plaintiff passed through this door and down this stairway; that he, in attempting to return, opened another door leading into another part of the house, where the floor had been taken up for repairs, and, stepping in, fell into the cellar and was injured; that he did not know the condition of the building, and supposed he was going in through the door at which he had gone out. Plaintiff both denied and admitted that he knew what the word "Toilet," painted on the wall, meant, but testified that he did not see it. *Held*, that the evidence showed no actionable negligence on the part of defendant.

2. A complaint alleging that plaintiff was at the place where the accident occurred on business with, and at the invitation of, defendant, is sufficient to show defendant's duty, as between the parties, to keep the premises in safe condition.

Department 1. Appeal from superior court, city and county of San Francisco; John F. Finn, Judge.

J. F. Castlehun, for appellant. *Marcus Rosenthal*, for respondent.

Works, J. This is an action for damages for personal injuries, alleged to have been the result of the defendant's negligence. There was a trial by jury. When the plaintiff's evidence was in, the defendant moved for a nonsuit, which was denied. There was a verdict for the plaintiff, the defendant's motion for a new trial was denied, and he appeals.

The evidence on the part of the plaintiff showed substantially that the defendant was a keeper of a liquor saloon, and that his private residence was connected therewith, in the same building; that the plaintiff was in the saloon, drinking beer; that he asked the defendant the way to the urinal; that the defendant pointed the way; that in the direction indicated by him there was a stairway leading to the urinal in the basement of the building, and on the wall the word "Toilet" was painted in large letters to direct the way; that in the same general direction pointed out by the defendant there was a door leading out onto a porch, back of the defendant's dwelling or family rooms, from which a stairway led down into the back yard; that the plaintiff, instead of taking the stairway leading to the urinal connected with the saloon, passed through the door out onto the porch, and down into the back yard, where there was a urinal for the use of the family; that the plaintiff attempted to return to the saloon, but instead of coming through the door through which he had passed out, he opened another door leading into another and private part of the house, where the floor had been taken up for the purpose of making repairs, and, stepping in, was precipitated into a cellar and injured; that the plaintiff did not know the condition of the building which caused his fall, and that he supposed that he was coming back through the door at which he had gone out. The plaintiff both denied and admitted that he knew what the word "Toilet," painted on the wall, meant, but testified that he did not see it.

This evidence showed no actionable negligence on the part of the defendant, and for that reason the nonsuit should have been granted. The keeper of a public place of business is bound to keep his premises, and the passage-ways to and from it, in safe condition, and use ordinary care to avoid accidents or injury to those properly entering upon his premises on business. Parker v. Publishing Co., 69 Me. 173; Carleton v. Steel Co., 99 Mass. 216; Bennett v. Railroad Co., 102 U. S. 577. But this rule only applies to such parts of the building as are a part of, or used to gain access to, or constitute a passage-way to and from, the business portion of the building, and not to such parts of the building as are used for the private purposes of the owner, unless the party injured has been induced by the invitation or allurement of the owner, express or implied, to enter therein. Zoebisch v. Tarbell, 10 Allen, 385; Parker v. Publishing Co., 69 Me. 173; Pierce v. Whitcomb, 48 Vt. 127; Wilkinson v. Fairrie, 1 Hurl. & C. 631; Murray v. McLean, 57 Ill. 378; Victory v. Baker, 67 N. Y. 366; Toomey v. Sanborn, 14 N. E. Rep. 921. As was said in Sweeny v. Railroad Co., 10 Allen, 372: "In order to maintain an action for an injury to person or property by reason of negligence or want of due care, there must be shown to exist some obligation or duty towards the plaintiff which the defendant has left undischarged or unfulfilled." The evidence fails to show any such duty resting upon the defendant towards the plaintiff. His injury resulted from his entrance, uninvited, into the private apartments of the defendant. No duty rested upon the defendant, as between him and the plaintiff, to keep such part of his premises in a safe condition. The plaintiff was there without right. The evidence does not show that he was in any way induced by the defendant to enter upon that part of his premises. It not only fails to show negligence on the part of the defendant, but does clearly show contributory negligence on the part of the plaintiff. The way to the urinal was plain to be seen. The plaintiff chose to go into the private yard of the defendant, and in coming back mistook the door through which he fell for the one through which he passed out. He had no right to pass through either of these doors. To do so under the circumstances was such negligence as must preclude him from recovering for his injuries. Victory v. Baker, 67 N. Y. 366.

Conceding that the respondent was not wrongfully in the place where the accident occurred, and giving the most liberal construction to his evidence, he was there by the mere license of the appellant, and for that reason the appellant owed him no duty, and he went there subject to all the risks attending his going. Holmes v. Railway Co., L. R. 4 Exch. 257; Parker v. Publishing Co., supra.

Counsel for respondent rely mainly upon McRickard v. Flint, 21 N. E. Rep. 153, as supporting his case. The case referred to differed widely from the one before us. The negligence relied upon there was that the defendants had failed to comply with a statute of that state, which provided that "in any store or building in the city of New York in which there shall exist or be placed any hoist-way, elevator, or well-hole, the openings thereof through and upon each floor of said building shall be provided with and protected by a substantial railing, and such good and sufficient trap-doors with which to close the same as may be directed and approved by the superintendent of buildings; and such trap-door shall be kept closed at all times except when in actual use by the occupant or occupants of the building having the use and control of the same," etc. It was held that the failure to comply with this statute was *prima facie* evidence of negligence, and that the plaintiff, being in the building on business with one of the occupants, and walking through a door opening onto the elevator shaft, by reason of which he fell and was injured, was not guilty of contributory negligence. This, it seems to us, presents an entirely different question from the one we are considering, and does not in any way militate against the conclusions we have reached. There are other cases cited, but they do not conflict with the views we have expressed.

The appellant also contends that the court below erred in overruling his demurrer to the complaint. We think the complaint was sufficient. It alleges that the plaintiff was at the place where the accident occurred on business with, and at the invitation of, the defendant. This was sufficient to show the duty on the part of the defendant, as between the parties, of keeping the premises in safe condition. As we have seen, the evidence failed to establish this allegation, and for that reason the plaintiff's case was not made out. Judgment and order reversed.

We concur: FOX, J.; PATERSON, J.

(80 Cal. 504)

BROWN v. CASEY. (No. 12,978.)

(*Supreme Court of California.* Sept. 11, 1889.)

APPEAL—RULINGS ON EVIDENCE.

Where the bill of exceptions does not contain all the evidence, it cannot be said that the court erred in allowing a witness to testify that an instrument purporting to be a deed was a mortgage.

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

L. W. Elliott, for appellant. *J. C. Campbell*, for respondent.

WORKS, J. This is an action to quiet title. The court found fully the claim of title under which both of the parties claimed to own the property, which clearly showed that the plaintiff was the owner thereof, and that the defendant had no title thereto. The appellant assigns as error that the court permitted a witness to testify that a certain instrument purporting to be a deed was in fact a mortgage. The bill of exceptions does not contain all of the evidence, or purport to do so; therefore, conceding that the question asked called for a conclusion of the witness, or was otherwise improper in form, we cannot say that this error was injurious to the appellant, or such as should reverse the judgment. There is nothing in the findings to show an estoppel as against the respondent or his grantors. The findings covered the issues raised, or attempted to be raised, by the cross-complaint of the defendant.

Judgment and order affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; THORNTON, J.

(3 Cal. Unrep. 139)

FOX v. DYER *et al.* (No. 12,509.)

(*Supreme Court of California.* Sept. 24, 1889.)

FRAUDULENT CONVEYANCES — PLEADING — COMPLAINT.

In an action to set aside fraudulent conveyances, a complaint which does not sufficiently state the facts constituting the fraud, and does not show that plaintiff would have been injured thereby, is demurrable.

Department 1. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Action to set aside fraudulent conveyances, by Fox against Dyer and others. From a judgment sustaining a demurrer to the complaint, plaintiff appeals.

E. J. & J. H. Moore and *A. E. Ball*, for appellant. *Haggin & Dibble* and *Metcalf & Metcalf*, for respondents.

WORKS, J. The complaint in this case attempts to state the facts showing that certain conveyances of real estate by an assignee in insolvency were fraudulent, and that the plaintiff, as one of the creditors of the insolvent, was thereby damaged. The complaint is unnecessarily long, and to attempt to state even its substance would for that reason extend this opinion in like manner, and serve no useful purpose. The court below sustained a demurrer to the complaint, and we think properly. It does not sufficiently state the facts claimed to have constituted the fraud, nor does it show that the plaintiff was in a position to have been injured, conceding that the conveyances were fraudulently made. Judgment affirmed.

We concur: FOX, J.; PATERSON, J.

(80 Cal. 570)

TAPPAN v. ALBANY BREWING CO. (No. 12,433.)

(*Supreme Court of California.* Sept. 21, 1889.)

CONTRACT—PUBLIC POLICY.

An agreement to pay one of the owners of land sold under a decree in a suit for partition a further sum for her interest therein, provided she would not oppose the confirmation of such sale, which was made for an inadequate price, is against public policy, as being a promise to pay a consideration for the concealment of a fact which it was

the party's duty to make known to the court and her co-tenants.

Department 1. Appeal from superior court, Alameda county.

N. D. Anderson, for appellant. *Thos. H. Smith*, for respondent.

WORKS, J. The complaint in this case alleges, in substance, that an action for partition of certain real estate having been brought, judgment rendered, decree for the sale of the property entered, the property was sold to the defendant; that the property was sold for much less than its real value; that the plaintiff's assignor, who was one of the defendants, and a tenant in common of the real estate, being dissatisfied with the price at which the property was sold, was about to commence proceedings to prevent the confirmation of the sale by the court; that the defendants, to induce her not to make such objections, agreed to pay her $1,000 additional for her interest in the property immediately upon the sale being confirmed; and that she, relying upon such promise, and in consideration thereof, refrained from making objections to the confirmation of said sale, and that, no objection being made, the sale was duly confirmed. The defendant paid $100 of the amount, and this action is to recover the balance of $900. The court below overruled a demurrer to the complaint, and the defendant failing to answer, judgment was entered against it, and it appeals.

The demurrer should have been sustained. The contract was a fraud, not only upon the court, whose duty it was to pass upon and confirm or set aside the sale, but upon the parties in the action of partition. It was the plain duty of the plaintiff's assignor, if she knew of any valid reason why the sale should have been set aside, or not confirmed, to make it known to the court and her co-defendants. It is contended by the respondent that this was nothing more than the payment of a sum of money by way of a compromise of litigation, and that such contracts have been upheld. We do not so construe the agreement. It was a promise to pay a consideration for the concealment of a fact from the court and the parties, material to the rights of said parties, and which it was her duty to make known. Such a contract was against public policy, and neither party should receive the aid of the courts to enforce it. Beard v. Beard, 65 Cal. 356, 4 Pac. Rep. 229. The judgment is reversed, with instructions to the court below to sustain the demurrer to the complaint.

We concur: FOX, J.; PATERSON, J.

(80 Cal. 521)

TROUSCLAIR *v.* PACIFIC COAST STEAM-SHIP CO. (No. 13,025.)

(*Supreme Court of California.* Sept. 12, 1889.)

CONTRIBUTORY NEGLIGENCE—EVIDENCE.

1. Plaintiff was injured by a train while pushing off from a wharf in a boat. He might have easily escaped injury if he had changed his position in the boat, or had entered it at another place, and could have seen and heard the approaching train from a distance. His testimony showed that his mind was so fixed on the boat that he paid no attention. *Held* contributory negligence, warranting a nonsuit.

2. In such case it is immaterial that defendant was negligent in having its tracks so near the edge of the wharf, and in having only two men in charge of the train, and in using inferior brakes, and that it had no wharf franchise, and the bay was a public highway for boats, in the absence of evidence that the injury was willful and wanton.

BEATTY, C. J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, San Diego county; E. PARKER, Judge.

Olin Wellborn and *Henry J. Stevens*, for appellant. *Henderson & McDonald*, for respondent.

HAYNE, C. Action for damages for personal injuries. Verdict and judgment for plaintiff. Defendant appeals.

The defendant is a corporation owning and operating a wharf extending into the bay of San Diego, at which vessels land. Along the length of the wharf was a railroad track, which was used for the purpose of transporting freight to the shore. On one side of this track was a space about seven feet, which was used as a passage-way for travelers along the wharf. On this side was a landing for small boats, with steps going down to the water, and a boat-house, which was rented by the defendant to a man who kept boats for hire. On the other side was a space of about 13 inches between the outer rail and the edge of the wharf. On this side, about 300 yards from the shore, was a raft moored to the wharf. There was some staging there, with steps down to the raft. The plaintiff must have been familiar with the general features of the place, for he testifies that he had "been going there for about three years." On the day of the accident the plaintiff had been fishing on the raft. While there, he accepted an invitation from one of his companions to go boating. The companion procured a boat, and attempted to bring it up to the raft. He did not succeed in getting it close enough, and the boat drifted along-side the wharf. He then told the plaintiff to go upon the wharf, and get down from there into the boat, which the plaintiff proceeded to do. The boat might have been brought up to the raft with slight trouble. The plaintiff himself testifies in this regard as follows: "I don't know what there was to obstruct the passage to the raft. He didn't get up close enough. I suppose, if he had taken a run out and back again, he might have come in. I don't recollect any obstruction to prevent his getting in." When the plaintiff got into the boat the bow had got under the wharf, with which the boat then made an angle. The mast was close up to the side of the wharf, and projected several feet above it. The companion was in the stern. According to the plaintiff's story, he was engaged for 10 or 15 minutes in trying to push the boat out from the wharf. While so engaged, the train came backing out towards the end of the wharf at the rate of about "six or eight" miles an hour. When about 40 yards from the boat, the lookout on the end of the train saw the mast and the plaintiff, and signaled the engineer to stop. The latter did not see the signal as soon as he ought to have done; and although, when he did see it, he tried to stop, he was not able to do so before the place of danger was reached. The edge of the cars caught the mast, and broke it in two. The plaintiff was struck by the mast, thrown against a cross-piece or "cap-head," on which the floor of the wharf rested, knocked overboard, and seriously injured. The view between the place of the accident and the starting point of the train was unobstructed. In this regard the plaintiff testified as follows: "Between me and the point where these cars would start out was an open space. There was nothing to obstruct the view to me or to them. I might have been obstructed by the canvass between me and them. I could not see the cars. I didn't know the cars were coming. I had no thought to determine whether the man in the cars could see me or not. I didn't know they were coming." "There was no train in sight when I got into the boat that I recollect. If there was any train, I didn't know it. My mind was so fixed on the boat that I never paid any attention. I did not notice any before I got into the boat." As above stated, the lookout on the train (who was one of the plaintiff's witnesses, and no longer in the employ of the defendant) saw the plaintiff. He "could see his head." And it seems entirely clear that, if plaintiff had looked, he must have seen the train coming. Not only could he have seen it if he had looked, but he could have heard it if he had listened. One of his witnesses testified that "a train of that kind, running out on that pier, makes a great deal of noise and fuss. You can hear it from one end of the wharf to the other. You often can, except on account of the wind. It depends whichever way the wind blows. * * * A train could be very easily heard running, at the rate we were running, long before we got to where the man was at the mast." And the plaintiff himself testified that "there was scarcely no wind going." If he had seen or heard the train, he could easily have saved himself by stepping back to the stern of the boat, where his companion remained uninjured. But he neither looked nor listened. His mind "was so fixed on the boat" that he "never paid any attention."

It therefore appears from the plaintiff's own account that, while seeking amusement and recreation, he voluntarily placed himself in a dangerous position,—a position in which, unless care was taken, he would in all probability be injured by the running of the defendant's train in the ordinary way; that he did so, although the perfectly safe course of having the boat come up to the raft involved very slight exertion or delay; that while in such dangerous position he never thought of danger. He did not look, he did not listen, but allowed his entire attention to be absorbed by what he was doing. This seems to us to have been gross negligence. Suppose that a man should go to sleep upon a railroad track running in the middle of a highway, or should stop his vehicle on a crossing to converse with a friend, and pay absolutely no attention to the approach of trains. Would he have a valid claim if, while in such a position, a train should injure him? The answer to such a claim would be simple and obvious. It was his own fault to act in such a way, and but for such fault the accident would not have happened. In other words, his own neligence contributed directly and proximately to the injury. This seems to be a plain proposition, and the facts of this case are within it. But authority is not wanting. The case of Glascock v. Railroad Co., 73 Cal. 137, 14 Pac. Rep. 518, is directly in point. There a person was killed while crossing a railroad track at a place where the view was unobstructed for 200 yards. Although the engineer did not ring his bell or blow his whistle, as he should have done, it was held, in a suit brought by his administratrix, that the plaintiff was properly nonsuited; and PATERSON, J., delivering the opinion, said: "Having good eyes, it was his duty to use them, at least to some extent, for his own protection, and his failure to do so would be contributory negligence, and prevent a recovery, notwithstanding the negligence of the defendant in failing to ring the locomotive bell or blow the whistle. * * * If he looked, he saw; and, having age and faculties to understand the dangers, is charged with a knowledge of them, and was bound to act upon that knowledge as a prudent and cautious man would under the circumstances."

In the case before us, it may be conceded, for the purposes of the opinion, that there was negligence on the part of the defendant in having its track so near the edge of the wharf, and in having only two men in charge of the train, and in not having better appliances in the way of brakes. In view of the contributory negligence of the plaintiff this is immaterial. So the fact, if it be such, that the defendant had no wharf franchise, and the fact that the bay was a public highway for boats, are immaterial. The want of a wharf franchise could only go to establish wrong on the part of the defendant, and not to excuse wrong on the part of the plaintiff. And the right to navigate the bay does not give immunity from the consequences of doing so negligently. It is certainly true that the plaintiff's conduct did not give the defendant a right to willfully or wantonly injure him; but there is no pretense that the injury was willful or wanton on the part of the defendant or its employes. The evidence does not show anything of the kind, and the jury expressly found to the contrary. The plaintiff should have been nonsuited on his own statement. And, to say the least, his case was not strengthened by the evidence introduced by the defendant. In a case like this, the fact that the jury viewed the locality makes no difference. We therefore advise that the judgment and order denying a new trial be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are reversed, and the cause remanded for a new trial.

WORKS, J., did not participate in the decision of the above cause.

BEATTY, C. J. I dissent. At the time defendant's motion for a nonsuit was sub mitted it had been made perfectly clear by the plaintiff's own testimony that he was giving no heed to the passage of trains along the wharf or pier when the accident occurred. He was neither looking nor listening; was, in fact, taking no precaution whatever to avoid danger from that source; and was therefore guilty of contributory negligence if he knew or had reasonable grounds for apprehending injury from a passing train. But was it clearly shown by plaintiff's testimony that he had such knowledge or grounds of apprehension? I cannot say that it was. He was not on the track or pier, but was in a small sailboat on the bay, which, by the careless and unskillful management of his companion, had been drifted by the wind against the wharf, so that its bow was under, and its mast was resting against, the side of the pier, in which position it was held by the force of the wind or current so firmly that all their efforts were insufficient to disengage it. It makes no difference, it seems to me, that he entered the boat from the pier while it was in this situation. Except in so far as that and previous visits to the pier might tend to prove knowledge on his part of the manner in which the pier and track were constructed, I think that, after he was once fairly in the boat, his subsequent conduct must be viewed precisely as if he had been sailing on the bay, and by accident or unskillfulness had been carried into the position in which defendant's train found him. The question, then, is whether he knew or had reason to suppose that defendant's track had been so laid that its cars moving upon the rails would project beyond the edge of the wharf so as to come in contact with the mast of his boat. As to this he testified that he did not know that the track was so laid, and it appears to me he had no reasonable grounds to suppose so. The wharf in question extends from the shore to the ship channel, a distance of about 1,200 feet across the bay of San Diego,—a bay navigated by small sailing vessels, which are liable at any time to be drifted against the side of the pier; and certainly no one could presume that a track would be so laid upon it that cars in passing would impinge against the masts of boats lying along-side. In fact, it was shown that the cars first used on the track did not project beyond the edge of the wharf, but that wider cars were subsequently adopted, which projected 12 or 15 inches, and that the rails were never moved in so as to render the wider cars harmless. For these reasons I cannot say that the superior court erred in denying the motion for a nonsuit.

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80 Cal. 625

In re JESSUP'S ESTATE. (No. 13,124.)

(*Supreme Court of California.* Sept. 30, 1889.)

EXECUTORS—EMPLOYMENT OF COUNSEL.

Executors have no authority to litigate adverse claims of heirs, legatees, or devisees, and payments to counsel so employed will not be allowed on settlement of the executorial accounts.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

For former report, see 21 Pac. Rep. 976.

John H. Dickinson, for appellants. *Henry I. Kowalsky*, (*W. H. L. Barnes*, of counsel,) for respondent.

PER CURIAM. This appeal is from an order settling the annual account of Isaac Jessup and S. O. Putnam, executors of the last will and testament of Gershom P. Jessup, deceased. The alleged error consists of the disallowance by the court of certain items of account for moneys expended by the executors in the employment of counsel to resist the claim of Richard P. Jessup to the estate, as the pretermitted heir of the deceased. As to the value of the legal services of the attorneys, no question arises. But the contention of the respondents is that the contest was between the legatees named in the will and the pretermitted heir, and that in such a contest the executors cannot represent either side. In Roach v. Coffey, 73 Cal. 281, 14 Pac. Rep. 840, the court said: "We think that it is the settled law of this state that an administrator cannot represent either side of a contest between heirs, devisees, or legatees contesting for the distribution of an estate. He cannot litigate the claims of one set against the other. His duty is to preserve the estate, and distribute it as the court shall direct." Citing Estate of Wright, 49 Cal. 550; Bates v. Ryberg, 40 Cal. 465; Estate of Marrey, 65 Cal. 287, 3 Pac. Rep. 896. It is true that in none of these cases was the question of the allowance of attorney's fees directly involved; but the right of executors or administrators to litigate adverse claims of heirs, legatees, or devisees necessarily involved the right to employ counsel for that purpose. The right to employ counsel depends upon the right to litigate. Order affirmed.

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80 Cal. 415

ROBINSON *v.* MERRILL *et al.* (No. 12,107.)

(*Supreme Court of California.* Sept. 5, 1889.)

JUDGMENT—OPENING.

An order granting a motion to vacate a judgment for plaintiff because notice of motion to restore the cause to the calendar was not given, as required by a former order striking it off, is not an abuse of discretion, though it does not require the costs of trial paid out by plaintiff to be refunded, where no request to impose terms was made.

Department 1. Appeal from superior court, Santa Clara county; F. E. SPENCER Judge.

J. M. Wood, for appellant. *G. B. Merrill*, for respondents.

FOX, J. The transcript shows that this was an action upon a street assessment. Complaint in the usual form, and alleging ownership of the land in all of the defendants. The answer of defendant Merrill traversed all the allegations of the complaint except that of ownership of the land. Default of the defendants Low and the Hibernia Savings & Loan Society was entered. On the 22d of January, 1883, it was by the court ordered that the case be stricken from the calendar, to be restored on notice. On the 31st of January, 1887, the plaintiff dismissed the case as against defendants Moses Ellis and John Doe, (both of whom were owners in the land, according to the allegations of his complaint,) and without amending his complaint, and in the absence of defendant Merrill, who had answered, submitted his proofs, and took judgment against all the defendants except the two whom he had just dismissed. On the 4th of February the matter came on for hearing on the application of defendant Merrill to vacate and set aside said judgment, notice of which application had been duly given, under an order made by the court on the 1st of February, shortening the time for such notice. The application or motion was heard on affidavits and the records of the court; and the attention of the court being called to the fact of the order of January 22, 1883, striking the case from the calendar, to be restored on notice, and it not appearing that any notice of motion to restore the case to the calendar had ever been given, and other reasons also appearing from the affidavit of the moving party, the court made an order vacating and setting aside the judgment entered in the cause, and that the cause be restored to the calendar, to be taken up on notice to be given by plaintiff to defendants. From this order the appeal is taken. Appellant makes the point that the granting of this order was an abuse of judicial discretion, especially as he had paid out nine dollars costs of trial and entry of judgment, and that the order vacating the judgment was made without requiring the refunding of this sum. It does not appear from the record that any application was made to the court to impose terms as a condition of its order. If such application had been made, it would have been entirely in the discretion of the court to impose them or not; and from the facts appearing in this record it does not appear to us that it would have been any abuse of discretion to refuse such terms. The appeal is without merit, and the order appealed from is affirmed.

We concur: Works, J.; McFarland, J.

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80 Cal. 368

Newman v. Bank of California *et al.*

(No. 11,932.)

(*Supreme Court of California.* Sept. 30, 1889.)

Tenants in Common—Adverse Possession.

In an action by one of several tenants in common against an adverse claimant to recover possession of the entire land, his recovery of judgment inures to the benefit of all his co-tenants; and as his possession is their possession, and relates back to the time he commenced his action, no title by adverse possession can be acquired as against them during the pendency of his action. Thornton, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

George A. Nourse, for appellants. *Newlands & Allen, T. M. Osment,* and *B. B. Newman,* for respondent.

Works, J. The appellants and one Chapman were the owners as tenants in common of the real estate in controversy. The respondent Quinn was in possession, claiming to be the owner of the whole of the property, and holding the same adversely. Before the statute of limitations had run, Chapman brought his action against Quinn, alleging that he, Chapman, was the owner of the undivided one-half of the property; that Quinn was in possession thereof without right, and had no right, title, or interest therein; and asking for the possession of the whole of the property. The court below found the facts as alleged in the complaint, and rendered judgment in favor of Chapman that he was the owner of the undivided half of the property, that Quinn had no right, title, or interest in any part thereof, and that Chapman recover possession of the whole of the property. Quinn appealed to this court and the judgment was affirmed. Chapman v. Quinn, 56 Cal. 266. He then appealed to the supreme court of the United States, with the same result. Quinn v. Chapman, 111 U. S. 445, 4 Sup. Ct. Rep. 508. Upon the final determination of the case, a writ of possession was issued upon the judgment, and Quinn was ousted, and Chapman put in possession of the land. Between the time of the bringing of Chapman's suit and his being put into actual possession under the writ the time necessary to give Quinn title by adverse possession, if undisturbed, as against the appellants, had fully run. The sole question presented here is whether the bringing of the action by Chapman, one of the tenants in common, in the manner above stated, and his recovery of the possession, had the effect to prevent the possession of Quinn ripening into a title to the property as against the appellants, the other tenants in common. Counsel for respondents contend that there is no privity between tenants in common, and that the commencement of an action by one cannot inure to the benefit of another, as against the statute of limitations, and that a judgment recovered by him affects his interest in the property alone. In support of these propositions they cite: Chipman v. Hastings, opinion of this court, December 8, 1873, (unreported;) Read v. Allen, 56 Tex. 176; Read v. Allen, Id. 182; Stovall v. Carmichael, 52 Tex. 383; Burleson v. Burleson, 28 Tex. 385, 417; Pendergrast v. Gullatt, 10 Ga. 224; McFarland v. Stone, 17 Vt. 175; Wade v. Johnson, 5 Humph. 118; Bronson v. Adams, 10 Ohio, 135; Gray v. Givens, 26 Mo. 303; Doolittle v. Blakesley, 4 Day 273; Hammett v. Blount, 1 Swan, 385; Walker v. Perryman, 23 Ga. 309, 315; Mobley v. Bruner, 59 Pa. St. 481; Bennett v. Hethington, 16 Serg. & R. 196; Roe v. Rowlston, 2 Taunt. 446. It is contended that the unreported case of Chipman v. Hastings is conclusive of the question in favor of the respondents; and so it would be, but for the fact that a rehearing was granted in the case, and upon a second hearing the question was not decided, or in effect decided the other way. 50 Cal. 310. Counsel for appellants concedes that the judgment recovered by Chapman did not inure to the benefit of his clients, but contends that, as he finally recovered possession, such possession related back to the time of bringing his action, and under the well established rule that the possession of one tenant in common is the possession of all, the appellants must be regarded as having been in possession, and the respondent Quinn to have been ousted, at the time such action was commenced.

We think the learned counsel for appellants has conceded too much. If the judgment of Chapman did not inure to the benefit of the appellants, their title is undoubtedly lost by adverse possession. It is only by the aid of such judgment that his position that Quinn was, in contemplation of law, out of possession from the time the action was commenced, can be maintained. The complaint of Chapman against Quinn presented two questions for litigation, viz., the title to the undivided half of the property, and the right to the possession of the whole thereof. Quinn might have defeated the action entirely by proving that Chapman had no title to the property. He might have defeated a recovery of the undivided half of the land not claimed by Chapman, by showing that he, Quinn, was the owner, or entitled to the possession of the same. He did neither. Therefore the judgment in that case is, as between him and Chapman, conclusive against him that he was a mere trespasser upon the land at the time the action was commenced, and that Chapman, as one of the tenants in common of the property, was then entitled, as against him, to the possession of the whole thereof. If Chapman had, as such tenant in common, gone into the actual possession at that time, his possession would have been that of all of the owners, and they would, in contemplation of law, have been in possession. Did his recovery of possession, under the circumstances, have the same effect? One tenant in common may maintain a separate action to recover possession of his interest in the property. In such case his title and right to possession alone is involved, and the judgment cannot operate for or against the other owners. Williams v. Sutton, 43 Cal. 71; Walker v. Perryman, 23 Ga. 309. But such tenant may maintain an action against a mere trespasser for the possession of the whole of the property. Williams v. Sutton, supra; Chipman v. Hastings, 50 Cal. 310.

The right to recover the whole might have been defeated by a showing that at the time the suit was brought the defendant had acquired the title of the other owners by deed, estoppel, the statute of limitations, or otherwise, as one tenant in common may be barred of his rights, and another not. McFarland v. Stone, 17 Vt. 173; Bronson v. Adams, 10 Ohio, 136. It may be conceded, also, though we do not decide it, that, as to any claim of title existing at the time the suit was commenced against those defendants not suing, the defendant in that action was not concluded as between him and the tenants not suing. But the question here is quite a different one. Can he obtain title by possession subsequent to the bringing of the action, when the right to such possession, not only as to a part, but as to the whole, of the land, is put in issue in the case, and finally determined against him? We are quite clear that he cannot. As between him and Chapman, the judgment determines that he was, from the time the action was commenced, in the wrongful possession of the property, and, as between them, this question of the right to such possession relates to the time the suit was brought, and from that time, as between them, his possession conferred no title. The effect of the judgment, and the enforcement thereof by the writ of possession, was to make Quinn's possession of the whole tract the possession of Chapman from the time the action was commenced. If not, Quinn could have resisted the enforcement of the writ by saying, "I had no title to the undivided half of the property not claimed by you when you recovered your judgment, but I have since obtained it by remaining in possession. Therefore, you are not now entitled to the possession of that half, but only to the possession jointly with me as your tenant in common." This he certainly could not do as against Chapman. Now, if, in contemplation of law, Chapman was in possession from the time he commenced his action, for the same reason Quinn must be regarded as out of possession. Chapman's possession was the possession of the appellants. Unger v. Mooney, 63 Cal. 586; Olney v. Sawyer, 54 Cal. 380. Therefore they were in possession, and the statute of limitations could not run against them. So far, the judgment of Chapman, and subsequent proceedings under it, inured to the benefit of the appellants and preserved their title.

While the cases cited by the respondent support the general doctrine that a judgment for or against one tenant in common does not affect the rights of his co-tenants, they do not reach the question presented here. Some of the language used may be so construed as, in general terms, to cover the question under consideration, but they do not determine it. In some of the cases the doctrine that a judgment recovered by one tenant in common does not inure to the benefit of another is placed upon the express ground that he cannot recover the possession of the whole property, but only his own undivided share. Mobley v. Bruner, 59 Pa. St. 483; Bennett v. Hethington, 16 Serg. & R. 196; Gray v. Givens, 26 Mo. 291, 302. The conclusion reached must necessarily follow from such a rule, as the right of possession, as to the interest of other owners, is not involved or determined. But, as we have seen, the rule is the other way in this state. In some of the cases cited the right of one tenant in common to recover the whole of the land from a mere trespasser is recognized; and those cases tend to confirm the conclusion we have reached, but are not decisive of the question. Read v. Allen, 56 Tex. 176, 182; Read v. Allen, Id. 182, 190; Stovall v. Carmichael, 52 Tex. 388; Pendergrast v. Gullatt, 10 Ga. 218, 224; McFarland v. Stone, 17 Vt. 165, 175.

For the reasons stated we think the court below erred in holding the respondent Quinn to be the owner of the undivided half of the land. Judgment reversed, with instructions to the court below to modify its conclusions of law in accordance with this opinion, and to render judgment on the findings in favor of the appellants.

We concur: Beatty, C. J.; Fox, J.; McFarland, J.; Sharpstein, J.

I dissent: Thornton, J.

(80 Cal. 605)

Reynolds v. Willard. (No. 12,977.)

(*Supreme Court of California.* Sept. 26, 1889.)

Adverse Possession—Payment of Taxes.

1. Where defendant in ejectment claims by adverse possession, he is bound to prove either that

taxes were assessed on the land, and were paid by him, or that none were assessed, and, in the absence of any such evidence on his part, it will be presumed that taxes have been assessed, and that he has not paid them.

2. Where his adverse possession began, but did not have the required duration, before the statute requiring the payment of taxes on land so claimed took effect, and where the verdict must have been against him, as it was not shown that he had paid the taxes, or that none had been assessed, after the statute took effect, an instruction that defendant, to establish his adverse possession, must prove his payment of all taxes assessed on the land, is a harmless error.

3. Under such statute it is not sufficient that defendant should prove his payment of taxes on certain lands, supposing the land claimed by adverse possession to be included therein, but he must prove that he actually paid taxes on the land in dispute.

THORNTON and MCFARLAND, JJ., dissenting.

In bank. Appeal from superior court, San Joaquin county; J G. SWINNERTON, Judge.

W. L. Dudley, for appellant. *J. C. Campbell*, for respondent.

WORKS, J. Action of ejectment. Defense, adverse possession. Trial by jury, and verdict for plaintiff. Judgment accordingly. Motion for new trial denied. Defendant appeals. There was evidence tending to show that the land in controversy was held adversely by the defendant from August, 1882, until the commencement of this action, September 22, 1887, but there is other evidence tending to show that this possession was not continuous, but was interrupted by a third party taking and holding possession for a part of one year, and cultivating and growing a crop on the land. There was also some evidence slightly tending to show that the defendant's adverse possession commenced as early as 1874. The court instructed the jury that, in order to make out his defense of adverse possession, the defendant must have proved the payment by him of all taxes levied and assessed against the land.

The appellant contends that this instruction was erroneous for two reasons: (1) Because there was no evidence that any taxes had been levied or assessed against the land. (2) As the evidence tended to show that the land was held adversely, prior to the enactment of the statute requiring payment of taxes, it was error to instruct that all taxes must have been paid by the defendant, including the time prior to the enactment of the statute.

As to the first of these, counsel claim, on the authority of Ross v. Evans, 65 Cal. 439, 4 Pac. Rep. 443, and McNoble v. Justiniano, 70 Cal. 396, 11 Pac. Rep. 742, that the burden was upon the plaintiff to show that taxes had been levied and assessed against the property, and that, in the absence of such proof, the defendant was not called upon for any evidence on the subject. The cases cited do not support this contention, nor do we believe it to be the correct rule. The plaintiff made out his case by showing a paper title to the property. The defendant, in support of his claim of title by adverse possession, was bound to prove every fact necessary to show such possession, for the requisite time, including the payment of taxes, if any had been levied and assessed. If taxes had been levied and assessed, he should have proved the fact, and also that he had paid the same. If none had been levied and assessed, he should have proved that fact as a reason for not making payment. Having failed to make such proof, it cannot be presumed in aid of his possession that no taxes had been levied and assessed. Neither of the cases relied upon by the appellant are in conflict with this view of the law. McNoble v. Justiniano has no bearing on the question. Ross v. Evans related to the findings of the court and not to the evidence. In that case the court below found that the taxes had not been paid, but failed to find that any had been levied and assessed, and this court held, very properly, that the findings were defective in this respect. But while we adhere to the case referred to, we are clearly of the opinion that, in the absence of any evidence on the point, the court below should find that taxes had been levied and assessed, and that the defendant had not paid the same. The presumption that the assessor had done his duty should be regarded as *prima facie* evidence that such property had been assessed. In the absence of any evidence from the defendant, the fact should be found against him. This must be the result of the well-established rule that a party who relies upon adverse possession must prove every fact necessary to establish such possession for the requisite length of time. Garwood v. Hastings, 38 Cal. 223; Figg v. Mayo, 39 Cal. 267.

Conceding that the evidence tended to show that the adverse possession commenced in the year 1874, the other objection to the instruction is well taken. The statute requiring the payment of taxes took effect in 1878. From the time the defendant took possession until the statute took effect the payment of taxes was not necessary, and to instruct the jury that all taxes must have been paid to entitle the defendant to recover was error. But, as it is conceded that there was no evidence showing either that the defendant had paid the taxes levied and assessed subsequent to the enactment of the statute, or that none had been levied or assessed, and as the full term of five years could not have run before the statute took effect, the verdict of the jury must necessarily have been against him on that ground, and the giving of the instruction was a harmless error. Besides, the evidence tending to show possession on the part of the defendant prior to the year 1882 was so meager as to be unworthy of notice. It is perfectly evident that the only possession relied upon by the defendant at the trial was that commencing with the year 1882, and as to that the instruction was correct.

It was admitted at the trial that the defendant had paid all taxes levied and assessed against certain lands covered by a patent to him, and the evidence tended to show that he supposed the land in controversy to have been a part of such lands, but that in fact it was not, but was part of a tract patented to the plaintiff's grantor, and by him conveyed to the plaintiff. The defendant asked the court to instruct the jury that if the defendant held the land, believing it to have been within his patent, and paid the taxes on the land patented to him, supposing that he was paying on the land in dispute, such payment was a sufficient compliance with the statute. The instruction was correctly refused. The defendant was bound to prove, under the statute, that he actually paid the taxes on the land in controversy. It was not sufficient for him to show that he paid on other lands, supposing it to include the lands in dispute. Judgment and order affirmed.

We concur· BEATTY, C. J.; SHARPSTEIN, J.; FOX, J.

We dissent, (Ross v. Evans, 65 Cal. 439, 4 Pac. Rep. 443; Heilbron v. Ditch Co., 75 Cal. 123, 17 Pac. Rep. 65:) THORNTON, J.; MCFARLAND, J.

(81 Cal. 39)

BELCHER v. MURPHY. (No. 12,985.)

(*Supreme Court of California.* Sept. 30, 1889.)

NONSUIT—GROUNDS OF MOTION—FINDINGS.

1. In an action to enjoin defendant from destroying a levee alleged to have been built by plaintiff on land belonging to her to protect another tract of her land from overflow, where there is no evidence that plaintiff owned the land on which said levee was built, or any other land as alleged, a motion for a nonsuit on the ground of plaintiff's failure to prove any of her material allegations, is too general to raise any question as to the want of such evidence.

2. In such action a finding that "said levee is upon the line dividing the lands of plaintiff and defendant, and is built partly upon the lands of each," is a sufficient finding that said levee was built upon land owned by plaintiff, to sustain a judgment for her.

In bank. Appeal from superior court, Sacramento county; W. C. VAN FLEET, Judge.

Grove L. Johnson, for appellant. *A. P. Catlin*, for respondent.

WORKS, J. This is a proceeding by the respondent to enjoin the appellant from destroying a levee alleged to have been constructed by the respondent on a certain tract of land owned by her to protect a certain other tract of her land from overflow. There was a trial by the court, findings for plaintiff, and judgment accordingly. The appellant moved the court below for a nonsuit, which was denied. He also moved for a new trial, which was also denied, and he appeals. The motion for a nonsuit was "on the grounds of plaintiff's failure to prove any of the material allegations of the complaint, and a failure to prove any damage done to the levee, or any notice to the defendant of the claim of the plaintiff to the levee prior to his purchase." The evidence tended to show that one Taylor was the owner of property, which he sold to the appellant, and that at the time of such sale he called to the attention of the appellant the fact that the respondent had with his (Taylor's) consent constructed the leveo in question on the line of, and partly upon, the lands then owned by Taylor, and that the appellant purchased his lands with full knowledge of the fact that such levee was constructed by the respondent, and owned by her. There is an entire absence of any evidence in the record that the respondent was the owner of the lands upon which the levee was constructed, or of any other lands, as alleged in her complaint, and if the record contains all the evidence, and the motion for a nonsuit had pointed out this want of evidence as a ground for the motion, it should have been sustained. But the motion was entirely too general to raise any such question. It was not sufficient to move on the ground that the plaintiff had failed to prove any of the material allegations of the complant. The particulars in which it was claimed the evidence was insufficient should have been specifically pointed out. Poehlmann v. Kennedy, 48 Cal. 201; Coffey v. Greenfield, 62 Cal. 602. As to the specific objections pointed out in the motion, there was sufficient evidence on the part of the plaintiff, and the nonsuit was for that reason properly denied.

It is also contended by the appellant that the evidence does not show that the plaintiff was the owner of the lands described in her complaint. It is not clear whether it is intended to claim that the findings are not sustained by the evidence in this respect or not, but, if so, there is no specification in the transcript which raises any such question.

It is further contended that the findings of the court are insufficient to sustain the judgment for the reason that there is no finding that the respondent was the owner of the real estate. But the court does find that "said levee is upon the line dividing the lands of plaintiff and defendant, and is built partly upon the lands of each." This, we think, is a sufficient finding that the levee was constructed upon land owned by the respondent, and is sufficient in that respect to uphold the judgment.

As to the point made that the evidence is not sufficient to show that the appellant in any way injured the levee, we think there was evidence to sustain the finding of the court, and the same may be said with reference to the other objections made to the findings. We find no available error in the record. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.

I concur in the judgment: MCFARLAND, J.

(81 Cal. 14)

QUINN v. QUINN *et al.* (No. 12,961.)

(*Supreme Court of California.* Oct. 1, 1889.)

PARTNERSHIP — WHAT CONSTITUTES — AUTHORITY OF PARTNER.

1. An agreement between two persons, providing that they shall together work a quarry and share equally in the profits, and that the manager thereof shall pay the expenses out of the proceeds of the same, constitutes a partnership between such persons, as defined by Civil Code Cal. § 2395, being "an association of two or more persons for the purpose of carrying on business together, and dividing its profits between them."

2. Where, in consideration of such an agreement, a lease of the quarry, personal property used in working it, and stone already quarried, are transferred from one party to the other for the purpose of carrying on the business, all such property becomes partnership property.

3. Where one partner promises to devote his time, labor, and skill to working said quarry, but does little work in the three months succeeding the formation of the partnership, and then leaves the quarry and is absent for six months seeking

work elsewhere, and declares to several persons that he has no interest in the quarry, such conduct is an abandonment of the business such as to give his partner the right to dispose of all the partnership property without his assent or knowledge, under Civil Code, § 2430, declaring that one partner has no right to make such disposal unless his copartners have wholly abandoned the business to him.

4. Where a judgment is right upon the facts found, the appellate court will not reverse it for an erroneous statement of the principles of law involved.

Commissioners' decision. In bank. Appeal from superior court, Placer county; B. F. MYERS, Judge.

F. P. Tuttle and *Charles F. Hanlon*, for appellant. *John M. Fulweiler*, for respondents.

HAYNE, C. Suit for an accounting. The general facts are as follows: On March 3, 1885, the plaintiff, Thomas Quinn, who was then the owner of the lease of a certain quarry, and the owner of certain personal property used in connection therewith, and of some stone which had been quarried and was on the ground, assigned the lease to his brother, Patrick Quinn. On the same day, and as part of the same transaction, the two brothers signed an agreement, which referred to the assignment of the lease, and recited that "the true consideration of said assignment are the terms, covenants, and agreements herein contained, and the due fulfillment of the same," and provided for the working of the quarry. The material provisions of this agreement were as follows: The expenses of working the quarry, including those previously incurred by Thomas, were to be paid by Patrick "out of the proceeds of the business," and the net profits were to be equally divided between them. The business was to be conducted in the name of Patrick, and he was to have "complete management and control" thereof. But Thomas was to "devote his time, labor, and skill" thereto, and was to incur a penalty of $3.50 for every day that he failed to do so. The business was carried on up to December 12, 1885, when work on the quarry was stopped. On February 3, 1886, Patrick, without the knowledge or consent of Thomas, transferred the lease and all the personal property to one Healy, who thereupon took possession, and soon afterwards ordered Thomas off the premises. The main question is as to the validity of this transfer. The court below gave judgment for the defendant Healy, and the plaintiff appeals.

We think that a partnership existed between Thomas and Patrick. The written agreement provided for the working of the quarry together, and that each was to share equally in the profits of the business. There was, therefore, "an association of two or more persons, for the purpose of carrying on business together, and dividing its profits between them." And this, in general, constitutes a partnership. Civil Code, § 2395. There was not only a community in the right to profits, but also a community in the liability for losses. The agreement provided that the expenses should be paid by the manager "out of the proceeds of the business," but there was no express provision as to liability in case of loss. The contract was silent on that point. Hence an equal liability for losses was implied. Civil Code, § 2404. And the profits were to be divided as profits, and not as rent or compensation for services, such as is allowed by a certain class of cases. There was, therefore, a partnership. Moreover, this is alleged by the plaintiff in his complaint, and his counsel insists upon it in his brief. Such partnership was a strict, and not a mere mining, partnership; for, even if it be assumed that there could be a mining partnership in such a thing as a quarry, (compare Civil Code, § 2511,) the partnership was created by the express agreement of the parties. Decker v. Howell, 42 Cal. 636. All of the property was partnership property. The lease appears from the partnership agreement to have been transferred solely in consideration of the covenants of said agreement, and is alleged in the complaint to have been transferred "for the purpose of forming said partnership." And the personal property used in connection with the quarry, and the quarried stone which then existed, is in the same category. For the complaint alleges that "it was agreed between him and said Patrick that said personal property should be used by the partnership in their said business, and that the value of said personal property was an advance made by him to the partnership, for which the partnership became indebted to him." It does not appear what became of the stone which had been quarried at the time of the partnership agreement. Probably it was disposed of during the operation of the business. The quarried stone which was in existence at the time of the transfer to Healy is found to have been quarried "at the expense and by the labor of said Patrick and Thomas," and this finding is not attacked by the specifications. The other personal property is found to have been transferred to Patrick with the lease, and this finding is not attacked by the specifications. But, even if the evidence could be examined with reference to the matter, we think that, although it perhaps would not show that the transfer of the personal property was by the written agreement, yet that the circumstances show that it was the intention that all the personal property should go into the concern. At any rate, the plaintiff, who has expressly alleged the fact in his complaint, is not in a position to have the findings and judgment against him set aside on the ground that the fact is not as he alleged it. Then, had one of the partners the right to transfer said property to a third person without the assent or knowledge of the other? Section 2430 of the Civil Code provides that "a partner, as such, has not authority to do any of the following acts, unless his copartners have wholly abandoned the business to him, or are incapable of acting. * * * (3) To dispose of the whole of the partnership property at once, unless it consists entirely of merchandise." This prohibition, as will readily be seen, does not apply if the non-consenting partner has wholly abandoned the business. The distinct implication is that if he has wholly abandoned the business the other partner has authority to make the transfer. Now, the court found, in substance, that before the transfer to Healy the plaintiff had abandoned the business. The precise language of the finding is as follows: "The plaintiff abandoned his right and privilege under his agreement with Patrick before the assignment to Healy, but did not repudiate any obligations." This, we think, must be construed as a finding that the plaintiff abandoned the business; for, while he might have abandoned the business without abandoning his right therein, we cannot see how he could have "abandoned" his right to the business without abandoning the business, within the meaning of the provision. If this finding is to stand, we think that the judgment will have to be affirmed. The plaintiff attacks it as unsupported by the evidence, but we think that there is sufficient evidence to support it.

It appears that plaintiff did very little work after his agreement of March 3, 1885. He did not work at all in that month. He worked only about 14 days in April and 17 days in May, and not at all thereafter. He left the place in June, and did not return until December, which was after work on the quarry had stopped. His own account of his wanderings is as follows: "I went to British Columbia, and remained there about six weeks, after leaving the quarries. Not being able to get work in British Columbia, I returned to San Francisco, and tried for some time to get work there. About the forepart of September, 1885, I went to Mare island, and worked there for about two months or more. I then returned to San Francisco, and remained there awhile, and some time in the month of December came back to the quarry. From the time I left the quarry in June, 1885, up to December, 1885, I did not do any work at the quarry." After work on the quarry was stopped in December, it appears that it laid idle for a while. In this regard the defendant Healy testified as follows: "At the time I took possession, in February, 1886, the quarry had not been worked for nearly two months. It was all filled up with water, and I got horses and had it pumped out. Tom was there, with other idle men, and I let him go to work with them." Not long afterwards plaintiff was ordered away, according to Healy, on account of drunkenness and idleness. While plaintiff was away, between June and December, as above stated, he seems to have declared to several persons that he had no interest in the quarry. There is evidence tending to show that he so declared to R. J. Harrington, in Vallejo; to J. P. M. Phillips, at Mare island; and to C. C. Wolfcott, at the same place. These declarations do not operate in any way as an estoppel. But they are evidence, in connection with his absence from the quarry, of an abandonment of the business; and, taking the whole evidence together, we think that it was sufficient to support the finding in question. And if the court was justified in finding an abandonment of the business, its judgment was right, and not, as stated by the learned counsel for the appellant, "*sans* reason, *sans* authority, *sans* excuse." If it be objected that the conduct of the parties showed a dissolution of the partnership, which was at will, then either partner was authorized to act in liquidation, (Civil Code, § 2459,) and had authority to dispose of the partnership property, (Id. § 2461.) Nor is it any objection to the view we have taken that the trial court stated as its conclusion of law that "there was no partnership between Thomas and Patrick Quinn, and that the defendant Healy is entitled to judgment for his costs." If the judgment is right upon the facts found, the appellate court will not reverse for an erroneous statement of the principles of law involved, in view of which the only conclusion of law which is necessary is that one side is entitled to judgment, etc. See cases collected in Hayne, New Trials & App. § 243. The complaint alleges fraud, and want of consideration for the transfer to Healy. But the findings negative both of these charges, and the plaintiff does not attack them by his specifications of the insufficiency of the evidence. We therefore advise that the judgment and order denying new trial be affirmed.

We concur: BELCHER, C. C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order denying a new trial are affirmed.

(80 Cal. 574)

TREADWELL v. WHITTIER *et al.* (No. 11,656.)

(*Supreme Court of California.* Sept. 24, 1889.)

NEGLIGENCE—DANGEROUS MACHINERY—DAMAGES—EVIDENCE.

1. In a suit for damages for personal injuries, where the complaint alleges the nature of the injuries received and their permanent character, evidence of damages through inability to attend to business, necessarily resulting from such injuries, can be introduced without such damages being specially pleaded.

2. An instruction that plaintiff must prove his case to the satisfaction of the jury by a preponderance of testimony complies with Code Civil Proc. Cal. § 1826, providing that such degree of proof is not required as produces absolute certainty, but only moral certainty.

3. Where defendants use an elevator for the purpose of lifting persons 40 feet vertically, they are carriers of passengers, and are liable for any defect or flaw in the machinery which is discoverable on a reasonable and careful examination according to the best known tests reasonably practicable.[1]

4. Persons furnishing elevators must use, as to customers or others using their elevators by request, all reasonable efforts to furnish good machinery, of good material, and of the kind found safest for the purpose, and must adopt such new inventions as combine the greater safety with practical use.

5. Evidence of advice given by a skilled mechanic to one of the defendants as to their careless manner of running the elevator, and by him communicated to all other persons in the store, is admissible.

Department 2. Appeal from superior court, city and county of San Francisco; OLIVER P. EVANS, Judge.

McAllister & Bergin, *D. M. Delmas*, and *J. C. Denson*, for appellants. *Lloyd & Wood* and *Garber & Bishop*, for appellee.

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[1] The rule as to the degree of care required, and as to the *onus* of proof, in case of injury from defective machinery, applicable between a common carrier of passengers and his passengers, is applicable as between the owner and manager of a passenger elevator and the passengers in it. Goodsell v. Taylor, (Minn.) 42 N. W. Rep. 873.

THORNTON, J. The plaintiff brought this action to recover damages for injuries to his person, caused by the falling of an hydraulic elevator operated by defendants in their store, on which he (plaintiff) was riding at the time. The cause was tried before a jury. Verdict and judgment passed for plaintiff, and the defendants prosecute this appeal from the judgment and from an order denying their motion for a new trial. The action is based on the negligence of the defendants in using the elevator with broken, insecure, and insufficient machinery, in not taking proper care of such machinery, and in the running and operating of the elevator, in consequence of which the plaintiff, without any fault or negligence on his part, received the injuries of which he complains. We insert here the averments of the complaint specifically setting forth the cause of action: "That defendants are, and at all times hereinafter mentioned were, copartners in business, engaged in trade and commerce at the city and county of San Francisco under the firm name and style of Whittier, Fuller & Co.; that the said defendants, as copartners, did, at the times hereinafter mentioned, conduct and carry on business in a building at the south-west corner of Pine and Front streets, in said city and county, comprising three stories or floors and a basement, and the defendants at said times had owned and maintained an elevator or hoist, operated by machinery, situated in the basement of said building, and wholly under the control and management of the said defendants, and in their exclusive use, which said hoist or elevator was used, and intended to be used, by defendants for the purpose of transporting and carrying their customers and those in said building for the purpose of trading with them, or such persons as they might request to be so transported, and their merchandise, to and from the different floors or stories of said building; that heretofore, to-wit, on the 23d day of December, 1878, this plaintiff, being lawfully in the said store or building of the defendants as a customer, and for the purpose of trading with defendants, was requested by the said defendants to get upon the said hoist or elevator for the purpose of being carried from the upper or third floor of said building to the lower or street floor thereof; and then and there the said plaintiff, in pursuance of such request, got into the said elevator or hoist for the purpose aforesaid, and immediately thereupon, when the said defendants undertook to transport or lower the said plaintiff from the said upper or third floor to the lower or street floor of their said store, the said hoist or elevator, by reason of the broken, insecure, and insufficient machinery by which the same was run, and by reason of the negligent and careless conduct of the defendants in the care of the said machinery, and in the running and operating of the same, and in the running and operating of the said hoist or elevator, without any fault or negligence on plaintiff's part whatsoever, was precipitated from said upper or third floor into the basement of said building with great and excessive rapidity and violence, and the plaintiff was thereby greatly bruised, broken, damaged, and injured in his body and limbs, and became and was thereby made sick, sore, lame, and disordered, and so remained for a long space of time, to-wit, from thence hitherto, and said plaintiff sustained a fracture of his left leg in the ankle joint, and was otherwise seriously injured, so that he was confined to his bed for a long period of time, to-wit, three months, and was thereafter, for a period of four months, unable to walk save with crutches, and his said left leg, by reason of said fracture, is, and always will be, shorter than his other or right leg, and the plaintiff has sustained other and internal injuries from which he can never recover, and the same will and do permanently affect and impair the health, strength, and activity of plaintiff, and said plaintiff for a long period of time, to-wit, ever since said accident, has suffered great pain of body and anguish of mind; that plaintiff at the time aforesaid had no notice or knowledge that the machinery whereby the said elevator or hoist was run or operated was out of order, or broken, or insecure, and defendants had full notice and knowledge thereof." On the argument, and in the briefs, several points were and are elaborately discussed and presented for consideration and determination. To the consideration of these points we proceed, in the order in which they were presented by counsel for defendants (appellants here) on the oral argument.

1. It is argued that the court erred in giving the tenth instruction requested by the plaintiff. That instruction was given in these words: "If, under the evidence and instructions of the court, the jury find for plaintiff, then, in assessing the plaintiff's damages, the jury may take into consideration not only the loss and immediate damage arising from the injuries received at the time of the accident, but also the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury in question, which renders him less capable of attending to his business than he would have been if the injury had not been received." It is said by counsel for defendants that the loss or impairment of the capacity to attend to business is in the nature of special damages, and must, as such, be specially pleaded; that, if not specially pleaded, no evidence can be introduced to show diminished capacity for business, nor any inquiry legitimately made in respect to it. The allegation of damage in the complaint has been quoted above at large. It is averred and set forth by plaintiff that by reason of his fall he was greatly bruised, broken, damaged, and injured in his body and limbs, and became and was thereby made sick, sore, lame, and disordered, and so remained up to the time of action brought; that he sustained a fracture of his left leg in the ankle joint, and was otherwise seriously injured, so that he was confined to his bed for three months, and for a period of four months thereafter was unable to walk except with crutches; that his left leg, by reason of the fracture, is, and always will be, shorter than his right leg; that he sustained other and internal injuries, from which he will never recover, and the same will and do permanently affect and impair his health, strength, and activity; and that ever since the fall he has suf-

fered great pain of body and anguish of mind. Damages which necessarily result from the act complained of are denominated "general damages," and may be proved under the *ad damnum* clause, or general allegation of damage, while those which are the natural consequences of the act complained of, and not the necessary result of it, are termed "special damages." The defendant must be presumed to be aware of the damages which necessarily result from the act done, and therefore he cannot be held to be taken by surprise when proof is offered of such necessarily resulting damage. But as to the damage naturally, though not necessarily, resulting from the act done, the defendant cannot be presumed to be aware of them, and therefore, in order to prevent a surprise on defendant, it must be specially set forth in the complaint, or the plaintiff will not be permitted to give evidence of it at the trial. On this subject, see Chit. Pl. (16th Amer. Ed.) 348; 2 Greenl. Ev. § 254; Stevenson v. Smith, 28 Cal. 103; Potter v. Froment, 47 Cal. 165; Hunter v. Stewart, 47 Me. 419. Now, considering the physical injuries complained of, and set forth in the complaint, by plaintiff, viz., the fracture of his right leg, by reason of which it will always be shorter than his other leg, and that he has sustained other and internal injuries from which he can never recover, and which will permanently impair his health, strength, and activity, the court will not be straying from the rule above stated, if it directs the jury, in assessing the amount of damages sustained by plaintiff, to take into consideration the permanent loss and damage, if any is proved, arising from any disability resulting to the plaintiff from the injury complained of, which renders him less capable of attending to his business than he would have been if the injury had not been received. The court, in this instruction, only directed the jury to take into consideration in assessing the damages such as necessarily resulted from the injuries set forth in the complaint, if such injuries were proved by the evidence. That the injuries set forth will necessarily render a person less capable of attending to his business is clearly apparent, and no argument is needed to make it clear. The conclusion here reached is sustained by the rulings in the following cases: Morris v. Railroad Co., 45 Iowa, 30; Conner v. Construction Co., 29 Fed. Rep. 631; Wade v. Leroy, 20 How. 44; Nebraska v. Campbell, 2 Black, 592; Elkhart v. Ritter, 66 Ind. 140; Indianapolis v. Gaston, 58 Ind. 224; Potter v. Railroad Co., 28 Law T. (N. S.) 735; McKeever v. Railroad Co., 59 Cal. 294; Bradbury v. Benton, 69 Me. 199; Railroad Co. v. Wightman, 29 Grat. 431, 440, 441; Tyson v. Booth, 100 Mass. 266; Roberts v. Graham, 6 Wall. 578; Ward v. Smith, 11 Price, 19. We refer particularly to the case of Wade v. Leroy, above cited. In that case the court said: "The evidence conduced to prove that the plaintiff was seriously injured." Subsequently, in the opinion, these observations were made: "That before that time he had been concerned in conducting a business that required a degree of mental and bodily vigor, and that his time was of some pecuniary value; or that he had suffered a loss of some profit; and that, after some detention in New York, he had returned to his house in an infirm condition,—so infirm that his medical attendant and adviser deemed him incapable of pursuing any ordinary business or occupation, and had advised him to abstain from personal exertion. This evidence would certainly assist a jury to determine that the plaintiff had sustained an injury of no slight character,—an injury to his person, and which was followed by expense, suffering, and loss of time, which had for him a pecuniary value. These were the direct and necessary consequences of the injury, and sustained strictly and almost exclusively as an effect from it." In Bradbury v. Benton, above cited, the action was for a personal injury, and no special damages were alleged. The point was as to the recovery of prospective damages. As to this, the court, per LIBBEY, J., said: "In legal contemplation, all damages which will be sustained as the effect of the injury are sustained immediately. The future effect of the injuries is not special damages, which must be alleged, but general damages, which necessarily flow from the injuries received. Hunter v. Stewart, 47 Me. 419. The declaration specifically describes the injuries received. It is sufficient to authorize a recovery of all damages which had been or would be sustained by the plaintiff as the natural and ordinary effect of the injuries." We will remark here that in our judgment the words "his business," used in the instruction, referred to any business which plaintiff might undertake to carry out, and that there is no difference in meaning between the words "his business" and "his ordinary business." Plaintiff was entitled to the instruction as given, and the court committed no error in giving it.

2. The defendants requested the court to give the following instruction: "Plaintiff, in order to recover in this action, must prove to your satisfaction that defendants have been guilty of some fault or negligence, and must also prove what that fault or negligence was, and this plaintiff must do by a preponderance of evidence and to a moral certainty." This instruction was refused by the court as asked, and to this refusal defendants excepted. The court struck out the words at the end of the request, "and to a moral certainty," and gave it as thus modified. To this defendants also excepted. It is argued by defendants that they were entitled to have the instruction given as asked by reason of the provisions of section 1826 of the Code of Civil Procedure. That section is as follows: "The law does not require demonstration; that is, such a degree of proof as, excluding possibility of error, produces absolute certainty, because such proof is rarely possible. Moral certainty only is required, or that degree of proof which produces conviction in an unprejudiced mind." We are inclined to the opinion that giving the instruction as asked would have been error, and that the giving it as modified was also error. The law does not put on the plaintiff the burden of proving, not only fault or negligence on the part of the defendants, but also "what that fault or negligence was." The law requires proof that plaintiff has sustained an injury by the breaking of the machinery by which he is

carried or transported, and that such machinery was under the control and management of the defendant. When plaintiff has made such proof he has made out a case which entitles him, if not rebutted or disproved, to recover of defendant. The plaintiff, by such proof, has made a case showing negligence on the part of defendant. The burden is then thrown on defendant to show that he was not guilty of negligence for which he could be charged. This he can do by going into proof of the manner in which the hurt occurred, and showing that it was caused by an inevitable casualty, for which the law imposed on him no responsibility, or by establishing any fact which relieved him of responsibility. Take, for instance, the case of a passenger alleged to be injured by the negligence of a carrier in so carelessly driving a coach, on which plaintiff was a passenger, that it was overturned, and plaintiff was injured. The plaintiff only is called on to prove the overturning of the coach, and that he was hurt by it. This overturning the defendant is called on to show was not caused by his negligence at all. This he may show by direct proof that he was not negligent at all, or that the overturn occurred from some latent defect in the machinery, which broke and caused the overturn. The particular fault or negligence may come out on the evidence in the cause, but plaintiff is not required to prove what caused the overturn. The above is virtually established to be law by two cases decided by this court. Reference is here made to Boyce v. Stage Co., 25 Cal. 468, and Lawrence v. Green, 70 Cal. 420, 11 Pac. Rep. 750. In this case the plaintiff was only called on to show that he was hurt by the breaking of the machinery of the elevator, by which he was injured. When this is done he has made out a case, on which, there being no other evidence introduced, he has a right to recover. The plaintiff is not called on to make any more particular proof. Doubtless there are exceptions to this rule, but this case is not one. For the above reasons we are inclined to think that the instruction asked and refused, and the instruction as given, were erroneous. But, conceding that the views above stated are not tenable, we are still of opinion that the court below, by its ruling, committed no error of which defendants can complain. The defendants urge that they are entitled to the instruction that their fault or negligence should have been proved "to a moral certainty," under the provisions of section 1826 of the Code of Civil Procedure. That section is fully quoted above. By this section that degree of proof is required to establish a matter in dispute which produces conviction in an unprejudiced mind. When the evidence is such as to produce conviction of the truth of a fact in an unprejudiced mind, such a fact is said to be established to a moral certainty. Such evidence is deemed to be satisfactory, and will justify a verdict. It is so declared in the Code of Civil Procedure by section 1835. When a matter is proved to the satisfaction of a jury, by a preponderance of evidence, then it can be affirmed that they are convinced of its truth, and, being thus convinced of its truth, they can base a verdict on it. Code Civil Proc. § 2061, subd. 5, and section 1835, supra. It follows from the foregoing that when the jury were told that the plaintiff, in order to recover in this action, must prove to their satisfaction that the defendants had been guilty of what was stated in the instruction complained of, by a preponderance of evidence, they were, in effect, told that they must be convinced from the evidence to a moral certainty that defendants were so guilty, or the plaintiff was not entitled to recover. They could not be satisfied that the plaintiff had made such proof without being convinced of its truth to a moral certainty. The instruction, as given, was the equivalent of the requirements of section 1826 of the Code of Civil Procedure, and hence there was no error in the rulings of the court in regard to the request refused or the instruction given. If there was any error committed by the court, it was in giving an instruction too favorable to defendants, of which they cannot be heard to complain.

3. Defendants contend that the court erred in modifying the instruction numbered 9, requested by them. The instruction as asked by defendants was as follows: "If the accident in question was caused by a defect or flaw in one of the piston-rods of the elevator apparatus, which defect or flaw was not discoverable on an ordinary, reasonable, and careful examination, then your verdict should be for the defendants." The court modified the instruction so as to read as follows: "If the accident in question was caused by a defect or flaw in one of the piston-rods of the elevator apparatus, which defect or flaw was not discoverable on a reasonable and careful examination, according to the best-known tests reasonably practicable, then your verdict should be for the defendants." It is said by defendants that it was error for the court to insert the words, "according to the best-known tests reasonably practicable." The defendants used their elevator in lifting persons vertically to the height of 40 feet. That they were carriers of passengers, and should be treated as such, we have no doubt. The same responsibilities as to care and diligence rested on them as on the carriers of passengers by stage-coach or railway. In Fairchild v. Stage Co., 13 Cal. 599, which was an action by a passenger against a stage-coach proprietor, it was held that proprietors of stage-coaches are not insurers or warrantors of the safety of passengers to the same extent as common carriers of goods; still they are liable for the slightest neglect, and are held to extraordinary diligence and care. The court cites sections 592 and 601a, Story, Bailm., and Farish v. Reigle, 11 Grat. 711, where the same rule is laid down. As to the vehicle, Judge STORY says, in section 592, of such proprietors: "They are bound to provide coaches reasonably strong and sufficient for the journey, with suitable harness, trappings, and equipments, and to make a proper examination thereof previous to each journey." And, further: "Hence it has been held that if there is any defect in the original construction of a stage-coach,—as, for example in an axletree,—although the defect be out of sight and not discoverable upon a mere ordinary examination, yet if the defect might be dis-

covered by a more minute examination, and any damage is occasioned to a passenger thereby, the coach proprietors are answerable therefor. The same rule will apply to any other latent defect, which might be discovered by more minute examination and more exact diligence, whereby the work is not roadworthy, and a damage thereby occurs to any passenger." In section 601a, Justice Story says that "the law will, in tenderness to human life and human limbs, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof." In Farish v. Reigle, supra, the question was directly raised whether a stage-coach proprietor was responsible for more than ordinary diligence. The court unanimously held that he was. The court approved of the doctrines of Justice Story on this subject. In the cases cited, the court, speaking by Justice DANIEL, said: "The liabilities of such carriers naturally flow from their duties. As they are not, like common carriers of goods, insurers against all injuries except by the act of God, or by public enemies, the inquiry is naturally presented, what is the nature and extent of their responsibility? It is certain that their undertaking is not an undertaking absolutely to convey safely. But although they do not warrant the safety of the passengers at all events, yet their undertaking and liability go to the extent that they and their agents possess competent skill, and that they will use all due care and diligence in the performance of their duty. But in what manner (the author asks) are we to measure this due care and diligence? Is it ordinary care and diligence which will make them liable only for ordinary neglect? Or is it extraordinary care and diligence which will render them liable for slight neglect? As they undertake for the carriage of human beings, whose lives, and limbs, and health are of great importance, as well to the public as to themselves, the ordinary principle in criminal cases, where persons are made liable for personal wrongs and injuries arising from slight neglect, would seem (he says) to furnish the true analogy and rule. It has been accordingly held that passenger carriers bind themselves to carry safely those whom they [admit] into their coaches, as far as human care and foresight will go,—that is, for the utmost care and diligence of very cautious persons; and of course they are responsible for any, even the slightest, neglect. Section 601. In section 601a the further proposition is stated that, when injury or damage happens to the passengers by the breaking down or overturning of the coach, or by any other accident occurring on the ground, the presumption *prima facie* is that it occurred by the negligence of the coachman; and the *onus probandi* is on the proprietors of the coach to establish that there has been no negligence whatsoever, and that the damage or injury has been occasioned by inevitable casuality, or by come cause which human care and foresight could not prevent; for the law will, in tenderness to human life and limbs, hold the proprietors liable for the slightest negligence, and will compel them to repel, by satisfactory proofs, every imputation thereof." This ruling in Fairchild v. Stage Co. was approved in Boyce v. Stage Co., 25 Cal. 468, and Lawrence v. Green, 70 Cal. 417, 420, 421, 11 Pac. Rep. 750.

It thus appears to be settled law in this state that a proprietor of stage-coaches is liable for the slightest negligence in regard to the vehicle provided by him; that he is responsible to his passenger for the utmost care and diligence of very cautious persons. In Rodgers v. Railroad Co., 67 Cal. 608, 8 Pac. Rep. 377, it was said by the court: "Manifestly it was the duty of the defendant, a railroad company, to furnish alike to its passengers and employes a suitable and safe road, engines, cars, and appliances for conducting its business," etc. Certainly the degree of care and diligence to be exercised by a stage-coach proprietor, as to the vehicle to be provided by him for the carriage of passengers, is just as high as regards a railroad company, and the cars or other machinery which it is to provide and furnish for such transportation. The railroad company is bound for the utmost care and diligence of very cautions persons, and is responsible for any, even the slightest, neglect. The same rule applies in both cases, and for the same reason, that each undertakes to carry human beings, whose lives and limbs and health are of great importance, as well to the public as themselves.

In Maverick v. Railroad Co., 36 N. Y. 378, the rule is stated as well settled that "passenger carriers bind themselves to carry safely those whom they take into their coaches, as far as human care and foresight will go; that is, to the utmost care and diligence of very cautious persons." The court cites Bowen v. Railroad Co., 18 N. Y. 408, and Deyo v. Railroad Co., 34 N. Y. 9, where the same rule is laid down.

In Taylor v. Railroad Co., 48 N. H. 313, a large number of authorities are collected in an able opinion by BELLOWS, J. In this opinion it is declared: "The doctrine of the American courts is still more strict and explicit; and the general current of the authorities is that the carrier of passengers is bound to the utmost care and diligence of very cautious persons, and is responsible for any, even the smallest, neglect; holding their undertaking to be to carry their passengers with safety as far as human care and foresight can go. This is distinctly laid down in Story, Bailm. §§ 601, 601a; and also in 2 Greenl. Ev. § 221; and in 2 Kent, Comm. *601, *602; and Redf. R. R. c. 17."

In Railroad Co. v. Derby, 14 How. 486, it is said by the court: "When carriers undertake to convey persons by the powerful but dangerous agency of steam, public policy and safety require that they be held to the greatest possible care and diligence. And, whether the consideration for such transportation be pecuniary or otherwise, the personal safety of the passengers should not be left to the sport of chance, or the negligence of careless agents. Any negligence in such cases may well deserve the epithet of 'gross.'" This statement is approved in The New World v. King, 16 How. 474, as resting not only on public policy, but sound principles of law. See Redf. R. R. § 149, note 5. The above rule is sustained by Stokes v. Saltonstall, 13 Pet. 181; in Massachusetts, by Ingalls v. Bills, 9 Metc. 1;

and McElroy v. Railroad Co., 4 Cush. 400; in Maine, by Edwards v. Lord, 49 Me. 279; in Connecticut, by Hall v. Steam-Boat Co., 13 Conn. 320; Derwort v. Loomer, 21 Conn. 253; Fuller v. Railroad Co., Id. 557, 576; in Vermont, by Hadley v. Cross, 34 Vt. 586. See, also, Hegeman v. Railroad Corp., 16 Barb. 353, approved in 13 N. Y. 9; Caldwell v. Murphy, 1 Duer, 241; Railroad Co. v. Burke, 13 Wend. 626; Railroad Co. v. Aspell, 23 Pa. St. 147; Railroad Co. v. Kennard, 21 Pa. St. 203; Railroad Co. v. Yarwood, 15 Ill. 468; Railroad Co. v. Fay, 16 Ill. 558; Frink v. Potter, 17 Ill. 406; Frink v. Coe, 4 G. Greene, 555; McKinney v. Neil, 1 McLean, 540; Maury v. Talmadge, 2 McLean, 157; Cornwall v. Railroad Co., 28 N. H. 169; Clark v. Barrington, 41 N. H. 51.

In Railroad Co. v. Kennard, supra, Judge GIBSON said "that the carrier is bound to guard the passenger from every danger which extreme vigilance can prevent." And it is said by AGNEW, J., speaking for the court, in Meier v. Railroad Co., 64 Pa. St. 225, that the above expresses the true measure of responsibility.

In Laing v. Colder, 8 Pa. St. 482, Judge BELL said that, though in legal contemplation the carrier does not warrant the absolute safety of his passengers, he is bound to the exercise of the utmost degree of diligence and care. The slightest neglect against which human prudence and foresight may guard, and by which hurt or loss is occasioned, will render them liable in damages.

One of the ablest of our text-writers and jurists, Judge Cooley, thus states the rule as to carriers of passengers: Such carrier "only undertakes that he will carry them without negligence or fault. But as there are committed to his charge for the time the lives and safety of persons of all ages and of all degrees of ability for self-protection, and as the slightest failure in watchfulness may be destructive of life or limb, it is reasonable to require of him the most perfect care of prudent and cautious men, and his undertaking and liability as to his passengers goes to this extent: that, as far as human foresight and care can reasonably go, he will transport them safely. He is not liable if injuries happen from sheer accident or misfortune, where there is no negligence or fault, and where no want of caution, foresight, or judgment would prevent the injury. But he is liable for the smallest negligence in himself or his servants." Cooley, Torts, (2d Ed.) 768, 769. The learned author cites, as sustaining his statements of the law, a long list of cases, which will be found in note 1, p. 769.

As said by BELLOWS, J., in Taylor v. Railroad Co., 48 N. H. 314: "Upon grounds of public policy, also, the carrier of passengers is bound to exercise the highest degree of care and diligence. To his diligence and fidelity are intrusted the lives and safety of large numbers of human beings;" and when passengers are carried by steam the demand for the utmost skill and diligence is especially required, "for then, in consequence of the greater speed, the hazards to life and limb are largely increased." The same degree of responsibility must attach to one controlling and running an elevator. Persons who are lifted by elevators are subjected to great risks to life and limb. They are hoisted vertically, and are unable, in case of the breaking of the machinery, to help themselves. The person running such elevator must be held to undertake to raise such persons safely, as far as human care and foresight will go. The law holds him to the utmost care and diligence of very cautious persons, and responsible for the slightest neglect. Such responsibility attaches to all persons engaged in employments where human beings submit their bodies to their control, by which their lives or limbs are put at hazard, or where such employment is attended with danger to life or limb. The utmost care and diligence must be used by persons engaged in such employments, to avoid injury to those they carry. The care and diligence required is proportioned to the danger to the persons carried. In proportion to the degree of danger to others must be the care and diligence to be exercised; where the danger is great, the utmost care and diligence must be employed. In such cases the law requires extraordinary care and diligence. We know of no employment where the law should demand a higher degree of care and diligence than in the case of the persons using and running elevators for lifting human beings from one level to another. The danger of those being raised is great. When persons are injured by the giving way of the machinery the hurt is always serious, frequently fatal; and the law should and does bind persons so engaged to the highest degree of care practicable under the circumstances. It would be injustice and cruelty to the public in courts to abate in any degree from this high degree of care. The aged, the helpless, and the infirm are daily using these elevators. The owners make profit by these elevators, or use them for the profit they bring to them. The cruelty from a careless use of such contrivances is likely to fall on the weakest of the community. All, including the strongest, are without the means of self-protection upon the breaking down of the machinery. The law, therefore, throws around such persons its protection by requiring the highest care and diligence. The carrier of passengers is under obligations to use the utmost care and diligence in providing safe, suitable, and sufficient vehicles for the conveyance of his passengers. Readhead v. Railroad Co., L. R. 2 Q. B. 412, L. R. 4 Q. B. 379; Jamison v. Railroad Co., 55 Cal. 593; Ingalls v. Bills, 9 Metc. 1; Taylor v. Railroad Co., 48 N. H. 304; Caldwell v. Steam-Boat Co., 47 N. Y. 287; Railroad Co. v. Huntley, 38 Mich. 537; Railroad Co. v. State, 29 Md. 252; Railroad Co. v. Sanger, 15 Grat. 230; Kelly v. Railroad Co., 15 N. E. Rep. 879; Railroad Co. v. Herbert, 116 U. S. 651, 652, 6 Sup. Ct. Rep. 590.

Railroads must keep pace with science and art and modern improvement, in their application to the carriage of passengers, but are not responsible for the unknown as well as the new. Meier v. Railroad Co., 64 Pa. St. 225. In this case it is stated that the rule laid down in the second assignment of error is a correct summary of the law. The language used in the assignment of error referred to is this: "That the rule in regard to carriers of passengers is this: the utmost care and vigilance is required on the part of the carrier. This rule does not require the utmost degree of care which the human mind is capable of imagining; but it does require that the highest degree of practicable care and diligence should be adopted that is consistent with the mode of transportation adopted. Railway passenger carriers are bound to use all reasonable precautions against injury of passengers; and these precautions are to be measured by those in known use in the same business, which have been proved by experience to be efficacious. The company is bound to use the best precautions in known practical use. That is the rule: The best precautions in known practical use to secure the safety of the passengers, but not every possible preventive which the highest scientific skill might suggest." Railroad companies are bound to adopt the most approved modes of construction and machinery in known use in the business. If they fail to do so, and injury result in consequence, they are responsible, as is said in Ford v. Railroad Co., 2 Fost. & F. 730. The company "was bound to use the best precautions in known practical use, to secure the safety of their passengers, but not every possible preventive which the highest scientific skill might have suggested."

In Steinweg v. Railroad Co., 43 N. Y. 123, it is held that railway companies, as common carriers, are bound to have such vehicles and machinery for the transportation of goods as the improvements known to practical men, and tested by practical use, may suggest, but not to take every possible precaution which the highest scientific skill might suggest, nor to adopt any mere speculative and untried experiment. As stated above, it is said in Ingalls v. Bills, 9 Metc. 1, that the carrier of passengers is responsible for defects that might have been discovered upon the most careful and thorough examination. In Hadley v. Cross, 34 Vt. 586, the doctrine of Ingalls v. Bills, supra, was applied to a livery stable keeper letting a defective carriage, and he was held liable if the defect could have been discovered upon the most careful and thorough examination.

It was held in Hegeman v. Railroad Corp., 16 Barb. 353, that the carrier is bound to conduct his business with all the care which human prudence and skill could suggest, and the defendants in that case were held liable for injuries caused by a defect in a car made by a competent manufacturer, which defect was not discoverable upon a thorough examination after the car was finished, but might have been before, by bending the axle in which the defect was. This decision was affirmed in 13 N. Y. 9. See, also, Caldwell v. Steam-Boat Co., 47 N. Y. 287.

In Railroad Co. v. Hamilton, 66 Tex. 95, the court said, in regard to a passenger carrier: "If any certain or satisfactory test is known which is within the reach of the company, it should be applied, and they should not, in that case, be excused, if they rely upon a test which is clearly insufficient."

In relation to tests, it was said in Hegeman v. Railroad Corp., 13 N. Y. 26, 27: "It is perfectly understood that latent defects may exist, undiscoverable by the most vigilant examination, when the fabric is completed, from which the most serious accidents have and may occur. It is also well known, as the evidence in this suit tended to prove, and the jury have found, that a simple test (that of bending the iron after the axle was formed, and before it was connected with the wheel) existed, by which it could be detected. This should have been known and applied by men 'professing skill in that particular business.' It was not known, or, if known, was not applied, by these manufacturers. It was not used by the defendants, nor did they inquire whether it had been used by the builders. They relied upon an external examination, which they were bound to know would not, however faithfully prosecuted, guard their passengers against the danger arising from concealed defects in the iron of the axles, or in the manufacture of them. For this omission of duty, or want of skill, the learned judge held, and I think correctly, that they were liable." Here it is held that the test referred to should have been known and applied by men "professing skill in that particular business," (viz., that of making axles and wheels for railway cars.) The case related to a broken axle. The defendants were held liable, if the test was not known to the manufacturers, or, if known, was not applied by them.

In the light of the foregoing well-settled rules of law, that carriers of passengers are responsible, as far as human care and foresight will go, for the utmost care and diligence of very cautious persons, and therefore for the slightest neglect; that they are bound for defects in the vehicles which they furnish, which might have been discovered by the most careful examination,—we think the court below did not err in modifying the instruction under consideration as pointed out above. It is a most reasonable precaution imposed on such a carrier, of whom we consider the owner of an elevator one, to require him to test the vehicles or machinery used by him by the best known tests reasonably practicable. If such tests are not used, the carrier is wanting in the care and foresight required. Nor are the defendants excused from the degree of care and diligence above pointed out, by the fact that the elevator in use was constructed by a competent and skilled manufacturer, from whom they purchased it. The manufacturer was their agent or servant in the construction of the elevator, and they are responsible for any want of care of the maker or builder. The obligation of care and foresight rests on the person using the elevator, and he cannot shift it from himself to another person. This point is made and decided in Hegeman v. Railroad Corp., 16 Barb. 356, as also by the court of appeals of New York in the same case, where it was there heard. In the case in 16 Barb. the court, per HARRIS, J., said: "They [the defendants] gave evidence to show that they had purchased the car from a manufacturer of high reputation for the excellence and safety of the cars manufactured by him, and that, after employing all reasonable care and skill for the purpose of detecting any defect in the machinery, the defect in the axle, which was the cause of the accident, had remained undiscovered, and, in fact, could not be discovered by means of any examination which the defendants were able to make. The rule of law applicable to the evidence upon this branch of the case was very accurately stated by the learned judge at the circuit. After having distinctly laid down the general proposition that the defendants were not liable if they had exercised all reasonable care and diligence in providing a safe track and a safe engine and cars, and had properly supplied their train with a suitable number of competent and faithful men to take charge of the train, and those men had managed it in a careful and skillful manner, he proceeded to say, in respect to the defect in the axle, that the defendants were responsible for this defect to the same extent as if the axle had been manufactured by themselves. Of the soundness of this rule I think there can be no doubt. From the very necessity of the case, the defendants are obliged to carry on their business through the instrumentality of agents. Some are employed to construct or keep in repair their road-way; others, to construct or repair their engines and cars; and others, again, to operate such engines and cars upon the road. For neglect or want of skill in any of these the defendants, as principals, are answerable to third persons. Whether the engine or car which they place upon the road for the purpose of carrying passengers has been manufactured in their own workshops, by agents employed directly for that purpose, or by a manufacturer engaged in the business of supplying such articles for sale, they are alike bound to see that in the construction no care or skill has been omitted for the purpose of making such engine or car as safe as care and skill can make it. When such care and skill has been exercised, the defendant's duty, in this respect, has been discharged. If, on the other hand, a defect exists in the construction, which might have been detected and remedied, they are answerable for the consequences." The same point was thus disposed of in the opinion of the court in the same case in 13 N. Y. 26: "It was said that carriers of passengers are not insurers. This is true. That they were not required to become smelters of iron or manufacturers of cars in the prosecution of their business. This also must be conceded. What the law does require is that they shall furnish a sufficient car to secure the safety of their passengers by the exercise of the 'utmost care and skill in its preparation.' They may construct it themselves, or avail themselves of the services of others; but in either case they engage that all that well-directed skill can do has been done for the accomplishment of this object. A good reputation upon the part of the builder is very well in itself, but ought not to be accepted by the public or the law as a substitute for a good vehicle. What is demanded, and what is undertaken by the corporation, is not merely that the manufacturer had the requisite capacity, but that it was skillfully exercised in the particular instance. If to this extent they are not responsible, there is no security for individuals or the public."

It was said of a coach proprietor by ALDERSON, J., in Sharp v. Grey, 9 Bing. 457, that he is liable for all defects in his vehicle which can be seen at the time of construction, as well as for such as may exist afterwards, and be discovered on investigation. If not, he might buy ill-constructed or unsafe vehicles, and his passengers be without remedy. The above remarks apply with all their force to the proprietor of an elevator. The reasonableness of the rule that the responsibility cannot be shifted to the manufacturer appears from the consideration that the law gives no remedy to the injured passenger against the manufacturer or builder of the elevator. There is no privity between the builder and the passenger.

The remarks of HANNEN, J., in Francis v. Cockrell, L. R. 5 Q. B. 184, are especially appropriate here. In that case the plaintiff sued to recover for an injury occasioned by the fall of a grand stand at a race-course. The defendant owned the stand, but had contracted with another to build it. It was defectively constructed through the negligence of the contractor, and from the defect the fall occurred. The defendant was held liable. HANNEN, J., said that the case was analogous to that of a carrier of passengers contracting with a builder to construct a car for him, where the builder was guilty of negligence in its construction. He said further: "In the ordinary course of things, the passenger does not know whether the carrier has himself manufactured the means of carriage, or contracted with some one else for its manufacture. If the carrier has contracted with some one else, the passenger does not usually know who that person is, and in no case has he any share in the selection. The liability of the manufacturer must depend on the terms of the contract between him and the carrier, of which the passenger has no knowledge, and over which he can have no control; while the carrier can introduce what stipulations and take what sureties he may think proper. For injury resulting to the carrier himself by the manufacturer's want of care the carrier has a remedy against the manufacturer; but the passenger has no remedy against the manufacturer for damage arising from a mere breach of contract with the carrier. Longmeid v. Holliday, 6 Exch. 761, 20 Law. J. Exch. 430. See George v. Skivington, 5 L. R. Exch. 1. Unless, therefore, the presumed intention of the parties be that the passenger should, in the event of his being injured by the breach of the manufacturer's contract, of which he has no knowledge, be without remedy, the only way in which effect can be given to a different intention is by supposing that the carrier is to be responsible to the passenger, and to look for his indemnity to the person whom he selected, and whose breach of contract has caused the mischief." In Francis v. Cockrell, supra, the plaintiff was allowed to recover for the negligence of the contractor, a competent builder, though the defendant was not himself guilty of negligence, and was affirmed on this point in the exchequer chamber. L. R. 5 Q. B. 501. To the same effect are Grote v. Railway Co., 2 Exch. 251, and Burns v. Railway Co., 13 Ir. C. L. 543.

4. It is further argued that the court

erred in giving the first instruction asked by plaintiff. The instruction is as follows: "That the defendants owed it as a duty to the persons using the elevator in their store, either as customers or by their invitation or request, to use all reasonable means and efforts to furnish good and well-constructed machinery adapted to the purposes of its use, of good material, and of the kind which is found to be safest when applied to use; and, while they were not required to seek and apply every new invention, they must adopt such as are found by experience to combine the greater safety with practical use." We think this is a direction that the defendants were bound to use all reasonable means and efforts to furnish good and well-constructed machinery adapted to the purpose of its use, and all reasonable means and efforts to furnish or provide it of good material, and of the kind that is found to be the safest when applied to use; that the kind of machinery furnished and the material furnished must be of that kind which has been found by others using it or constructing such machinery to be safest in practical use. The latter portion of the instruction bears out this interpretation. It is that the defendants must adopt such inventions as are found by the experience of other persons to combine the greatest safety with practical use; yet, while they are bound to do this, the law excuses them from seeking and applying every new invention. The instruction, as we understand it, is but a fair deduction from the rule that the defendants must use the utmost care and diligence to carry safely those who ride in their elevator, as far as human care and foresight will go; and, while they do not engage for absolute safety, they do bind themselves and warrant that they will use the utmost care and diligence of very cautious persons, as far as human care and foresight will go, to provide such means of carriage as are above pointed out. Like common carriers of passengers, they must keep pace with science, art, and modern improvement in supplying safe obtainable vehicles, machinery, and appliances for their use. See 2 Redf. R. R. 241, 242. They must adopt the most improved modes of construction and machinery in known use in the business; and if they do not, and injury occur, they will be held responsible. 2 Redf. R. R. (6th Ed.) 242. As was said in Hegeman v. Railroad Corp., 16 Barb. 358: "The defendants were bound to use every precaution which human skill and foresight could suggest to insure the safety of passengers." A like obligation rested on the defendants in this case. See, on this point, Smith v. Railroad Co., 19 N. Y. 127; Steinweg v. Railroad Co., 43 N. Y. 127; Bevier v. Canal Co., 13 Hun, 258; Meier v. Railroad Co., 64 Pa. St. 225, 227, 230. We find no error in the giving of this instruction by the court below.

5. It is urged that the court below erred in allowing the witnesses Bangs and Ravekes to testify as to the instructions given the defendants and their employes with respect to running the elevator. Bangs appears to have been a skilled mechanic, who had been engaged in putting up elevators. He had repaired the elevator of defendants several times. On one occasion, when he was repairing this elevator, he cautioned one of the defendants as to the mode in which they ran it. He told this defendant, when he was there repairing the elevator, about their using it very carelessly; that they ought to be more cautious; that the pressure should be shut off at a particular point. "Ravekes was one of the defendants, and he testified that Bangs generally instructed us that we should always ease the water off as it was getting to the place to be stopped, and not let it run without that; that Bangs further told him what the effects would be of neglecting this." The questions which brought out this testimony, and the answers to the questions, were objected to. It would be strange to hold that this evidence was not admissible. The defendants were bound to acquaint themselves with the best mode of running this elevator, so as to carry safely those who rode on it. They should have sought information diligently on this point. Making use of a contrivance for raising human beings vertically, if they failed to acquaint themselves with the safest mode of running it, would be of itself the grossest negligence. Any caution which they received should have been most acceptable to them. Here they were cautioned by a skilled man that they were running the elevator carelessly. The evidence was competent and material to show a knowledge by defendants that they were operating the elevator incautiously and carelessly. We cannot conceive that the *scienter* can be proved in any other mode than by information from others. Conceding that the evidence of Bangs was hearsay, it was of that character of hearsay which is admissible for the purpose for which it was allowed. Certainly the evidence of Ravekes, one of the defendants, was not hearsay. He testified to information conveyed to him material on the main issue in the case, viz., of negligence. What was said by Bangs to Ravekes was said in reply to inquiries by the latter, and the information was communicated by Ravekes to everybody else in the store. On the point of admissibility, see 1 Greenl. Ev. § 101, and 1 Whart. Ev. § 252.

The above disposes of all the points discussed on the oral argument, and all, we presume, relied on to secure a new trial. We have nevertheless looked into all the other points discussed in the opening brief of appellants, and, after consideration, find no error in the rulings of the court below. The judgment and order must be affirmed, and it is so ordered.

I concur: SHARPSTEIN, J.

MCFARLAND, J. I concur in the judgment of affirmance.

1. I concur in all that is said in the first point discussed in the opinion of Mr. Justice THORNTON.

2. I think, also, that the court below did not err in striking the words, "and to a moral certainty," out of the instruction asked by defendants. The words "moral certainty," as found in section 1826 of the Code of Civil Procedure, are certainly somewhat confusing, considering their celebrated use by Chief Justice SHAW in the Webster Case, 5 Cush. 320, as part of the def-

inition of belief beyond "a reasonable doubt." It is evident, however, that the words were not used in the latter sense in the section referred to, else the well-recognized distinction between the amount of evidence required for conviction in a criminal case and the amount sufficient to determine an issue in a civil action would be entirely obliterated. The legislature must be held as stating, or trying to state, in section 1826, the general difference between a mathematical, or strictly scientific, demonstration, and the kind of proof usually obtainable in judicial trials. They did not intend to use the words, in that relation, as synonymous with proof beyond a reasonable doubt. And this is apparent from section 2061, which provides that the court, on proper occasions, must instruct the jury, among other things, "that in civil cases the affirmative of the issue must be proved, and, when the evidence is contradictory, the decision must be made according to the preponderance of evidence; that in criminal cases guilt must be established beyond reasonable doubt." It was sufficient, therefore, in the case at bar, for the court to tell the jury that plaintiff must prove his case "by a preponderance of evidence." To have added, "and to a moral certainty," would have tended to confuse and mislead the jury.

But I do not entirely agree with the other reasons which Mr. Justice THORNTON gives for sustaining the action of the court on this instruction. I think he states the doctrine too broadly, that the mere happening of an accident, of itself, proves the negligence of the carrier. Of course, in many instances, the nature of the accident, and the circumstances under which it occurred, will, if unexplained, make a *prima facie* case of negligence; but I do not take it to be established as a rule of law that any accident by which a passenger is injured will have that effect. In Boyce v. Stage Co., 25 Cal. 468–470, there are some expressions (in the opinion of the court) which tend towards such an extreme doctrine; but they were not necessary to the decision of the case. In that case the circumstances showed extreme carelessness on the part of the driver of the coach. The court say: "At the point where the overturning occurred, the road formed the arc of a circle. Instead of moving on the arc, the team took the chord, and went so near the precipice as to allow the wheels to run off. * * * One cannot read the evidence in connection with the diagram contained in the record without coming to the conclusion that the overturning which caused nearly fatal injuries to the plaintiff, and death to some of the other passengers, was the result of careless inattention on the part of the coachman in not keeping his team in the road. * * * It is most probable, from the evidence, that his inattention was the result of drowsiness, induced by the hour and the use of too much liquor." But if, in such a case, the plaintiff should merely show that while a coach was going at a moderate gait, along the middle of a good, wide, and commonly traveled road, it was suddenly overturned without any apparent cause, would those facts alone make out a case of negligence (which is always the gist of such an action) against the defendant?

3. I concur in the doctrine that the responsibility of a common carrier of passengers attaches to one who controls and runs an elevator used as appellants used the elevator by which respondent was injured.

I also concur in the conclusion that the court below did not err in giving the first instruction asked by plaintiff, or in adding to the ninth instruction asked by defendants the words, "according to the best-known tests reasonably practicable;" but I think that some of the cases cited by Mr. Justice THORNTON, with apparent approval, in his discussion of those instructions, carry the rule concerning the application of tests beyond its legitimate reach. On all other points I concur in the opinion of Mr. Justice THORNTON.

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80 Cal. 530

FRESNO CANAL & IRRIGATION CO. v. DUNBAR. (No. 12,780.)

(*Supreme Court of California.* Sept. 13, 1889.)

COVENANTS RUNNING WITH THE LAND—LIENS—EVIDENCE.

1. Plaintiff entered into a written contract with R. to furnish him water on his land by means of an irrigating ditch, at a stated price, for 40 years. The contract declared that "this agreement and the covenants therein contained on the part of the party of the second part run with and bind the land." The contract was recorded. *Held*, that the clause providing that the contract should run with and bind the land created a lien on the land for its enforcement, and, when recorded, was notice to all subsequent purchasers. MCFARLAND, J., dissenting.

2. Under Civil Code Cal. §§ 1460–1466, specifying what covenants run with the land when contained in a grant of the estate, the covenants under the contract in question do not run with the land, not being contained in the grant of the estate, and no personal judgment can be had against a purchaser of the land for his refusal to perform them.

3. Code Civil Proc. Cal. § 1951, provides that every instrument conveying or affecting real property, acknowledged, or proved and certified as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in any action or proceeding; and a certified copy of the record of such instrument, thus acknowledged or proved, may also be read in evidence with the like effect as the original, on proof, by affidavit or otherwise, that the original is not in the possession or under the control of the party producing the certified copy. Plaintiff sued on a contract in writing, which purported to be a lien on the land of defendant, and alleged that the instrument had been duly acknowledged and recorded. On trial he introduced in evidence an instrument purporting to be the one sued on or a duplicate, but which had not been acknowledged. He then introduced the record of the instrument with the acknowledgment added. *Held*, that the instrument was inadmissible as the one sued on, because it had not been acknowledged, and that the record was inadmissible without accounting for the original.

4. Where plaintiff agrees with defendant to furnish him water from a main ditch, and to put in a box or gate, to be used in transferring the water to a ditch to be dug by defendant, and plaintiff complies with its part of the contract, defendant cannot avoid payment by failing to dig his ditch.

5. Where the proof showed that the water was furnished by plaintiff at the place agreed, the offer of defendant to show that plaintiff's ditch was negligently and unskillfully constructed was properly refused, as immaterial.

In bank. Appeal from superior court, Fresno county; J. B. Campbell, Judge.

Action by the Fresno Canal & Irrigation Company, on a contract to furnish water from an irrigating ditch to the land of defendant, L. L. Dunbar. The contract was made with one Roeding, the vendor of defendant. The defense was that the contract did not create a covenant running with the land, and that it was not a lien on the land. On trial by the court without a jury a personal judgment was entered against defendant, and also a decree enforcing a lien on the land for the amount of the judgment, and ordering the property sold to satisfy it. Civil Code Cal. §§ 1460–1466, provide that every covenant contained in a grant of estate in real property, made for its direct benefit, runs with the land, including covenants of warranty, or for quiet enjoyment, or for further assurance on the part of the grantor, or for the payment of rent, taxes, or assessments, on the part of the grantee, or for the addition of some new thing, or for the direct benefit of some part of the property not then in existence or annexed thereto, when made by the covenantor expressly for his assigns or the assignees of the covenantee, and that such covenant runs with the land only so far as the assigns thus mentioned are concerned, and that the only covenants which run with the land are those specified in this title, or those incident thereto. Code Civil Proc. Cal. § 1951, provides that every instrument conveying or affecting real property, acknowledged or proved and certified as provided in the Civil Code, may, together with the certificate of acknowledgment or proof, be read in evidence in any action or proceeding; and a certified copy of the record of such instrument, thus acknowledged and proved, may also be read in evidence with the like effect as the original, on proof by affidavit or otherwise that the original is not in the possession or under the control of the party producing the certified copy.

Wharton & Short, for appellant. *Geo. E. Church*, for respondent.

Works, J. The respondent, the plaintiff in the court below, being a corporation engaged in diverting and supplying water for irrigation, entered into a contract with one Roeding, who was then the owner of a certain tract of land, by which the respondent sold to said Roeding for the sum of $1,200 a water-right for said real estate, and in and by said contract "grants, bargains, sells, and conveys to the party of the second part, from the main canal of the party of the first part, or from a branch thereof, all the water that may be required, not exceeding at any time four cubic feet per second, for the purpose of irrigating said lands;" and agreed to place a suitable box or gate in the bank of its main canal, or a branch thereof, at the most convenient point for the conveyance of the water to said land. And the party of the second part, said Roeding, agreed to construct a ditch from said box or gate to said land at his own risk, cost, and expense, and that the ditch so constructed should be a branch ditch of said company, and under its control. The contract contained the following further covenants, material to the question presented on this appeal: "It is understood and agreed that the water to be furnished under this agreement is intended to form a part of the appurtenances to said section of land, and the right thereto shall be transferable only with, and run with, said land, and that the party of the first part is bound by this instrument to all subsequent owners of said land, but to no other person. The party of the second part, for himself, his heirs and assigns, covenants and agrees that he and his successors in interest and estate in said land will pay annually to the party of the first part, at their office, in gold coin of the United States, on the first Monday in September of each year, after the water shall first be brought to the said land, until the year 1920, and during the existence of said corporation, the sum of four hundred dollars, and in case of default of such payment in any one year for the space of thirty days after it shall become due, this agreement shall terminate and become thenceforth null and void and of no effect, at the option of the party of the first part, their successors and assigns. * * * It is covenanted that this agreement and the covenants therein contained on the part of the party of the second part run with and bind the land." The contract was to run and be in force from the 8th day of December, 1881, until the 16th day of February, 1921, and during the existence of said corporation. Roeding sold and conveyed the lands described in the agreement to the appellant. This action was brought against the appellant, alleging the making of the contract, and that the respondent had complied with the terms and conditions thereof; that the land had been conveyed to the appellant; that the contract was duly acknowledged and recorded before his purchase of the property, and that certain installments of the amount agreed to be paid by Roeding had become due and were unpaid. There was a demurrer to the complaint on the ground that the same did not state facts sufficient to constitute a cause of action, which was overruled. The defendant answered, denying the material allegations of the complaint, and by way of cross-complaint set up that the ditch of the plaintiff had been so negligently and improperly constructed as to cause the overflow of the defendant's lands, by which he had been damaged in the sum of $1,000. A demurrer to the cross-complaint was sustained. The cause was tried by the court, and findings made in favor of the plaintiff, and a personal judgment rendered against the defendant, and also a decree enforcing a lien for the amount due, and ordering the sale of the property for its satisfaction.

The appellant contends that the complaint was insufficient, and that the demurrer thereto should have been sustained on the ground that the contract sued upon created no lien upon the land, and was not personally binding upon the purchasers from Roeding. This is placed on the ground that at common law, and under the provisions of the Code of this state, a covenant cannot be made to run with the land except where such covenant is made in connection with and as a part of the conveyance or transfer of the land itself, and that the clause in the contract attempting to extend the liability beyond the person contracting was nothing more than an attempt to create and enforce a covenant running with the land. We are inclined to the opinion that counsel are right, that this was not such a covenant as would run with the land. Civil Code, §§ 1460-1466; Cole v. Hughes, 54 N. Y. 444; Bloch v. Isham, 28 Ind. 37; Scott v. McMillan, 76 N. Y. 144. But there is something more in the contract than the attempt to extend the liability to subsequent purchasers or assignees of the party contracting. There is an express agreement that it shall bind the land itself; therefore, it does not depend upon the question whether a covenant on the part of the then owner of the property would run with the land or not. The question is whether the provision in the contract was such as to create a lien upon the land. We think it perfectly clear from the language used that this was the intention of the parties. It was provided that the right to the water to be furnished by the respondent should be and become appurtenant to the land, and this was followed by an express agreement that the contract to pay the money therefor should bind the land. This, we think, created a lien upon the land, and as the complaint alleges that the contract was acknowledged and recorded, it was notice to the appellant of the existence of such lien. Under such a covenant the land is liable in the hands of a subsequent purchaser. Scott v. McMillan, 76 N. Y. 144. But it does not follow that by reason of such covenant in the contract, and the subsequent purchase by the appellant, he became personally liable for the payment of the amount to become due, although the contract inured to his benefit so long as he continued to be the owner of the land; and so far as the judgment is personal against him it is erroneous. He purchased and held the real estate subject to the lien, but did not become personally liable to pay the debt. We think for these reasons that the demurrer to the complaint was properly overruled, as it stated a cause of action for the foreclosure of the lien.

At the trial the plaintiff offered in evidence a contract shown to have been signed by Roeding, similar to, if not the same as, the one sued upon in the action, except that it was not acknowledged; and there was evidence in connection with its offer that it was the custom of the respondent to take these contracts in duplicate. The contract was objected to by the defendant on the ground that it was not the one sued upon, and it was alleged to have been duly acknowledged, and the acknowledgment was set out in full in the complaint. The court overruled the objection, and the contract was read in evidence. The plaintiff then offered in evidence the record of the same contract, with the acknowledgment added, as recorded in the recorder's office. To this the defendant objected on the grond that the record was incompetent. The court also overruled this objection, and allowed the record of the contract to be read. Conceding that the contract read in evidence was the same, except the acknowledgment, as the one sued upon, and was a duplicate thereof, it failed to prove sufficient to charge the land in the hands of the defendant in this action, for the reason that he could only be held liable, or the lands charged in his hands, by proof of the acknowledgment and recording of the instrument, which was the only evidence of notice on his part at the time of his purchase of the existence of the lien upon the land. Therefore, if the admission of the record of the contract was erroneous, the plaintiff failed to make out his case in this respect. The admission of the record of the contract without proof of the loss of the original, or otherwise accounting for it, was error. Code Civil Proc. § 1951; Brown v. Griffith, 70 Cal. 14, 11 Pac. Rep. 500. It is otherwise under the Code as amended. St. 1889, p. 45.

There was a motion for a nonsuit, which was denied. The appellant contends that the nonsuit should have been granted, for the reason that there was no evidence that the water had ever been brought to the lands of the defendant, or used by him. The solution of this question depends upon the construction to be given to the contract, which provided that the company should furnish the water from its main ditch, or a branch thereof, and that it would put in a box or gate, to be used in transferring the water to a ditch to be constructed by the defendant to conduct the water to his lands. If the plaintiff could only recover upon the water being actually conducted to and upon the lands of the defendant, then the motion was well taken; but we think this should not be the construction of the contract. When the company had complied with its agreement to bring water through its main ditch, and to construct a box or gate through which to pass the water into a ditch to be constructed by the defendant, as provided in the contract, it had done all that was necessary to be done on its part, and the defendant could not avoid a recovery by the failure on his part to construct the ditch agreed to be constructed by him. The company was entitled to recover for the water from the time it was prepared to furnish it at the box or gate to be put in by it.

The defendant offered to prove that the plaintiff had so negligently and unskillfully constructed its ditch as to amount to a failure to perform its part of the contract, and so as to cause the destruction of defendant's land, instead of being a benefit to it; and that therefore plaintiff had not complied with its agreement, and that the defendant had been deprived of the beneficial use of the water in that way, and that therefore there was no consideration to defendant. The court below refused to allow the proof, and, we think, properly. If the defendant could have proved, or had offered to prove, that the water was not supplied at the place agreed upon, this would have been a good defense to the action; but it was entirely immaterial whether such failure was caused by the want of a sufficient ditch to carry the water, or the improper and negligent construction of the same, or from some other cause. Plaintiff proved that the water was supplied at the place agreed upon, and this was the material question to be determined. Besides, there was no pleading under which the offered evidence was proper. There is the further contention that the plaintiff failed to construct a head-gate at the most convenient point for irrigating the land, but upon this question the evidence was conflicting, and we cannot disturb the finding of the court. The personal judgment against the defendant for the amount claimed to be due was erroneous, but in other respects it was proper in form, and should be upheld, except for the errors commited at the trial, as above stated. Judgment and order reversed.

We concur: BEATTY, C. J.: THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.

MCFARLAND, J. I concur in the judgment of reversal; but in my opinion the contract sued on is not one that can be enforced against the land in the hands of subsequent grantees. It is true that the contract is not strictly what is usually called a "covenant running with the land," but it is in the nature of such a covenant, and has practically the same consequences. In my opinion, therefore, it is within the meaning of section 1460 et seq. of the Civil Code; and, not having been made in a case, and in the manner contemplated by those sections, it is invalid, except as between the original contracting parties.

(81 Cal. 19)

FORD v. BOARD OF STATE HARBOR COM'RS.
(No. 13,374.)

(*Supreme Court of California.* Oct. 1, 1889.)

OFFICE AND OFFICER—APPOINTMENT AND TENURE.

1. Pol. Code Cal. § 2521, provides that the board of state harbor commissioners shall appoint certain officers, including a chief wharfinger and such number of wharfingers and collectors as they deem necessary, and that such officers shall hold for the term of four years, but may be removed by the board at any time, after due investigation, for causes affecting their official character and competency; and in case of a vacancy in such offices the board must fill the same by appointment for four years. *Held*, that the power delegated to the board, by the legislature, of creating the office of collector, necessarily implied the power to abolish the office, when, in the judgment of the board, it was no longer necessary, though the term of four years, for which the incumbent was appointed, had not expired.

2. St. Cal. 1880, p. 11, § 4, provides that as soon as practicable the rates of wharfage must be adjusted and classified by such system, and collected by such officers, as the commissioners may direct; that the duties of such officers, and their compensation, shall be fixed by the commissioners, and when such system is put in force no tolls must be collected by load or vehicle on any merchandise passing on or off the wharves, and the system of collection by toll collectors must cease. *Held*, that the revision of the Code in 1883, by which the collectors were declared to be officers, did not impliedly repeal the statute of 1880, so as to take from the commissioners the power to remove collectors, as it left in full force section 2524 of the Code, giving the commissioners and mayor of San Francisco authority to modify dockage and wharfage rates, and directing that thereafter the collection of tolls should cease and the collectors be discharged.

BEATTY, C. J., and WORKS and THORNTON, JJ., dissenting.

In bank. Application for writ of mandate.

James G. Maguire, for plaintiff. *W. W. Morrow* and *T. C. Coogan*, for defendant.

FOX, J. This is an application for a writ of mandate to compel the defendant to allow and pay to plaintiff the sum of $30, as and for the balance due him on account of his salary as collector for the month ending July 24, 1889. The real purpose of the action is to determine the question of the power of the board of state harbor commissioners to discharge a collector before the expiration of his term of office, for no cause except that his services are no longer needed. The case is submitted upon an agreed statement of facts, from which it appears that on the 9th of June, 1887, the board appointed the plaintiff to the office of collector, in accordance with the provisions of section 2521 of the Political Code; that the plaintiff duly qualified as prescribed by law, and entered upon the discharge of his duties as such officer, and continued to discharge them until the 16th day of July, 1889; that subsequent to such appointment and qualification, and prior to said last-named date, the board adjusted and classified the rates of wharfage on merchandise and other articles, and determined and directed that such charges should be collected upon that portion thereof described in a written statement to be furnished to the board by the master, owner, consignee, or agent of the vessel, describing the merchandise intended to be discharged from, or received on, such vessel, while lying at and making use of the wharves within the jurisdiction of said board; that by reason of the adoption of such system the board determined that the services of said Ford, as such officer, were no longer necessary, and on the 12th day of July, 1889, passed a resolution requiring said Ford to appear before the board on the 16th day of said month, and show cause, if any he had, why he should not be removed from his position as collector; that on said last-named day Ford appeared, and for cause pleaded his appointment and qualification in June, 1887, that his term had not expired, and that he was ready, able, and willing to perform the duties of the office until the expiration of his term, notwithstanding which the board then and there passed a resolution removing him from his position as collector, having before voted to adopt a system for the collection of the revenue, under which system his services as collector would not be necessary; that the board has appointed no other person to succeed Ford in said office of collector, and has determined not to appoint any successor to him, but to abolish said office; that on the 23d of July the board ordered paid a demand in favor of said Ford for $70, which was to pay for his services from the 24th of June to and including the 16th of July, and no more; that on the 25th of July Ford demanded an additional sum of $30, to pay for his services from the 16th of July to and including the 24th of July, but the board refused to allow the same; that ever since the 16th of July the said Ford has been ready and willing to perform the duties of said office, but the board has refused to accept such performance; that no charges and no question concerning any cause or causes affecting the official character or competency of said Ford were ever investigated by said board; and that said board has under its control a sufficient fund to pay said claim of $30.

The board of state harbor commissioners, defendant herein, is an executive board, created by law, and having charge of that portion of the bay of San Francisco lying along the water front of the city and county of San Francisco, and adjacent thereto, and of the improvements, rights, easements, and franchises appurtenant thereto, and connected therewith, of the construction and maintenance of the sea-wall, wharves, docks, etc., and of the collection of the revenues therefrom. It was first created and organized under the "Act to provide for the improvement and protection of the wharves, docks, and water front of the city and county of San Francisco," approved April 24, 1863, (St. 1863, p. 406.) This act authorized the leasing out of the wharves, as fast as they came into the possession of the board, for terms not exceeding three years, and in section 5 provided: "Should the commissioners be unable to lease any wharf or other work coming into their possession, they shall employ some suitable person to collect the revenue which may arise from such wharf or other work, and pay him a proper compensation therefor, not exceeding the rate of $150 per month, and not in any case exceeding the amount by him collected." In 1864 (St. 1863-64, p. 141) this provision was amended so as to read as follows: "Should the commissioners be unable to lease any wharf or other work coming into their possession, they shall employ some suitable person or persons to collect the revenue which may arise from such wharf or other work, and pay a proper compensation therefor, not exceeding the rate of one hundred dollars per month to each person so employed, and not in any case exceeding the sum of two hundred dollars per month for collecting the revenue as aforesaid, and not exceeding the amount collected from such wharf or other work." This provision was carried into the Political Code of 1872, as section 2527, without any material change. In 1876 the entire article of the Political Code relating to harbor commissioners was remodeled, and in section 2522 it was provided: "Said commissioners shall also appoint a sufficient number of persons wharfingers to collect the revenue arising from dockage, cranage, rents, and tolls, by authority of this article, and may also appoint a sufficient number of persons toll collectors to collect the tolls authorized to be collected by this article." Thus the provision as to the method of collecting the revenue stood until 1883, when it was again remodeled and transferred to section 2521 of the Political Code, which is the section coming up for special consideration in this case. It will be observed that, up to the remodeling in 1883, wharfingers and collectors or toll collectors were mere appointees of the board. They were not denominated as officers, and no terms of office were fixed for them. Like any other appointees or employes, they were subject to appointment and removal at the pleasure of the board. The changes of 1883 involved the remodeling of several sections of the article pertaining to the board, and effected a complete reorganization of the board itself. Section 2521, as then adopted, provided: "The board, on entering on the duties of their office, must appoint the following officers, viz., a secretary, an assistant secretary, an attorney, a chief engineer, a chief wharfinger, and such number of wharfingers and collectors as they deem necessary. Such officers shall hold for a term of four years from the dates of their respective appointments, but may be removed by the board at any time, after due investigation, for causes affecting their official character or competency. The order for such removal, stating distinctly the causes therefor, must be entered on their minutes. In case of a vacancy in such offices by the expiration of a term, or for any other cause, the board must fill the same by an appointment for four years." Here will be noticed several significant changes from anything which had been found in the laws before. Certain of the appointees had before that time held positions which had been spoken of as "offices," such as the secretary, assistant secretary, and chief wharfinger, who had been required to give bonds for "the faithful performance of the duties of their offices," but no one of them had ever before been declared or designated by law as an officer having a fixed term of office, or protected from discharge at the pleasure of the board; and the term "officer" or "office" was never before applied to the position of wharfinger or collector, or toll collector, although all of them were required to give bonds for the faithful discharge of their duties. Now, however, every appointee of the board, except mere manual laborers, was designated as an "officer," and his place as an "office," with a fixed term, running to the full limit allowed by the constitution, protected in express terms against removal, except for cause affecting his official character or competency, and after due investigation; and the term was to run for the full four years, without regard to the time when it should begin, or any attempt to make the beginning or ending of the term correspond in time with that of other officers of the state, or of any department of either state or local government. Even in case of vacancy the appointment was not, as in other cases, to fill the unexpired term, but for a full term of four years, commencing at a time when the vacancy was filled. The wisdom of, or the motive for, this radical change and departure from the rules of practice usually adopted in other cases, are matters with which this court has nothing to do, and over which it has no control. Our only inquiry is, how far is the statute binding upon the state to keep a man in office after it has ceased to have any use for the office or the officer?

It may be conceded for the purposes of this case, that the contention of plaintiff, if made in behalf of the secretary, assistant secretary, attorney, chief engineer, or chief wharfinger, would be correct, although we do not so now decide, but does it follow that it is also correct when applied to the offices of wharfingers or collectors? The secretary, assistant secretary, attorney, chief engineer, and chief wharfinger hold offices created by the legislature itself, with fixed terms. But not so with the wharfingers and collectors. The same law which authorizes the board to fill the offices created by the legislature authorizes the board to create these latter offices, and fill them as it deems necessary. It is only when the board has deemed it necessary to fill the place of wharfinger or collector, and has filled the place, that it becomes an office, or has a term. Having created and filled the office, such filling is for the term, and during the term the board is prohibited by law from creating a vacancy in the office, except after due investigation, and for cause. But it by no means follows that it may not abolish that which it created,—the office itself,—and thus dispense with the officer. The legislature has not said to the board: "There shall be a collector, whom you may appoint, who shall hold his office for four years;" but it has said: "If you deem a collector necessary, you may appoint one, and in that case his term of office shall be for four years." It thus delegated to the board the power to create the office or not, as it might deem best.

Plaintiff contends that, the legislature having provided by law that if such an office was created and filled the term should be four years, and that during that time the incumbent could be removed only for cause, the office itself cannot be abolished, and the incumbent thus deprived of his office. Several authorities have been cited in support of this proposition, chief among which are People v. Hill, 7 Cal. 103, and People v. Jewett, 6 Cal. 291. But none of them are directly in point. Both the cases mentioned were cases of attempted removal of one person and appointment of another to the same office; not of removal because the office itself was abolished. The case at bar is more like that of State v. Smith, 65 N. C. 369, cited by defendant. The constitution of North Carolina provided that "the general assembly shall provide for the establishment of special courts for the trial of misdemeanors in cities and towns where the same may be necessary." As here, the board might appoint such collectors as it should deem necessary. In 1868 the general assembly by law established a special court for the city of Wilmington, and provided for a judge of said court, to be appointed by the governor, to hold office for the term of eight years. The governor appointed Cantwell judge of the court, and he entered upon the discharge of the duties of his office. In 1871 the general assembly repealed the law creating the court. The question was whether Cantwell could thus be deprived of his office before the expiration of his term. To this the court said: "If the effect be to abolish the court, the incidental effect must be that the incumbent of the office can no longer discharge the duties of a judge, for there can be no officer where there is no office," and held that the right of the general assembly thus to abolish the office was "too clear for discussion." So in this state it has been held that, when the legislature has created an office provided for or contemplated by the constitution, and it has been filled, the office may be destroyed during the term of the incumbent. People v. Squires, 14 Cal. 13. In People v. Jewett, supra, cited by plaintiff, it was held that the power to create an office included the power to destroy or abolish it. In People v. Banvard, 27 Cal. 475, the question was whether a county treasurer could be legislated out of office during the term for which he was elected,—a term regularly fixed and established by law. The court declared that the question was not an open one; that it had been met and determined in People v. Squires, supra. In Re Bulger and in Re Merrill, 45 Cal. 553, this court decided two points bearing upon the question involved in this case: (1) That the legislature had power to delegate, even to a mere voluntary association, the power to appoint to a position which the law had declared to be a public office; (2) that the legislature can abolish or change an office created by it, and it may extend or abridge the terms of its incumbents at pleasure. The exercise of this power to abolish an office by the same authority that created it and fixed its term, and thus remove the incumbent before the expiration of his term, has been too frequent and too long practiced in this state to leave the question of the right to do so longer open to discussion. The legislature abolishes offices of its creation, and thereby removes the incumbents thereof during their terms of office, at its pleasure. A significant instance of its exercise of this power is found in the very act under which the present board of harbor commissioners exists. The board was fully organized under the provisions of the Political Code as they had been remodeled in 1876, when in 1883 the legislature, by an amendment of the Code, legislated all the members out of office, notwithstanding their fixed terms, which had not expired, and provided for the immediate appointment of an entire new board. So, also, the people abolish offices which have been created, and the terms whereof have been fixed, by them, in the constitution itself, and thus remove officers of their own election during the terms for which they have been elected. In this way this court itself has been more than once reorganized, its judges removed during the constitutional terms for which they had been elected, a new court organized, with new judges on its bench. By the adoption of the constitution of 1879 the entire judiciary of the state was removed, although the majority of its officers were in the midst of their terms of office; and at the same time, and by the same act, many others of the state and county officers were deprived of their offices, not by the expiration of their terms, but by the abolition of the offices themselves. This was but the exercise by the people of the power to abolish the offices which they had themselves created, and no one ever questioned their power. So whenever the people, directly, or through the legislature, clothe any department of the government, or any of its boards or officers, with power, at discretion, to create an office, they clothe it with a like power to abolish the same office. The counsel for defendant have cited cases from more than half the states in the Union in support of this proposition, that the power which creates an office may abolish it, without regard to the expiration of the term of the incumbent. But, in view of the decisions and practice in our own state, it is unnecessary to review them. To all this, however, it may be replied (and perhaps that is the fair construction of the contention of plaintiff, although he has not expressed it in that form) that the office here under discussion was created, and its term fixed, by the legislature, and it is the board, and not the legislature, which attempts to abolish it. In a narrow, technical, and restricted sense it may be true that the legislature created the office, and fixed its term, but not in the broad sense that gives the legislature any control over the existence of the office. It has not appointed the officer, or said that there shall be such an office or officer. It has simply authorized a subordinate body (the defendant here) to make certain appointments, at its discretion, as it "may deem necessary," and provided that, if such appointments were made, the appointees should be officers, holding for a term of four years, and during that term protected from the perils caused by the pressure of others for the places held by them, by a provision that they may be removed by the board only after due investigation, for causes affecting their official character or competency. This certainly does not protect them against the abolition of the office. And who is to abolish it? The legislature did not establish it, or determine the question of the expediency or necessity of establishing it. It delegated to another the power to establish it when that other should deem it necessary,—*ex necessitati,*—that carried with it the power to abolish, whenever there was no longer a necessity to maintain that which had been so established. And we are not without an expression of legislative judgment as to whether or not these offices should be abolished. The general provisions of law for the organization, powers, and duties of the board of state harbor commissioners are, and since 1872 have been, found in the article on that subject in the Political Code. But the whole law affecting said board is not found there. In reference to this board, and the subject-matter of its jurisdiction, the legislature has been in the habit, as it has in reference to other subject-matters embraced in the Codes, of legislating from time to time by acts other than those amendatory of the Codes. Whether this was wise or unwise is not for us to say. Our duty is to examine and construe these acts and the Codes together, and whenever they are not in conflict with each other, to give force and effect to both. In 1878 the legislature passed "An act concerning the water front of the city and county of San Francisco," (St. 1877-78, p. 417.) This act conferred certain powers, and imposed certain duties, upon the board of state harbor commissioners, not imposed or conferred by the provisions of the Code. In 1880 another act was passed, amendatory of the one last mentioned, and conferring further powers on the board of state harbor commissioners. St. 1880, p. 10. Section 4 of that act reads as follows: "Sec. 4. As soon as practicable the rates of wharfage on merchandise and other articles must be adjusted and classified upon such system, and be collected in such manner, and by such officers, as the commissioners may determine and direct. The duties of such officers, their compensation and amount of bond for faithful performance of duty, shall be fixed by the commissioners. When such system is put in force, no tolls must be collected by the load or vehicle on any merchandise passing on or off the wharves, and the system of collection by toll collectors must cease." This provision still remains in force, unless repealed by implication, by the passage of the amendments made to the Code in 1883. There is nothing in the act making those amendments touching upon the subject-matter of this provision, or in conflict with it, unless it be held that the provision authorizing the board to appoint such number of collectors as it should deem necessary, and fixing their terms of office, is so in conflict. We do not think the two provisions conflict with each other. They certainly do not to such an extent that force and effect may not be given to both; and, if it had been intended by the latter act to have repealed the former, it would have been easy to say so, but this was not done. On the contrary, in the Code itself we find a provision looking to the same result. In section 2524, as it was passed in 1876, and still remains unchanged, we find the following provision: "And the commissioners and the mayor of San Francisco may so modify and establish such rates of dockage and wharfage as will produce a revenue not to exceed in amount the moneys collected in the year 1875, collecting, as near as possible, equal amounts from dockage and wharfage. When such modification has been made the collection of tolls must be abolished, and the toll collectors discharged."

It will thus be seen that as early as 1876 the legislature contemplated and authorized the adoption of a system by the board, by means of which the army of toll collectors on the city front should be withdrawn. To hasten the coming of that period the act of 1880 enlarged their discretion as to the kind of system which might be adopted, and enabled the board to act without the aid of the mayor in the matter, and, when the legislature of 1883 came to revise and remodel the Code on the subject, it left both provisions in full force, at least in so far as related to the discharge of toll collectors. If it should be said that only one of the two systems could be adopted, then, of course, it would be the one last provided for, and as that is practically the system which the board has adopted, and it accomplishes the result, it follows that the will of the legislature is being carried into effect.

Our conclusion therefore is that the board had full power to abolish the office as it did, without regard to the term of the officer, and thereupon discharge him; and that from the date when the office was so abolished, and he discharged, the plaintiff had no further claim upon the board, either to accept his service or to render him compensation. The writ is denied, and the complaint dismissed.

We concur: McFarland, J.; Sharpstein, J.

I dissent: Thornton, J.

I concur in the judgment: Paterson, J.

Beatty, C. J. and Works, J. We concur. The defendant is an executive board, created by law, and charged with the care and improvement of the water front of San Francisco. It has control of certain wharves, docks, slips, etc., and collects wharfage, tolls, and other charges for the use thereof. It was first organized under the act to "provide for the improvement and protection of the wharves, docks, and water front of the city and county of San Francisco," approved April 24, 1863, (St. 1863, p. 406.) From time to time this act has been amended and supplemented. It was carried into the Political Code upon its adoption in 1872, and has since been remodeled at different sessions of the legislature. From the establishment of the board down to the year 1883, the commissioners were authorized to appoint wharfingers and toll collectors; the provision concerning these employes in the last amendment of the Political Code, previous to 1883, being as follows: "Said commissioners shall also appoint a sufficient number of persons wharfingers to collect the revenue arising from dockage, cranage, rents, and tolls by authority of this article, and may also appoint a sufficient number of persons toll collectors to collect the tolls authorized by this article." Pol. Code, § 2522, amendments of 1876. In 1883 the Political Code was so amended as to effect a complete reorganization of the board, and the provisions relating to wharfingers and collectors were radically changed. By section 2521 it was enacted that "the board, [the new board,] on entering on the duties of their office, must appoint the following officers, viz., a secretary, an assistant secretary, an attorney, a chief engineer, a chief wharfinger and such number of wharfingers and collectors as they deem necessary. Such officers shall hold for a term of four years from the dates of their respective appointments, but may be removed by the board at any time, after due investigation, for causes affecting their official character or competency. The order for such removal, stating distinctly the causes therefor, must be entered on their minutes. In case of a vacancy in such offices by the expiration of a term, or for any other cause, the board must fill the same by an appointment for four years." By section 2522, prescribing the duties of the various officers, it was provided that "the wharfingers shall have supervision of the wharves to which they are assigned, and must require the regulations of the board and orders of the chief wharfinger to be respected and obeyed, and good order to be preserved thereon. The collectors must collect the revenues in such manner as the board may direct, and must daily account for and pay all moneys into the office. The wharfingers and collectors must each take and subscribe an official oath, and give such official bond as the board may require. * * * All the above named officers must perform such other duties pertaining to their positions as the board may from time to time prescribe." Section 2552 provides for the salaries of officers, and fixes that of the wharfingers at $125, and that of collectors at $100, per month. Under this amended and revised statute the present board was organized, and on the 9th of June, 1887, the plaintiff was appointed a collector.

Recently the board has decided to introduce some changes in their system of collecting revenues, which render the services of some of its collectors unnecessary, and for that reason alone they have undertaken to remove the plaintiff from his position, and to abolish his office. There is no charge against him affecting his official character or competency, but he has, by resolution of the board, after notice of its intention so to do, been removed, in the interest of economy in the administration of its business. No person has been appointed to succeed him, and there is no intention to make such appointment. On the contrary the office, so far as the board has the power to abolish it, is abolished. The plaintiff, claiming to be an officer with a fixed term and stated salary, has instituted this original proceeding by *mandamus* to compel the defendant to pay him the salary accrued since the date of its order declaring his removal. It is admitted that his salary since that date has not been paid; that the defendant has funds to pay, and that it is its plain statutory duty to pay, if the plaintiff is, notwithstanding its order of removal, still a collector. It is further admitted that the plaintiff has no other plain, speedy, or adequate remedy, and, in short, that, if the defendant had no power to abolish the collectorship held by the plaintiff, he is entitled to a peremptory writ. Had the defendant such power? If section 2521, as re-enacted in 1883, is constitutional and valid, we do not see how it can be so construed as to allow the removal of the collector except for one of the causes enumerated, nor how the board could, in such case, refuse to fill the vacancy thereby created by a new appointment for a term of four years, however useless the services of such collector may have become. The result of this construction seems to be absurd, and it may well be supposed that it was not actually contemplated by the legislature; but, in seeking the intent of the law-makers, we must be guided by the terms of the law if they are plain and unambiguous, and we cannot, even for the purpose of avoiding serious inconvenience, adopt a construction in conflict with the obvious effect of the language of a statute.

We discover no ambiguity here. On the contrary, the legislature has plainly said that the board of harbor commissioners, on entering on the duties of their office, shall appoint a secretary and certain other named officers, and also as many wharfingers and collectors as they deem necessary. These latter, like the rest, are to be officers, with prescribed duties, a fixed term for four years, and stated salaries. They are to take the oath of office, and furnish bonds, and are to be irremovable during the term for which they are appointed, except after notice and hearing upon charges affecting their official character and competency. Moreover, for each wharfinger or collector appointed an office is created,—a collectorship or wharfingership,—which thereafter continues in permanence, and must be filled for a full term of four years whenever it becomes vacant by expiration of a term or for any other cause. It may be created—a hundred or a thousand collectorships or wharfingerships may be created—by the board, but not one can be abolished. The highest number created at any time is, for all future time, the minimum number of said offices until the legislature shall intervene and abolish so many as it may deem to be superfluous. It matters not how clearly it may be demonstrated that, under a new and improved system of administration, the services of many or most of these officers could be profitably dispensed with, the board which created the offices cannot abolish them, but must go on in the old way until the legislature comes to its relief. We cannot, we repeat, see any way to avoid this conclusion, if section 2521 is, in all respects, constitutional and valid.

Counsel for defendant have referred us to a provision contained in an independent statute passed in 1880, (St. 1880, p. 10,) and also contained in section 2524 of the Political Code, which they contend modifies the construction, or changes the operation, of section 2521, but we do not think this contention can be maintained. The provision in question is one which, in substance, empowers the board to fix its revenue upon a basis which will admit of the abolition of tolls, and directs the commissioners thereupon to abolish tolls and discharge the toll collectors. But this provision existed not only in the statutes, but in the Political Code, before the revision of 1883, and referred exclusively to the tolls collected from wagons and other vehicles passing to and from the wharves and slips. It had no reference to the wharfingers, or to the charges collected by them for dockage, etc. By the revision of 1883 the collectors therein provided for were charged with the collection of the entire revenue of the board, including that part formerly collected by the wharfingers, —in other words, the collectors under the new law differ from the toll collectors under the old law, not only in name but in function, and the collectors cannot be discharged, as provided in the statute of 1880 and the corresponding provisions of section 2524 with respect to the toll collectors, without discharging the only persons who, under the new system, have anything to do with the collection of the revenue of the board. This being so, the mere fact that in re-enacting section 2524 in 1887 and 1889, for the purpose of amending it in other particulars, this old and obsolete clause referring to the toll collectors was re-enacted, will not justify us in holding that the legislature intended thereby to alter or modify the operation of the provisions of section 2521 respecting the term and tenure of the collectors.

But satisfied, as we are, that under the statute, considered by itself, the defendant has no power to remove the plaintiff upon the ground assigned for their action, we are nevertheless not satisfied that his position can be sustained. If the appointment of each collector by the board creates an office which can only be abolished by law, then the act of the board in making the appointment, and thus creating the office, has all the force and effect of a statute, and we are brought to the inquiry whether the legislature can in this way delegate to a board of three persons the power to make laws creating offices to be filled by officers holding for the full constitutional term of four years, with salaries payable out of the public revenues, and irremovable during the term prescribed. It is settled, we suppose, beyond controversy that the power delegated to the legislature to make laws cannot be delegated by the legislature to any subordinate body, and if the power to be exercised by the board of harbor commissioners, under the provisions of section 2521, according to the construction which the plaintiff contends for, and which we are unable to deny, amounts, in effect, to the law-making power, it follows that such provisions must be unconstitutional.

We think that the creation of an office with permanent tenure, and salary payable out of the public revenues, which must continue to exist until abolished by statute, can only be accomplished by the exercise of a power essentially legislative, a power which the legislature alone possesses under the constitution, and which cannot be delegated.

We do not question the power of the legislature to authorize an executive board, such as the harbor commissioners, to appoint persons to fill offices which have been created by law, nor its power to give to such appointees a permanent tenure of their office within constitutional limits. Nor do we deny the validity of a provision which protects subordinate employes in public institutions from arbitrary removal from their positions in order to make room for others. We merely hold that the legislature cannot commit to the discretion of others the important function of creating public offices in unlimited or indefinite number,—offices which the power creating them is incompetent to abolish.

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80 Cal. 446

DALTON v. LEAHEY. (No. 12,051.)

(*Supreme Court of California.* Sept. 6, 1889.)

REFORMATION OF DEED.

In a suit to have a deed absolute in form declared a mortgage, where the allegations of the complaint and the evidence are that the money received by plaintiff was a loan, and not for the purchase of the property, a finding that there was a parol agreement that plaintiff could buy the land back at any time, by paying the price he had received, with interest, is outside the pleadings, and unsupported by the proof.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Craig & Meredith, for appellant. *Kellogg & King*, for respondent.

WORKS, J. This action was brought to have a deed, absolute in form, declared a mortgage. The court below found that the instrument was not a mortgage, but a conveyance in satisfaction of a debt due from the grantor to the grantee, and rendered judgment for the defendant. Counsel for appellant contend that the findings of the court are not sustained by the evidence; but we think otherwise. It is further claimed that the findings are contradictory, and do not support the conclusions of law and judgment. Some countenance is given to this claim by the finding of a parol agreement that the plaintiff should have the privilege of receiving back the property at any time by paying the price for which he sold the same, with interest; but this finding was outside of the issues, and was without any evidence to support it. The whole contention of the plaintiff, as shown by his complaint, and the evidence given to support it, was that the money received by him was a loan, and not for the purchase of the property, and that the instrument in controversy was a mortgage to secure such loan. There was no claim that the deed was either a conditional or a trust deed. We think this finding should not have been made, but it cannot so far affect the other findings as to justify a reversal of the case. As conclusions of law, the court found that the deed was not given as a mortgage, or as security for the payment of any indebtedness; that the relation of debtor and creditor, or mortgagor and mortgagee, did not exist between the parties, but that the grantee received and held the property as a trustee, for plaintiff's benefit, with the right to be reimbursed as such trustee for his outlay, but that under the complaint the plaintiff was not entitled to an accounting, or leave to redeem, or any other relief; and that the defendant was entitled to a judgment dismissing the action without prejudice. Judgment was entered accordingly. These conclusions of law are somewhat confusing; but the only criticism that can be made upon them is that, so far as they found the existence of a trust, they were outside of the issues, and were unwarranted by the evidence. They were more favorable to the appellant than we think they should have been, but we will not reverse the case for that reason.

Judgment and order affirmed.

We concur: **Beatty, C. J.**; **Paterson, J.**

Reade v. Reade. (No. 12,503.)

(*Supreme Court of California.* Oct. 2, 1889.)

Divorce—A Mensa et Thoro.

Under Civil Code Cal. § 136, providing "though judgment of divorce is denied, the court may, in an action for divorce, provide for the maintenance of the wife and her children, or any of them, by the husband," a divorce *a mensa et thoro* with alimony cannot be granted, where there is no statutory ground for an absolute divorce, or for the absence of the wife from her husband's home. Hagle v. Hagle, 16 Pac. Rep. 518, followed.

Department 1. Appeal from superior court, Marin county; E. B. Mahon, Judge.

Action by Louise J. Reade against F. W. Reade, for a dissolution of marriage on the ground of cruelty, for the custody of the children of the marriage, and for alimony. The court found "that the manner of defendant towards plaintiff has been cold, perhaps harsh; that the charge of extreme cruelty on the part of husband (defendant) towards the wife (plaintiff) has not been made out; that both parties to this action are more or less to blame for the relations now existing between them." The court refused a divorce, but decreed a separation, and awarded the custody of the children, with alimony, to the wife.

William C. Flint, for appellant. *James A. Waymire* and *F. M. Angelotti*, for respondent.

Per Curiam. On the authority of Hagle v. Hagle 74 Cal. 608, 16 Pac. Rep. 518, the judgment is reversed, and cause remanded, with directions to the court below to enter judgment in favor of the defendant on the findings.

(80 Cal. 462)

Brusie v. Gates *et al.* (No. 13,164.)

(*Supreme Court of California.* Sept. 6, 1889.)

Action to Quiet Title—Attachment.

1. Code Civil Proc. Cal. § 318, providing that no action for the recovery of real property shall be maintained unless plaintiff had possession within five years before the commencement of the action, and section 319, providing that no cause of action arising out of title to real property shall be effectual unless plaintiff shall have been so possessed, do not apply to actions to quiet title, as they may be brought without reference to the question of possession under section 738, which provides that "an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claims," and section 380 regulating the procedure "in an action brought by a person, out of the possession of real property, to determine an adverse claim of an interest or estate therein."

2. Under Code Civil Proc. Cal. § 559, requiring the officer serving a writ of attachment to return the same, "with a certificate of his proceedings indorsed thereon or attached thereto," when the return asserts that he attached certain property, but fails to set out the performance of all of the necessary acts, parol evidence is admissible to prove their performance.

3. In such case the evidence must be clear and satisfactory, and, when the witness will not testify positively to the performance of one of the necessary acts, the testimony is not sufficient.

In bank. Appeal from superior court, Stanislaus county; John W. Armstrong, Judge.

Action to quiet title by James Brusie against Samuel Gates and S. M. McLean. Judgment for plaintiff, and defendant Gates appeals.

W. E. Turner and *E. W. McKinstry*, for appellant. *T. B. Bond*, *Stonesifer & Minor*, and *S. C. Denson*, for respondent.

Works, J. This is an action to quiet title. The title of the respondent depends upon the validity of the levy of a writ of attachment on the property in the hands of the appellant's grantor and the subsequent sale of the same on execution. The attachment issued out of the justice's court, judgment was recovered and subsequently recorded in the recorder's office of the proper county, an execution was issued and placed in the hands of the sheriff, and the property sold to the respondent, who was the judgment creditor. The property was purchased by the appellant from the judgment debtor, for a valuable consideration, between the time of the levy of the writ of attachment and the recording of the judgment in the recorder's office. Therefore the respondent's right to recover depends, in the first instance, upon the validity of the levy of the writ of attachment, as the appellant became a purchaser for a valuable consideration before the judgment became a lien on the property.

The appellant contends that the complaint does not state a cause of action, and that the demurrer thereto was improperly overruled, for the reason that it fails to show that the plaintiff was, or had been within five years, seised or possessed of the property in controversy. Under the old practice act a party out of possession could not maintain an action to quiet title to real estate. Practice Act, § 254; San Francisco v. Beideman, 17 Cal. 461; Rico v. Spence, 21 Cal. 504. But the present Code gives the right to prosecute the action, generally, without reference to the question of possession. Code Civil Proc. §§ 380, 738; People v. Center, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481. Counsel for appellant concede this to be so, but claim that under sections 318 and 319 [1] of the Code of Civil Procedure the plaintiff must, at least, show that he has been in possession of the land within a period of five years. But in our judgment the sections referred to do not apply to actions of this kind, (Richardson v. Williamson, 24 Cal. 299;) and, if they did, they are statutes of limitation and do not affect the question of pleading raised here. It was not necessary for the respondent to show in his complaint that his cause of action was not barred by the statute of limitations. It not appearing on the face of the complaint that the action was barred, the question could only be presented by answer.

It is earnestly contended by the appellant that no valid levy of the attachment was shown by the evidence. The constable's return introduced in evidence was as follows: "I hereby certify that I received the annexed writ of attachment on the 2d day of October, 1878, and served the same on the same day by attaching the following described real estate, to-wit: Lots Nos. 12, 13, 14, 15, 16, in block No. 68, in the town of Modesto, Stanislaus county, state of California, and filing a notice thereof with the county recorder of said county, and delivering a copy of said attachment to B. B. Garner, an occupant of said real estate." It is claimed that this return is insufficient to show a valid levy for the reason that it does not show that the occupant of the land was served with notice that the property was attached, nor with a description of the premises sought to be attached, as provided by section 542 of the Code of Civil Procedure. The section referred to provides what shall be done to constitute an execution of the writ. If it be necessary for the return of the officer to set out, specifically, the acts done by him in executing the writ, the return before us is insufficient, as claimed. If, on the contrary, it is sufficient for the officer to make return in general terms that he served the writ by attaching the property, (describing it,) this return shows a valid levy. In order to show that the return was insufficient, counsel for appellant misstates the language of the return. He says: "His return is that he 'served the same by attaching the property [describing it] by filing a notice thereof with the county recorder of said county, and delivering a copy of said attachment to B. B. Garner, an occupant of said real estate.'" The return is not that he served the writ by filing the notice, etc., but that he served the same by attaching the property and filing the notice, etc.

If a general return that he served the writ by attaching the property (describing it) was sufficient, the additional statement therein that he also filed a notice, etc., may be regarded as surplusage, and we have a return showing a valid levy of the writ. The officer serving the writ is required to return the same, "with a certificate of his proceedings indorsed thereon or attached thereto." Code Civil Proc. § 559. If this were an open question, we should be inclined to hold that a general return of service was sufficient, and that it must be presumed, when the officer returned that he had served the writ by attaching the described property, that he had performed every act necessary to such service. Ritter v. Scannell, 11 Cal. 247. But this court has held to the contrary in the latter cases, and we feel that we should adhere to these decisions. Sharp v. Baird, 43 Cal. 579; Watt v. Wright, 66 Cal. 207, 5 Pac. Rep. 91, Gates v. McLean, 70 Cal. 47, 11 Pac. Rep. 489. Sharp v. Baird, supra, is directly in point. The court said in that case: "Section 14 of the Code requires the sheriff to return an attachment 'with a certificate of his proceedings indorsed thereon, or attached thereto.' It is his duty to state in his return what acts he performed in serving the writ, in order that the court may be enabled to decide upon its sufficiency to constitute a valid service. We must assume, therefore, that in these returns the sheriff stated all he did towards making the service; and, as these acts did not constitute a valid service, there was no lien created by the attachments." Watt v. Wright, supra, differs from the case at bar in that in the return passed upon there the officer made return that he had served the writ by doing certain acts, not including some of the acts named in the statute. Gates v. McLean, supra, decided that the very return we are now considering was not sufficient to show a valid levy. It is true, as contended by counsel for respondent, that the action before the court was not between the parties to this action, or their privies, and therefore not conclusively binding upon them; but it is a case directly in point, and should control our decision as to the sufficiency of this return. Kerns v. Dean, 77 Cal. 555, 19 Pac. Rep. 817.

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[1] Sec. 318. No action for the recovery of real property, or for the recovery of the possession thereof, can be maintained, unless it appear that the plaintiff, his ancestor, predecessor, or grantor, was seised or possessed of the property in question within five years before the commencement of the action. Sec. 319. No cause of action or defense to an action arising out of the title to real property, or to rents or profits out of the same, can be effectual, unless it appear that the person prosecuting the action or making the defense, or under whose title the action is prosecuted or the defense is made, or the ancestor, predecessor, or grantor of such person, was seised or possessed of the premises in question within five years before the commencement of the act in respect to which such action is prosecuted or defense made. Sec. 738. An action may be brought by any person against another who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim. Sec. 380. In an action brought by a person out of the possession of real property, to determine an adverse claim of an interest or estate therein, the person making such adverse claim and the persons in possession may be joined as defendants; and, if the judgment be for the plaintiff, he may have a writ for the possession of the premises, as against the defendant in the action, against whom the judgment has passed.

The respondent, recognizing the weakness of his case in this respect, attempted to piece out the constable's return by parol evidence that the acts required by the statute to constitute a valid levy of the writ, and omitted in the return, were actually done. The constable himself was called by the respondent, and it was proposed to prove by him that he had done the acts omitted in the return. This was objected to by the appellant on the ground that it was irrelevant and incompetent; that it was evidence tending to contradict the return of the officer; and that the appellant could not be bound by the acts done by the officer, but not set out in the return, and such acts would not be notice to him. As we read the constable's return this evidence did not tend in any way to contradict it. The offer was not to prove that the return was false in any respect, but to prove that something was done in addition to what was therein recited. Nor do we think the evidence could have been excluded on the ground that the appellant was not bound to take notice of acts done by the officer and not set out in his return. It is conceded that he had notice of the judgment and the issuance of the attachment. The return of the constable, and the recording of the notice of the attachment in the recorder's office, were notice sufficient to put him on inquiry, and, if the return might lawfully be aided by parol evidence, he was bound to take notice of the fact, and he took the land at his peril, and subject to the right of the respondent to make good his title by such evidence. The written return of an officer is not the only evidence of the fact that the writ was properly served; therefore, if the return simply omits to state any fact necessary to a valid service, such fact may be supplied by parol evidence, so long as the facts stated in the return are not varied or contradicted in such way as to affect vested rights. Ritter v. Scannell, 11 Cal. 249; Porter v. Pico, 55 Cal. 172; Davis v. Baker, 72 Cal. 495, 14 Pac. Rep. 102.

The lien of the attaching creditor does not depend upon the return of the officer, but upon the levy made by him, and if he has made the proper levy, and fails to make a proper or any return, the party in whose favor the writ is issued cannot be deprived of his rights under the same, but may, by other evidence, show that a valid levy was made. The same is true of a purchaser under an execution whose title depends upon the validity of the attachment levy. Wilson v. Madison, 55 Cal. 8; Blood v. Light, 38 Cal. 652. The cases cited by counsel for appellant are not in conflict with what we have said. They sustain the proposition that, where the officer states in his return that he did certain acts, as constituting the levy, which do not make the levy valid, subsequent purchasers have the right to rely upon such return as one stating, in effect, that the acts named were all the acts done by him. This doctrine is fully sustained by the authorities. But that is not this case. Here the officer states, in general terms, that he served the writ by attaching the property, and the fact that he proceeded to state, in addition, that he did certain acts, specifically naming them, is not sufficient to entitle a subsequent purchaser to reject the general statement in the return, and maintain that he did nothing but what is specifically set out. The authorities cited, to the effect that an officer cannot amend his return so as to affect rights which have vested on the faith of his return as originally made, have no bearing on the question. There was no offer here to change the return by parol evidence, which certainly could not be done so as to affect vested rights, but to prove something in addition to the facts recited in the return, and entirely consistent with it. It is in no sense an attempt to contradict, vary, or change the return.

It is further contended that the parol testimony was not sufficient to show a valid return. In this we fully agree with counsel for appellant. The only witness who testifies on the subject was the constable, who it was claimed made the levy. He testified that the levy was made 10 years before. It is perfectly apparent that he had no clear recollection of what had been done by him. After his attention had been called to the several papers about which he was expected to testify, his examination proceeded as follows: "*Question.* Under and by virtue of that writ of attachment what did you do? *Answer.* I levied on those lots; attached the lots. I put up notice of that kind, left a notice of that kind with B. B. Garner, the occupant of the property. I gave him a notice similar to this, a copy of the writ, and the notice that the property was attached. That is my recollection of it. *Q.* Then what did you do after giving the notice to Garner, the occupant? *A.* I filed this, or something similar to it, in the recorder's office here. *Q.* Did you do both of those things on the same day? *A.* I think so. I think I did. It was all right here in town, and I think I did it all the same day." And on cross-examination: "*Question.* This is ten years ago, isn't it? *Answer.* Yes, sir. *Q.* Have you any recollection now as to what you did on that occasion? *A.* Yes, sir. *Q.* You have a recollection? *A.* I have a recollection of doing just what I said I done. *Q.* You have a recollection of going to the premises and giving to Barney Garner some papers, have you? *A.* Yes, sir. *Q.* Do you recollect what papers you gave him? *A.* No; I couldn't say exactly what it was, any more than I gave him a copy of the writ of attachment and notice of attachment. That is what I suppose. *Q.* You suppose? *A.* Yes, sir. *Q.* And you only say that because it is your usual custom, isn't it? *A.* Not only that, but because it is my duty as well as my usual custom. *Q.* The question is now, have you any recollection of this particular act that took place ten years ago? *A.* I served a paper on Barney Garner. I can't say whether it was just as that is or not. There might be some difference in it. I couldn't say. There might have been a mistake, the same as there is in the return, but I intended it to be just as that is. *Q.* The question with me is a very easily answered one. Have you any recollection,—definite recollection,—now, as to what you served upon Barney Garner? *A.* I served a copy of the writ of attachment. *Q.* The basis of your testimony now is that you did serve him a copy of it, because that was your usual custom, and because it was your duty? *A.* I know I served a copy of the writ on him. *Q.* You know you served a copy of the writ? *A.* I don't know whether it was just word for word. *Q.* You don't know as to the notice? *A.* No; I wouldn't swear to it. *Q.* Now, let us see. Then, after having served this upon him, you then came and filed it in the recorder's office? That is your recollection? *A.* That is my recollection. It was filed there, I know. *Q.* And you recollect that act—that particular act—ten years ago, do you? *A.* Yes, sir. *Q.* Doing that particular act? *A.* Yes, sir; I am satisfied that I did. *Q.* Didn't you, a few moments ago, say that you could not swear that you did? *A.* I am satisfied that I did. *Q.* Didn't you, a few moments ago, say that you could not swear that you did give him a copy of that notice? *A.* I didn't swear it. I am satisfied that I did, but I am not going to swear that I did. *Q.* You are not going to swear that you did, but you are satisfied that you did? *A.* Yes, sir; I am. I served a notice,—a copy of the writ. I know that." The propriety of permitting the acts of an officer to be shown by parol, where he is required by law to make return thereof in writing, is open to serious question; and, where such proof is allowed, the evidence must be clear and satisfactory.

The evidence of this witness is anything but clear or satisfactory. As to one of the acts necessary to be done by him, viz., the service of the notice, he expressly says on cross-examination that he is not willing to swear that he served such notice, and he did not and would not swear that the other papers served were copies of the originals. It is evident that he testified to these facts, not from personal recollection of them, but because the law made it his duty to do certain things, and therefore he had done them. He presumed that in that instance the officer had done his duty,—a very natural presumption to be indulged in by him under the circumstances. If this evidence was sufficient, title to real estate in this class of cases must rest upon a most uncertain foundation. We know of no rule of law or reason that would justify us in holding it to have been sufficient, and we are clearly of the opinion that it was not. There are other questions discussed in the briefs, but, as the one last mentioned is decisive of the case, the others need not be considered. Judgment and order reversed, and cause remanded.

We concur: PATERSON, J.; THORNTON, J.; SHARPSTEIN, J.

(80 Cal. 393)

HEWES v. McLELLAN *et al.* (No. 9,652.)

(*Supreme Court of California.* Sept. 4, 1889.)

TAX-SALE—DEED—ASSESSMENT.

1. Under Pol. Code Cal. § 3773, providing that "the person who will take the least quantity of land * * * and pay the taxes and costs due, including fifty cents to the collector for the duplicate certificate of sale, is the purchaser," if it appears from the tax-deed that 50 cents was charged for the certificate, instead of the duplicate certificate, the deed will not be invalidated on the ground that the sale was for 50 cents too much. Following Doland v. Mooney, 21 Pac. Rep. 436.

2. The provision in the statute that "the collector may designate" what portion shall be sold, leaves it in the discretion of the collector to sell either a part or the whole. Following Doland v. Mooney, 21 Pac. Rep. 436.

3. Under Pol. Code Cal. § 3785, providing that the deed must recite "substantially the matter contained in the certificate," and section 3776, providing that the certificate must specify "the time when the purchaser will be entitled to a deed," a statement in the deed that the certificate recited that the purchaser would be entitled to a deed on a certain date is sufficient.

4. Under Pol. Code Cal. § 3636, providing that, "if the name of the absent owner is known to the assessor, the property must be assessed in his name; if unknown, the property must be assessed to 'unknown owners,' "—in the absence of any evidence to the contrary, the person in whose name the property is assessed will be presumed to be the owner.

Department 1. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

Freeman & Bates and ***E. W. Ashby***, for appellant. *John H. Boalt*, *Chas. W. Wheeler*, and ***E. A. & E. E. Lawrence***, for respondents.

WORKS, J. Ejectment. The plaintiff based his right to recover on two tax-deeds, alike in form. The deeds were offered in evidence, and excluded on the defendants' objection. This left the plaintiff without any evidence of title, and judgment of nonsuit was rendered against him, from which he appeals.

The only question in the case is as to the validity of these tax-deeds. They were objected to on the following grounds: "(1) The deed shows that 50 cents was charged for the certificate, and hence the tax-sale was for too much by 50 cents. (2) The tax collector offered the entire lot for sale instead of the smallest quantity which any person would be willing to take and pay the tax. (3) That there is no recital in said deed that plaintiff was or would be entitled to a deed in one year. (4) The land was assessed to Thomas Hayes, not to the owner; that being no name in law."

The first and second of these objections are determined against the respondent by Doland v. Mooney 21 Pac. Rep. 436, as we understand that case. If not, we now hold that the deed was not subject to these objections. As to the first, all that can be said is that the deed shows that 50 cents was charged for the certificate, instead of the duplicate certificate, as allowed by the statute.[1] But there appears to have been but one 50 cents charged, which renders this difference in the recital wholly immaterial.

As to the second, the property was offered in the way that was held to have been proper in Doland v. Mooney, supra.

The third objection is based on the provision of the Code which requires the deed to contain the recitals contained in the certificate of sale, one of which was the time when the plaintiff was or would be entitled to a deed. The deed contains the statement that the certificate recited that "the purchaser will, if the property so sold be not redeemed within twelve months from such sale, be entitled to a deed thereof on the 3d day of April, 1882." The requirement of the Code that the deed shall recite when the purchaser will be entitled to it is absurd, and results from the general provision [1] that it shall contain the recitals contained in the certificate, which was enacted, no doubt, without observing that one at least of the recitals, proper in the certificate, would be entirely improper and useless in the deed as the recital of a fact. We think, therefore, that it was sufficient that the deed recited the fact that this statement was contained in the certificate.

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[1] Pol. Code Cal. § 3773, provides that "the person who will take the least quantity of the land, * * * and pay the taxes and costs due, including fifty cents to the collector for the duplicate certificate of sale, is the purchaser."

The fourth objection seems to us to be frivolous. The Code provides: "If the name of the absent owner is known to the assessor, the property must be assessed in his name; if unknown, the property must be assessed to 'unknown owners.'" Pol. Code, § 3636. As the property was assessed in the name of Thomas Hayes, we must presume, in the absence of any showing to the contrary, that he was known by the assessor to be the owner, else the assessment would have been to "unknown owners." The certificate and deed are not required to state the name of the owner, but of the person assessed. Id. §§ 3776, 3786. It is not contended that this was not done in the present instance. The case of Roberts v. Chan Tin Pen, 23 Cal. 263, is cited in support of the objection that the property was not properly offered. That case does not support the contention of counsel. It was there held that the designation of the part of the property to be sold, and which was sold, was of an uncertain quantity, and that the sale was, for that reason, void. In this case there was no designation of a part, the offer being to the party who would take the least quantity of the land and pay the tax. The least that any one was willing to take was the whole. This was a definite amount, about which there could be no uncertainty. The statute in force at the time the sale mentioned in Roberts v. Chan Tin Pen was made, provided that in case the owner did not designate the part to be sold, then "the tax collector shall designate;" while the present statute provides that he may designate, etc. Pol. Code, § 3773. As this change was made by amendment, it may fairly be said that it was the intention of the legislature to leave it to the discretion of the tax collector to offer a part or the whole of the property, as he might think best. But, be this as it may, as the tax collector could find no bidder willing to pay the taxes for less than the whole property, there was no reason for designating a part less than the whole to be sold.

Counsel for respondent say that a deed precisely like the one under consideration was held to be invalid in Frink v. Roe, 70 Cal. 296, 320, 11 Pac. Rep. 820. The decision in that case was that "the tax-deed offered in evidence, executed by E. H. Washburn, tax collector, was properly excluded." The deed is not set out or mentioned in the opinion, except as above stated. We cannot know, therefore, on what ground this court held it to have been properly excluded. We think the deeds offered in evidence were valid, and that the court below erred in excluding them. There are some objections urged against them in this court that were not presented in the court below; but, conceding that objections to the admissibility of evidence that has been excluded can be made for the first time in this court, we hold that these additional objections are not well taken. Judgment reversed, and cause remanded.

We concur: PATERSON, J.; FOX, J.

(80 Cal. 417)

HOUGHTON *et al.* v. CLARKE. (No. 11,907.)

(*Supreme Court of California.* Sept. 5, 1889.)

ATTORNEY AND CLIENT—APPEAL.

1. In an action for services rendered as an attorney it appeared that the agreement was that the fee should be part of certain land when the client's title to it had been established. After a failure to recover the land, the attorney wrote to the client, proposing to go on with the litigation for a larger compensation. A witness testified that the attorney declined to proceed further under the old agreement. *Held*, that the evidence supported a finding that the attorney refused to perform the contract.

2. An excluded question will be presumed to be immaterial, unless the contrary appears from the question itself, or from an offer to prove the facts sought to be elicited by it.

Commissioners' decision. In bank. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

S. O. Houghton and *John Reynolds*, for appellants. *Craig & Meredith*, for respondent.

HAYNE, C. Action by attorneys to recover the value of professional services. Judgment passed for the defendant and the plaintiffs appeal.

It appears that the attorneys were retained in several suits in relation to certain land claimed by the client. During the pendency of the litigation the parties entered into a written agreement, whereby the client agreed to convey, and the attorneys to accept, a portion of the land in full satisfaction of all services rendered and to be rendered by them in the litigation. Nothing was said in the agreement as to whether the conveyance was to be contingent upon success in the litigation, but such was evidently the understanding of the parties; and the attorneys subsequently wrote a letter to the client in which they stated that, "to avoid any question in the matter, we hereby agree that we will not demand any conveyance of your land until your title shall be finally established." It was admitted that the agreement applied to all pending suits. The court found that the conveyance was to be made on condition that the title of the client should be finally established. The title of the client was not finally or otherwise established. It would seem that his success depended upon establishing that a decree in a certain foreclosure suit was valid. One of the cases came before the supreme court, which finally decided that the decree in the foreclosure suit was invalid; from which decision it seems to follow that the title of the client was not good. Nothing further appears to have been done with the other suits. But the attorneys had some idea that they could bring a bill in equity, "with a view of correcting, if possible, the defect in the decree of foreclosure," and that they drafted a bill "for that purpose, and for the purpose of enjoining the judgment." After this the client effected a compromise of the litigation, and in pursuance thereof conveyed to a third party the portion which he was to have conveyed to the attorneys. Since the title of the client was not established, it is clear that the attorneys have no claim upon the theory of performance of their agreement, and they make no such claim. Their position seems to be that they were prevented from performing the agreement by the act of the client in making the compromise. We do not deem it necessary to inquire whether any good could have come out of an attempt through a bill in equity to impart validity to a decree which had been finally decided to be invalid, or whether any different showing could have been made in the other suits; for upon the record before us we think that it must be held that there was no prevention. In this regard the trial court finds that after the decision by the supreme court, above referred to, the plaintiffs "refused to render to defendant any further services as attorneys unless he entered into a new agreement," giving them a larger share of the land; that he refused to enter into such new agreement, and thereupon made the compromise. It is manifest that if the attorneys refused to render further services they cannot claim that they were prevented from rendering them, or complain that the defendant took them at their word. Therefore, unless this finding can be set aside as unsupported by the evidence, the judgment and order appealed from must be affirmed. Such, in our opinion, is the question upon which the decision on this appeal must turn; and we think that the evidence upon the point was substantially conflicting, and that the finding cannot be set aside. It is certain that a letter was written by one of the attorneys to the client, in which the writer proposed to go on with the litigation for a larger compensation, and in which he, after stating that the partnership between him and his associate had been dissolved, said: "I expect to have his assistance in this matter to the end." The explanation given of this letter was that additional services were contemplated by the attorneys, and that it was a mere proposal by one of the former firm without the authority of his associate; and it is argued that "a careful reading of this letter will show that it contains no refusal to proceed under the contract." We think, however, that the client was justified in inferring from the letter that the attorneys were unwilling to proceed upon the basis of the existing agreement. And the wife of the client testified positively that the attorney (who seems to have been the one who had the management of the cases) "told me distinctly that he would not go any further under the old contract;" and that she never would have thought of compromising the litigation except for such refusal. She said she would communicate with her husband, who was then in Sonoma. And in a few days she went to Sonoma, and submitted the letter to him, and presumably told him what was said in connection with it. Apparently without further communication with the attorneys, the compromise was made. This evidence raises a substantial conflict with reference to the question of refusal; and if there was a refusal we think that it was not incumbent upon the client to communicate further with the attorneys.

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[1] Pol. Code Cal. § 3785, provides that the deed must recite "substantially the matter contained in the certificate."

It is contended that there was error in sustaining the defendant's objection to the question at folio 122. The question does not of itself indicate whether the answer to it would have been material or not, and there was no offer to prove the facts sought to be elicited by it. Therefore it cannot be determined from the record whether there was error or not; and, as the appellant must show error, the ruling is no ground for reversal. Marshall v. Hancock, ante, 261. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(80 Cal. 448)

SPOTTISWOOD v. WEIR *et al.* (No. 12,054.)

(*Supreme Court of California.* Sept. 6, 1889.)

EVIDENCE—HANDWRITING—EXPERTS—NEW TRIAL.

1. Evidence tending to prove the signature to a lost deed by its similarity to one alleged to have been affixed by the same person to another deed is not admissible unless the alleged signature has been proved to be genuine.

2. The opinion of a witness as to the genuineness of a signature, derived from comparing it with other signatures, is not admissible when the witness is not an expert.

3. Evidence tending to prove the form and description of letters in an alleged signature of a person is not admissible when there is no evidence to show the form and description of the letters in a genuine signature of that person.

4. When one has testified that he has never seen a certain person write, nor any writing which he knew to be his, his opinion as to the genuineness of that person's signature is not admissible.

5. If the exclusion of certain evidence is proper on any ground, the cause will not be reversed because the objection to it was not sufficiently definite, unless the objection not urged might have been obviated.

6. Where it appears, on a motion for a new trial, that a party has prepared counter-affidavits and served copies of them within the prescribed time, but inadvertently omitted to file them, he may file them after the expiration of the time prescribed.

7. The granting of a new trial on the ground of newly-discovered evidence is a question within the discretion of the trial court.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Shafter, Parker & Waterman and *Nagle & Nagle*, for appellants. *Doyle, Galpin & Zeigler*, for respondent.

WORKS, J. Action to quiet title to real estate. Trial by jury, and verdict and judgment for the plaintiff. The defendants appeal.

The controlling question in the case was as to the execution of a deed for the property in controversy from the plaintiff's grantor to the defendant Elizabeth Weir prior to the deed under which the former claimed title. The alleged deed was not produced, had never been recorded, and was claimed, at the trial, to have been lost. The effort was made to prove the existence of the deed, and that the name of the grantor signed thereto was his genuine signature. It was attempted to prove by the defendant Elizabeth Weir that the signature to the lost deed was the same as the one signed to a purported deed of the alleged grantor, which was produced and shown to the witness. To this the plaintiff objected, on the ground that the signature to the deed, which was attempted to be used by way of comparison, was not shown to be genuine. The objection was sustained, and this is assigned as error. The testimony was properly excluded on the ground stated. It was also objectionable for the reason that the witness was not an expert, and the question called for a mere opinion. Counsel for appellants cite several authorities to sustain their contention that the evidence was competent, but none of them are in point.

It is also claimed that the court below erred in refusing to allow a son of the defendant to testify to the description and form of the letters in the name "A. Hemme," the alleged grantor in the lost deed, from his recollection of it from having seen it before the deed was lost. This evidence might have been competent and important if there had been any evidence tending to show the forms of the letters in the genuine signature of Hemme, but, as there was no such evidence, the exclusion of the proposed evidence was harmless, conceding it to have been competent; and the remark of the court below as to the weight that should be given such testimony was equally harmless for the same reason.

There was an attempt, also, to prove the genuineness of the signature to the lost deed by another witness. The witness testified that he had "seen a few" of Hemme's signatures. Had never seen him write, but had seen a great deal of his handwriting. If he had stopped there his opinion might have been competent, but he was asked: "How do you know it is his handwriting," (meaning the handwriting he had seen,) and answered: "I do not know whether it was or not. It looked like it." He was then asked whether the signature to the deed was Hemme's. To this the plaintiff objected, and the objection was sustained. There was no error in this ruling. The witness did not testify that he knew Hemme's signature; that he had ever seen him write; or that he had ever seen any writing that he knew to have been his. Therefore no foundation was laid for the opinion he was asked to give.

It is claimed by the appellants that the objection to the question was not sufficiently definite. But if the exclusion was proper on any ground, the cause will not be reversed, no matter what was the actual objection made, unless the objection not urged might have been obviated. People v. Graham, 21 Cal. 266; Miller v. Van Tassel, 24 Cal. 463. The court might properly have excluded the evidence without any objection being made. People v. Turcott, 65 Cal. 127, 3 Pac. Rep. 461. It is quite obvious that the objection to this evidence could not have been obviated. The witness showed by his own testimony that he was not competent to give the opinion he was asked to give.

There are other errors assigned upon rulings in the exclusion of evidence, but none of them are well taken.

One of the grounds of the motion for a new trial was newly-discovered evidence. We have carefully read the affidavits in support of and against the motion, and are satisfied there was no error in denying the motion on this ground. There was no error in allowing the plaintiff to file counter-affidavits on the motion after the time fixed by the Code, under the showing made that they had been prepared and copies served, and the filing had been omitted by oversight and mistake. As we view the testimony in this case, the alleged newly-discovered evidence could not properly have changed the result; and for this reason, if for no other, the court below was right in refusing a new trial on this ground. Rainey v. State, 53 Ind. 278. The refusal to grant a new trial on this ground is reviewable in this court only for abuse of discretion, (Hobler v. Cole, 49 Cal. 250;) and newly-discovered evidence as a ground for a new trial is not regarded with favor, (Baker v. Joseph, 16 Cal. 180; Arnold v. Skaggs, 35 Cal. 686.) The showing in this case does not impress us favorably, to say nothing more of it. There was no abuse of discretion in denying the motion. Judgment and order affirmed.

We concur: PATERSON, J.; FOX, J.

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80 Cal. 420

GODFREY v. MILLER. (No. 11,706.)

(*Supreme Court of California.* Sept. 5, 1889.)

INSOLVENCY—PREFERENCES.

In an action to recover property under insolvent act Cal. 1880, § 55, providing that any property transferred by an insolvent within one month before the filing of his petition, with intent to prefer any creditor, to a person who had reasonable cause to believe the debtor to be insolvent, and that his intent was to prevent the property from going to his assignee, may be recovered, it appeared that the insolvent had collected money for defendant, and tortiously converted it; that he had notified defendant that his property would probably be attached the next day; that he turned over to defendant two days before the filing of his petition as an insolvent, and on a Sunday, the property in controversy in part payment of his debt; and that defendant received the property without making such an inspection and trial as he would have made under ordinary circumstances. Defendant testified that he took the property without design to defraud the other creditors of insolvent. The court found that defendant had acquired the property without any reason to believe that insolvent was unable to pay his debts, and without intent to evade any provision of the act. *Held*, that the finding was not supported by the evidence.

PATERSON, J., dissenting.

In bank. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

John Reynolds and *S. L. Rodgers*, for appellant. *J. E. Foulds*, for respondent.

FOX, J. This action was brought by plaintiff, as assignee of the estate of an insolvent debtor, to recover the possession or value of a horse and carriage alleged to have been transferred by the insolvent to defendant, in violation of section 55[1] of the insolvent act. The case was tried by the court, and judgment given for the defendant, from which, and from an order denying a new trial, the plaintiff appealed.

The following is one of the findings: "(10) That the defendant took and received the property described in the complaint from the possession of said A. C. Gilbert within ten days before the filing of his petition as an insolvent debtor, as aforesaid, to-wit, on the 15th day of March, A. D. 1885, but that the same was purchased by the defendant from the said Gilbert for a valuable consideration, in good faith, and without intent to hinder, delay, or defraud any creditor or creditors of said Gilbert, or to violate any provision of the insolvent act of 1880. That at the time of said sale and delivery of said property said defendant had no reasonable cause to believe that said A. C. Gilbert was insolvent, and that such transfer of said property was made with a view to prevent his property from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way hinder, impede, or delay the operation of, or to evade, any of the provisions of said act." It is this finding particularly that is attacked, on the ground that the evidence is insufficient to justify the same. From other findings it appears that on and prior to the 13th day of March, 1885, said A. C. Gilbert had collected moneys for the defendant to the amount of more than $800, including $607 which he had so collected on a note belonging to defendant, and of which last-named collection the defendant was not informed until on the said 13th day of March; that the moneys so collected by Gilbert for defendant had been used by Gilbert for his own benefit, without the knowledge or consent of defendant; that on the 14th of March defendant notified Gilbert by letter that he should call on him for the amount of said last collection; that on the 15th of March, which was Sunday, Gilbert went to the defendant, taking with him the horse and carriage described in the complaint, and informed defendant that he had none of defendant's money, and could not pay him; that certain of his property had been theretofore attached, and he had released the same; that on the day before (the 14th) it had again been attached by another creditor, and that he had been unable to release the same, and that he expected a further attachment would be levied on the following day, (the 16th,) and that if he were allowed time he could work out of his difficulties. He thereupon proposed to defendant that he should take the horse and carriage in part payment of the amount which he had collected on the $600 note, and, after some negotiations, the defendant agreed to take the same and credit Gilbert with the sum of $450 therefor, and the same was thereupon, on the said 15th day of March, delivered to the defendant, who had ever since retained the same. Defendant was not informed by Gilbert that he contemplated filing a petition in insolvency, and he knew nothing of Gilbert's financial difficulties, except what was told him by Gilbert, as aforesaid. Gilbert had been doing a large business, and had theretofore been believed by defendant to be perfectly solvent. The court also found that the defendant did not try the horse before making the purchase, and that he would not, under ordinary circumstances, have made such a purchase without first trying the horse.

The only evidence claimed to be in support of the tenth finding was that given by the defendant, as follows: "Question. Did you know, or did you have any cause to believe, that the transfer of this horse and buggy by Mr. Gilbert to yourself was made with a view to prevent the same from coming to his assignee in insolvency, or to prevent the same from being distributed ratably among his creditors, or to defeat the object of, or in any way to hinder, impede, or delay the operation of, or to evade, any of the provisions of the insolvency act? Answer. No." Before the answer was given the question was objected to as irrelevant and incompetent, and to the order of the court overruling the objection an exception was duly taken. That exception was well taken. In the form in which the question was put, it should not have been allowed. There were five questions in one. Which question should he answer? Which one did he answer? Whether he "had any reason to believe" was a question for the court, and not for the witness. Witnesses are to testify to facts, and from them the court is to determine what belief may properly be founded upon them. But in the view we take of this case this error becomes immaterial. The witness further testified that Gilbert had the horse and cariage long before he collected the money for him; and also that he, the witness, took the horse and carriage to save himself.

In view of this evidence, understanding that it is all there was on that subject, and of all the findings in the case, we do not see how this tenth finding can stand. If the transfer was not made in the usual and ordinary course of business, the statute makes that fact itself *prima facie* evidence of fraud. This certainly was not. It was made on a Sunday, between one attachment levied on Saturday and another that was expected on Monday, of both which facts the defendant was advised. The defendant took the property "to save himself," according to his own testimony, and also without trying it; a thing which he says himself he would not do under ordinary circumstances. It is true, *prima facie* evidence may always be overcome by other sufficient proof; but, under the circumstances developed here, we do not think there is other sufficient or any proof to sustain this finding. Even if Gilbert did not tell him in so many words that he contemplated filing a petition in insolvency, he must have had good reason to believe, from the facts which are found and undisputed, that Gilbert was in an insolvent condition; and it is certain that he took the property to prevent it being attached by some other creditor, and therefore the taking was contrary to the tenth finding, with intent to hinder, delay, and defraud any creditor or creditors of Gilbert. It was taken "to save himself," as against anticipated proceedings which would subject it to the claims of other creditors; a fact not consonant with the "good faith" found by the court. Two days afterwards the petition in insolvency was filed. It is hardly possible that Gilbert did not contemplate it on the Sunday when this singular transaction occurred, and enough was then brought home to the knowledge of defendant to put him upon inquiry, and to make him know that a preference was offered to him in fraud of other creditors. He was, in fact, put upon notice of the insolvency of Gilbert. "The fact that a sale of goods by an insolvent is not made in the usual and ordinary course of business is sufficient to charge the purchaser with notice of the insolvency of the seller." Ohleyer v. Bunce, 65 Cal. 544, 4 Pac. Rep. 549.

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[1] Section 55 provides that any property transferred by an insolvent within one month before filing his petition, with intent to prefer any creditor, to a person who had reasonable cause to believe the debtor to be an insolvent, and that his intent was to prevent the property from going to his assignee, may be recovered.

But it is urged that the defendant did not stand in the same relation to Gilbert that other creditors did, and therefore had a right to this preference; that the debt due to him was for moneys held by Gilbert in a fiduciary capacity, thus creating a liability from which Gilbert could not be discharged in insolvency. To our minds that point militates against the defendant rather than in his favor. If he was better protected than the others, all the more reason why he should not be a party to an attempt to defraud them. Judgment and order appealed from reversed.

We concur: Beatty, C. J.; Works, J.; Sharpstein, J.

Thornton, J., (*concurring.*) I concur in the judgment. The findings show that the judgment should be reversed. See Washburn v. Huntington, 21 Pac. Rep. 305.

I dissent: Paterson, J.

(81 Cal. 42)

Martin v. Hudson. (No. 12,917.)

(*Supreme Court of California.* Oct. 1, 1889.)

Contract—Mutual Assent.

Where plaintiff testifies that "agreement with Hudson [the defendant] was made September 9th at my office in Fresno; next saw Mr. Hudson four or five days thereafter; came and asked me to release him;" and defendant testifies that after the paper was made he next saw plaintiff at his office on the 15th of September, and said, "Mr. Martin, [the plaintiff,] I would like you to give up that contract,"—the evidence is sufficient to support a finding that defendant had asked to be released from the offer before plaintiff had accepted it.

Commissioners' decision. In bank. Appeal from superior court, Fresno county; B. Campbell, Judge.

Church & Cory, for appellant. *Wharton & Short* and *D. S. Terry*, for respondent.

Belcher, C. C. This action was brought to enforce the specific performance of an alleged contract to sell and convey certain real property. The court below gave judgment for the defendant, and the plaintiff appeals. The record shows that on the 9th day of September, 1887, the defendant executed and delivered to plaintiff a paper, by which he agreed to sell and convey the property in question for the sum of $5,000 —one-half payable on delivery of deed, and the balance one year thereafter, with interest at the rate of 8 per cent per annum; the "contract" to be "valid till November 1, 1887, and thereafter till revoked in writing." The court found that the paper was executed as above stated; that no consideration whatever ever passed from the plaintiff to the defendant therefor; and that it was a mere proposal or offer to sell. It then further found "that thereafter, and on or about the 15th day of September, 1887, and before the plaintiff had in any way accepted said offer, or agreed to accept the same, the defendant went to the plaintiff and requested the return of said offer, and asked to be released therefrom, and verbally withdrew the same."

It is claimed by counsel for appellant that this finding was not justified by the evidence, but in effect admitted that if it was justified the judgment should be affirmed. Counsel say in their reply brief: "There is no question, and no contention to the contrary has been made, that a proposal to sell land, made without consideration, may be withdrawn before acceptance. Had the offer made by defendant to plaintiff to sell him the land been withdrawn before acceptance, that would have been an end of the matter, and plaintiff have had no standing in court. Here, then, is the question, and the only question, to be considered in this case: Was said offer accepted before rescission, or the attempted rescission?" We think there was evidence tending to support the finding. The plaintiff was a witness, and on cross-examination testified: "Agreement with Hudson was made September 9th at my office in Fresno; next saw Mr. Hudson four or five days thereafter; came and asked me to release him." Defendant was also a witness, and testified that after the paper was made he next saw the plaintiff at his office on the 15th of September, and said: "Mr. Martin, I would like you to give up that contract." No point is or could be made that a verbal withdrawal by respondent of his offer to sell, if made before acceptance, was not sufficient; but the contention of appellant is that there was no verbal or other withdrawal or attempted withdrawal by him until the 17th day of September, when he served a written notice of rescission, and that prior to that time appellant had verbally and unqualifiedly accepted the offer. But, in view of the testimony above quoted, we think this contention cannot be sustained. As we cannot say that the finding was not justified by the evidence, it follows, in our opinion, that the judgment and order appealed from should be affirmed.

We concur: Hayne, C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

81 Cal. 38

McGrath *et al.* v. Hyde. (No. 11,666.)

(*Supreme Court of California.* Oct. 1, 1889.)

Review on Appeal.

1. Under Code Civil Proc. Cal. § 939, an exception to the decision on the ground that it is not supported by the evidence will not be considered, unless the appeal is taken within 60 days after judgment.

2. An allegation in a suit to cancel a deed, that the alleged maker never had, after the making of the deed, sufficient strength of mind or body to deliver it, "and the said deed never was delivered by" him, sufficiently raises the question of delivery, when denied in the answer, to require a finding on such issue.

In bank. On rehearing. For opinion on hearing in department, see 21 Pac. Rep. 948.

E. B. & S. W. Holladay, (*Craig & Meredith*, of counsel,) for appellant. *M. Cooney*, for respondents.

Sharpstein, J. The transcript contains a bill of exceptions, and the appeal is from the judgment. The findings were filed on the 7th day of January, 1885, and the notice of appeal on the 10th day of October, 1885. As the appeal was not taken within 60 days after the rendition of the judgment, we cannot review an exception to the decision on the ground that it is not supported by the evidence. Code Civil Proc. § 939. The finding "that the said Michael Hyde did not at any time deliver said deed to said Ellen Hyde, the person named therein as grantor," is attacked by appellant on two grounds: (1) That it is not supported by the evidence; (2) that it is outside the issues. For reasons already stated, we cannot consider the first of these grounds; and the second, in our opinion, is untenable. The allegation of the complaint "that if the said Michael Hyde ever signed or acknowledged the said instrument he was forced and unduly influenced to do so by the defendant, and he had not then, or at any time since the 8th day of May, 1882, sufficient strength of mind or body to execute or deliver the said deed, or to understand its provisions or covenants, and the said deed never was delivered by said Michael Hyde to the defendant," in our opinion is an allegation of non-delivery of the deed. This, and all the other allegations of the complaint, were denied by the answer of the defendant. That, we think, presented an issue upon which it was the duty of the court to find. As the court found upon all the issues, and the findings support the judgment, it must be affirmed.

We concur: McFarland, J.; Fox, J.; Thornton, J.; Works, J.; Paterson, J.

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80 Cal. 519

Gross v. Kelleher *et al.* (No. 12,388.)

(*Supreme Court of California.* Sept. 14, 1889.)

Review on Appeal.

A motion by defendant for a new trial was granted, unless the plaintiff remitted $25 of the judgment. Defendant's notice of appeal was from the order granting a new trial. There was nothing to show that plaintiff had remitted the $25. *Held* that, as it appeared from the record that the judgment appealed from was vacated by the order granting a new trial, there was nothing before the court for consideration.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Moses G. Cobb, for appellant. *Joseph Mee*, for respondent.

Works, J. This is an appeal from an order granting a new trial to the appellant on her own motion, and from a judgment against her. The order appealed from is as follows: "The motion of defendant Catherine Kelleher for a new trial having this day come on to be heard, and the matter having been argued and submitted to the court for decision, and the matter being fully considered, ordered that the same be granted, unless plaintiff forthwith file a waiver of twenty-five ($25) dollars of the money part of the judgment herein. If such waiver be filed, then that the new trial be denied. Filed August 5, 1887." The notice of appeal was as follows: "You will please take notice that the defendant in the above-entitled action hereby appeals to the supreme court of the state of California from the order of said court granting her motion for a new trial, made on the 5th day of August, and more particularly from so much of said order as permits the plaintiff to prevent the said grant of a new trial by the remission of $25 damages in the judgment recovered by him; and also from the judgment therein entered in the said superior court on the 13th day of June, 1887, in favor of the plaintiff in the said action, and against said defendant, and from the whole thereof."

There is nothing in the record showing or tending to show that the plaintiff ever remitted the amount mentioned in the order. If not, the order was one granting a new trial. We must presume the amount was not remitted, as the notice of appeal was from an order granting a new trial. This condition of the record renders it unnecessary for us to examine and pass upon the questions attempted to be presented upon the merits, as the judgment appealed from was vacated by the order granting a new trial; but we may say that we have carefully read the appellant's brief and the transcript, and are satisfied that no error was committed by the court below of which she has any reason to complain. If any error was committed, it was against the respondent, in requiring him to remit a part of his judgment or submit to a new trial. Judgment and order affirmed, with 20 per cent. damages.

We concur: Fox, J.; Paterson, J.

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81 Cal. 11

Wise v. Walker *et al.*

(*Supreme Court of California.* Oct. 1, 1889.)

Judgment—Res Adjudicata.

Defendants, first mortgagees, brought an action to foreclose, and made plaintiff, a second mortgagee, a party defendant. Pending suit, plaintiff bought the mortgagor's interest. After judgment, but before sale, a receiver was appointed, who collected the rents and profits until the sheriff's deed was given, defendants having purchased at the sale, when an account was had, and by order of court the amount of rents collected was applied in payment of a deficiency from proceeds of the sale. Defendants took possession and collected the rents pending an appeal from the judgment of foreclos-

ure, which resulted in reversal. A new trial was had, a similar judgment rendered, and defendants again bought at sheriff's sale. On accounting before the court on the second trial, defendants had their mortgage debt credited by the amount received from the receiver, and by the amount of all the rents they had collected up to that time. *Held*, that plaintiff could not maintain an action against them to recover the rents so collected on the ground that he was the owner during the time defendants collected them. Having been a party to the foreclosure proceedings, and having acquiesced in the accounting, he is bound by the judgment therein. Paterson, J., dissenting.

On rehearing. For former opinion, see 20 Pac. Rep. 81.

Edward P. Cole and *Roger Johnson*, for appellant. *Sidney V. Smith*, for respondents.

Per Curiam. The judgment in this case was affirmed on December 26, 1888. A rehearing was afterwards granted, and the case has been reargued and submitted. The reargument and reconsideration of questions involved have convinced us that the conclusion reached on the former hearing is correct, and the judgment is affirmed for the reasons stated in the opinion herein filed December 26, 1888. 20 Pac. Rep. 81.

Paterson, J., dissenting.

(80 Cal. 528)

Forney v. Forney. (No. 12,512.)

(*Supreme Court of California.* Sept. 16, 1889.)

Divorce for Drunkenness.

Under Civil Code Cal. § 106, providing that habitual intemperance as a ground for divorce shall be such intemperance as "would reasonably inflict a course of great mental anguish upon an innocent party," a complaint in divorce alleging intemperance as a ground, in the language of the statute, is sufficient without alleging the different acts of intoxication, and how the anguish was caused.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Charles J. Swift, for appellant. *Burnett & Bartlett*, (*Lester G. Burnett*, of counsel,) for respondent.

Works, J. Action for divorce. Finding and judgment for plaintiff. The appeal is from the judgment, and the case comes to us on the judgment roll. The grounds for divorce are stated in the complaint as follows: "That for four years and eight months last past said defendant has been, and still is, guilty of habitual intemperance, and is habitually intemperate from the use of intoxicating drinks to that degree that the intemperance of defendant reasonably inflicts a course of great mental anguish upon said plaintiff, and to that degree which did in fact during that whole time inflict, and still inflicts, a course of great mental anguish upon her; and that during all that time said plaintiff has been an innocent party with respect to said intemperance. That defendant was so intemperate from the use of intoxicating drinks, then and theretofore, and acted so cruelly and in such a threatening manner towards the plaintiff in consequence of such intemperance, that it became necessary for her to, and she thereafter did, on August 13, 1884, at Cayucas, San Luis Obispo county, Cal., leave the defendant, and has not returned to him. That the course and conduct of defendant aforesaid and his habits of intemperance have not changed for the better at any time since the plaintiff so left him." The findings of the court are, in effect, the same as the allegations of the complaint. The contention of the appellant is that the complaint and findings are defective and insufficient, for the reason that they state conclusions of law, and not the facts; that it is not enough to allege habitual intemperance to a degree which caused great mental anguish, but the extent of such intoxication, and the acts done by him while in that condition, tending to cause such mental anguish, and reasonably sufficient to bring about such a result, must be specifically alleged and found. The Code provides: "Habitual intemperance is that degree of intemperance from the use of intoxicating drinks which * * * would reasonably inflict a course of great mental anguish upon an innocent party." Civil Code, § 106. The complaint and findings are in the language of this provision of the Code. The contention of counsel for the appellant, as we understand him, is that this is not enough; that the acts and conduct of defendant, showing that he was intoxicated to the extent required by the statute, must be set forth. In other words, the complaint must allege just how often he was intoxicated, and to what extent, on each occasion; and what he did and said when in that condition, tending to cause mental anguish. We are not inclined to this view. The allegations contained in the complaint were allegations of fact, not conclusions of law, and, being charged in the language of the statute, and found in the same way, the complaint and findings were sufficient. Judgment affirmed.

We concur: **Fox, J.**; **Paterson, J.**

(80 Cal. 514)

Hasshagen v. Hasshagen *et al.* (No. 12,401.)

(*Supreme Court of California.* Sept. 14, 1889.)

Declarations of Trust—Statute of Frauds.

1. Plaintiff's decedent conveyed certain land to defendant, his brother, to avoid his creditors. Defendant at the time signed and acknowledged a deed of the land to his brother, which was not delivered, and the nature of the deed was not shown. Defendant testified that he afterwards paid for the land, and the deed was destroyed by consent. *Held*, that the deed did not constitute a written declaration of trust.

2. Testimony of defendant, taken down in writing after the death of his brother, and in settlement of the estate, is not a written declaration of trust, even if defendant admitted therein that there was such a trust.

3. A statement of account, given to the widow of deceased, merely showing the amount defendant had received as rent, and certain expenditures made, did not amount to a written declaration of trust.

4. Under Code Civil Proc. Cal. § 1971, and Civil Code, § 852, in order to establish a trust over any estate in real property it must be proven that the trust was created "by operation of law, or a conveyance or other instrument in writing."

Department 1. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Minnie C. Hasshagen, as administratrix of Louis Hasshagen, deceased, sued John G. Hasshagen and others, to declare a trust in certain real estate, for a reconveyance, and an accounting. Judgment for plaintiff, and defendants appeal. Code Civil Proc. Cal. § 1971, provides that no estate in real property, nor any trust therein, can be established otherwise than by operation of law, or a conveyance or other instrument in writing.

Joseph Kirk, for appellants. *Taylor & Haight*, for respondent.

Works, J. This action was brought to declare an express trust in land. The court below found that the conveyance from the plaintiff's intestate to the defendant "was made without consideration, and on the trust expressed and declared by said John in writing, that he, said John, would hold the premises therein conveyed for and to the use of said Louis, and that said Louis might have the same back again, together with all rents issuing therefrom, whenever desired by him, said Louis." It is contended by the appellants that there was no evidence to support this finding. The contention of the respondent is that the written declaration of the trust was established by —*First*, proof of the making, signing, and acknowledging of a deed of reconveyance at the time the property was conveyed to the defendant; *second*, by the testimony of the defendant, given in the matter of the estate of the deceased, in which he admitted the trust, the testimony being taken down in writing at the time; *third*, a statement of account.

1. The deed referred to, and claimed to have been a written declaration of trust, was not shown to have contained any such declaration. The evidence shows that at the time the deed from the deceased to the defendant for the property in controversy was delivered, a deed from the defendant back to the deceased was signed and acknowledged, but not delivered. The deed, not having been delivered, was not effective for any purpose; but, if it had been delivered, its contents were not proved, and we cannot know whether it was an absolute conveyance, a declaration of trust, or what not. Besides, the uncontradicted testimony of the defendant is that the conveyance from his brother to him was made by the former to avoid litigation with his creditors; that this deed for a reconveyance was made and retained by the defendant; that he afterwards paid his brother for the property in full; that he and his brother had a settlement of their affairs, and that the deed, instead of being delivered, was by the mutual consent of the parties destroyed. We cannot see, therefore, how this deed could be held to constitute a written declaration of a trust.

2. The evidence given by the defendant, and taken down in writing, did not constitute a written declaration of a trust, even if he had admitted therein that there was such a trust. But, instead of admitting any such trust, he positively denied it, and asserted that he had paid for the property in full. He did admit that there was a verbal understanding between him and his brother that the property was to be reconveyed. He says: "We had a verbal understanding that whenever he paid me what he owed I would deed him the property;" and says: "If paid now the money I gave to Louis Hasshagen, I don't think I would have any objection to reconveying this property to his heirs." This evidence had some tendency to show a verbal agreement that the property should be held in trust, but not that such a trust was declared in writing. This testimony, relied upon as a declaration of trust, was given long after the making of the deed, after the death of Louis Hasshagen and in the settlement of his estate.

3. The statement of account, relied upon as establishing a trust, was not one given by the defendant to the deceased, but to the plaintiff, his widow, and was merely a statement showing the amount the defendant received as rent, and how he had paid it out; some of the expenditures being for insurance, interest, and other expenses, and some payments to the plaintiff. There was nothing in this which could amount to a written declaration of a trust. There was an entire absence of any evidence to sustain the claim of an express trust, or to support the findings of the court below that there was any such trust. For this reason the motion of the defendant for a nonsuit should have been sustained, and the findings referred to are not sustained by the evidence. There was some evidence of circumstances tending to show that there was a verbal understanding that the property was held for the benefit of the deceased, such as the collection of the rents by the deceased, and payment of rents collected by the defendant to the plaintiff after the death of her husband. The explanation of these transactions by the defendant is not satisfactory. He says the money paid to her, and allowed by him to be collected and used by the brother, was merely by way of gift. But this cannot help the respondent's case. In order to entitle her to recover it was necessary for her to prove that the trust attempted to be established was created or declared in writing, or by operation of law. Civil Code, § 852; Code Civil Proc. § 1971; Feeney v. Howard, 21 Pac. Rep. 984; Barr v. O'Donnell, 76 Cal. 469, 18 Pac. Rep. 429; Donohoe v. Mining Co., 66 Cal. 327, 5 Pac. Rep. 495; Hellman v. McWilliams, 70 Cal. 452, 11 Pac. Rep. 659. There was nothing shown which could take this case out of the statute. Feeney v. Howard and Barr v. O'Donnell, supra. Nor was there anything in the transaction which could create a resulting trust. Feeney v. Howard, supra; Mescall v. Tully, 91 Ind. 96, 97; Barr v. O'Donnell, supra.

It is evident from the facts disclosed by the evidence that the original intent and purpose of the deceased in conveying the property was to hinder and defraud his creditors. The evidence of the defendant is that this purpose was finally abandoned, and he paid the consideration named in the deed. But whether he did or not, the object of the deceased being to defraud his creditors, and the agreement to reconvey, if one was made, having been verbal, there is the strongest reason in this case for a strict application of the statute of frauds. Judgment and order reversed, and cause remanded.

We concur: **Fox, J.**; **Paterson, J.**

(80 Cal. 626)

Romine v. Cralle *et al.* (No. 13,228.)

(*Supreme Court of California.* Sept. 30, 1889.)

Dismissal of Appeal.

1. The supreme court can, after an order dismissing an appeal, and after a *remittitur* is sent to the court below, modify the order of dismissal so as to read "without prejudice."

2. A motion for a new trial was heard and denied October 15, 1888. Defendant excepted, but took no appeal. February, 1889, the motion was again called up, and denied on the ground that it had been decided in October. *Held*, that the order of February was not appealable, and an appeal from the order in October, taken more than 60 days thereafter, came too late.

3. The order denying the motion for new trial was not void because made in the absence of one attorney of record, where another was present, and the record shows no lack of authority to appeal on his part.

In bank. Appeal from superior court, Sonoma county; Walter H. Levy, Judge. *John F. Burris*, (*Carroll Cook* and *R. M. Swain*, of counsel,) for appellants. *Laughlin & Thompson*, for respondent.

Thornton, J. Motion by respondent (plaintiff in court below) to dismiss two appeals. One of these appeals is from the judgment, and the other from the order denying a new trial. The appeal from the judgment is the second appeal from it. It appears that on the 18th day of January, 1889, an appeal from the judgment in this case was dismissed. On the next day the *remittitur* was sent to the court below. On the 22d of the same month the order dismissing the appeal was, on motion of appellant's counsel, modified so as to read "without prejudice." It is now urged that this court had no power to modify the order of dismissal after the *remittitur* had been issued; but we are of opinion that this court had, notwithstanding this fact, power over the order, and to modify it so as to permit the prosecution of a second appeal. The matter of prosecuting a second appeal from the judgment was one peculiarly within the power of this court, with the exercise of which power the lower court had no concern. This court could, in the exercise of its discretion, allow the plaintiff to prosecute a second appeal, and it was not divested of such power by the issuance of the *remittitur* on the dismissal of a prior appeal. The modification was one still within its discretion. We think the modification of the order of dismissal was properly made; therefore the motion to dismiss the appeal from the judgment is denied.

It is asked that the appeal from the order denying a new trial should be dismissed for the reason that a motion for a new trial had been made at a prior day, and was heard and denied by an order entered on the 15th day of October, 1888. To this order defendant, (appellant,) by his counsel, excepted, but no appeal was taken from it. The notice of this motion was served and filed on the 8th of October, 1888. On the 25th of February, 1889, this motion was again called up for hearing, when objection was made by counsel for plaintiff that it had been heard and decided on the 15th day of October, 1888, and should not be heard, and, if heard, should be denied. Thereupon the court denied the motion. It is objected that the order of the 25th of February, 1889, is not an appealable order. This contention must be sustained. The appeal should have been taken from the order of the 15th of October. As an appeal from the order last named, as it was taken more than 60 days after it was made, it was too late. It is said that the order of the 15th of October, denying the motion for a new trial, should be regarded as void, because it was made in the absence of one of the attorneys of record. But another of the attorneys of record appeared for the moving party. It is said that the latter attorney was not authorized to appear. The record shows no lack of authority. He signed the answer of the defendant (the moving party) as one of his attorneys. If he was not authorized to appear, that should have been inquired into by the court below. We cannot consider it. The record filed herein shows that he had authority, and this court cannot go behind the record. The motion to dismiss the appeal from the judgment is denied, and the motion to dismiss the appeal from the order denying a new trial is granted. So ordered.

We concur: **McFarland, J.**; **Fox, J.**; **Sharpstein, J.**; **Works, J.**; **Paterson, J.**

(80 Cal. 629)

Moulton v. McDermott *et al.* (No. 12,089.)

(*Supreme Court of California.* Oct. 1, 1889.)

Ejectment—Parties—Tenants in Common.

Under Code Civil Proc. Cal. § 384, providing that "all persons holding as tenants in common, * * * or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party," one of several co-distributees of the estate of a decedent may maintain ejectment against another person in possession of the entire premises distributed.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge. *H. A. Powell*, for appellant. *Carl T. Graef*, for respondents.

Hayne, C. Ejectment. The answer, among other things, pleaded a non-joinder of parties plaintiff, as follows: "That there is a defect of parties plaintiff, which defect does not appear on the face of the complaint, for the non-joinder of Calvin R. Moulton, Ellen N. Verrinder, *nee* Moulton, and Frank E. Moulton, in this, viz.: That plaintiff claims as the devisee of one E. S. Moulton, deceased, who in his life-time pretended that he had a right of property in the parcel of land described in the complaint, and made plaintiff and other said parties co-devisees thereof." The plaintiff gave evidence tending to show that the defendant was the tenant of one Mrs. Chase; that while defendant was such tenant Mrs. Chase conveyed to one E. S. Moulton; that Moulton died, and a decree of distribution of his estate was regularly made, "which distributes the premises in controversy, three-quarters thereof to Mary S. Moulton, the plaintiff; one-twelfth thereof to Calvin R. Moulton; one-twelfth thereof to Ellen N. Verrinder; and one-twelfth thereof to Frank Moulton." The defendant objected to the admission of this decree "on the ground that it shows title in others than the plaintiff, and that it only shows she has received a portion of the title of an outside party." This objection was overruled, and the defendant excepted to the ruling, and specified the same as error. The plaintiff had a verdict and judgment, and the defendant moved for a new trial. As appears from a bill of exceptions, the court "granted said motion on the ground of non-joinder of parties plaintiff, and that the co-distributees of plaintiff should have joined with her as plaintiffs in the action; the court at the same time expressly overruling all other grounds urged by defendants on such motion." The plaintiff appeals from the order granting a new trial.

We think that the order was erroneous. So far as is shown by the record, the co-distributees were tenants in common. And it is expressly provided by statute that "all persons holding as tenants in common, joint tenants, or co-parceners, or any number less than all, may jointly or severally commence or defend any civil action or proceeding for the enforcement or protection of the rights of such party." Code Civil Proc. § 384; Morenhaut v. Wilson, 52 Cal. 268, 269; Himes v. Johnson, 61 Cal. 259.

No brief has been filed for the respondent, and we do not see that there was any error at law occurring at the trial. We therefore advise that the order granting a new trial be reversed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order granting a new trial is reversed.

(81 Cal. 9)

In re TRAYLOR'S ESTATE. (No. 13,200.)

(*Supreme Court of California.* Oct. 2, 1889.)

WILLS—CONSTRUCTION.

A clause in a will, requiring the executors "to purchase at a price not exceeding $——, a tract of land at or near the residence" of certain persons, for the latters' use during life as a cattle pasture, without any other description of the land to be bought, is void for uncertainty.

Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Petition by Elizabeth H. Siddall for construction of the will of Elizabeth D. Traylor, deceased. From the decree rendered certain contestants appeal.

Selden S. & George T. Wright, (*Harmon Bell*, of counsel,) for appellants. *D. Wm. Douthitt*, (*J. C. Bates*, of counsel,) for respondent.

MCFARLAND, J. This is an appeal taken by Joseph and Margaret Wilson and Kitty Bell from a judgment of the court below construing the will of the deceased, and ordering a distribution of the residue of the estate to the heir at law. The only point made by appellants is that the court erred in holding void for vagueness and uncertainty the following clause of the will: "I also require my said executors to purchase, at a price not exceeding $———, a tract of land at or near the residence of said Wilsons, at Santa Barbara, for a cattle pasture; the free and exclusive use of which the said Wilsons shall have during their life-time, and the survivor of them, but which tract of land shall at the death of both of them vest in fee in their daughter, Kitty Bell." We think that the judgment of the superior court was right. Counsel for appellants argue the case, mainly, as if the only question were, did the failure to state the amount to be expended render the devise void? But that is only half of the problem. If there had been any certainty in the description, or, indeed, any description at all of the land directed to be purchased, it may be that the will should have been construed as directing the purchase of the land described, no matter what it might cost. But when we go from the blank dollar-mark to look for a description of the land, we come upon another blank as empty as the first. There is no description, either by common name, or by metes and bounds, or by quantity, or by any other sort of designation, by which any particular piece of land can be indicated. The case is very different from the cases cited, where bequests for the education, or support, or maintenance, etc., of infants and others, without specifying the amounts to be used for such purposes, have been maintained. In such instances the amount necessary for the purpose, considering the station in life of the legatee and the condition of the estate, can readily be ascertained with reasonable certainty. But in the case at bar there is no path that will lead the inquirer out of the labyrinth. Judgment affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

(81 Cal. 56)

DUNCAN v. THOMAS. (No. 12,028.)

(*Supreme Court of California.* Oct. 4, 1889.)

EXECUTORS AND ADMINISTRATORS—CLAIMS AGAINST ESTATES—APPLICATION OF PAYMENTS.

1. A claim against the estate of a decedent, presented to the personal representative, for services rendered, which gives the number of days' service in each month, the total for each year, and the grand total for all, with the wages per day, stating the full amount, and then credits the amounts received on account during each year, leaving a certain balance, is sufficient in form.

2. In the absence of application of payments by the parties, payments in each year are not applied on the services for the corresponding year, but, under Civil Code Cal. § 1479, on the obligation earliest in time, and the statute of limitations does not run against balances due on certain years, where there are subsequent payments.

Department 1. Appeal from superior court, Santa Clara county; FRS. E. SPENCER, Judge.

T. H. Laine, for appellant. *Wm. B. Hardy*, for respondent.

FOX, J. Action for balance due for work and labor. Claim duly presented to administratrix, and rejected; action brought thereon; issue joined; judgment for plaintiff; motion for new trial denied, and defendant appeals.

The first point made by appellant is that the claim, as presented to the administratrix, was unintelligible and insufficient. The claim was sufficient in form, under the rule prescribed in Fallon v. Butler, 21 Cal. 25, and Estate of Swain, 67 Cal. 641, 8 Pac. Rep. 497. And the complaint stated facts sufficient to constitute a cause of action; from which it follows that it was not error to overrule defendant's objection to the introduction of evidence in support of it.

The facts, as shown by the claim presented, the complaint and the findings, (which are fully supported by the evidence,) are briefly stated, as follows: Decedent was the owner of a grain warehouse at the town of Gilroy. Plaintiff was employed by him as foreman of such warehouse, and rendered service as such on such days as service was required, during every month, from January, 1881, to June, 1885, both inclusive; the service in the different months varying from 6 days to 27 days. He kept a tally of the service by the day, and charged for it at the rate of $2 per day, which was the minimum of value proved at the trial. No settlement seems ever to have been had, but decedent made payments from time to time on account of such service, and shortly before his death stated to his banker that he was indebted to plaintiff, and was looking over his account to see if he had a balance sufficient to pay him up. The account, as stated to the administratrix, and as sued upon, gave the number of days' service in each month, the total number in each year, and the grand total for all the years and months; being 951 days, at $2 per day, $1,902. It also credited the amount of money received on account thereof in each year, to-wit, 1881, $380; 1882, $200; 1883, $200; 1884, $250; 1885, $100; total, $1,130; and leaving a balance of $772. There was no conflict of evidence as to the number of days' service, or when it was rendered, or as to its value; and the amount of credits to which the estate was entitled was accepted as being correctly stated in the claim as presented.

Defendant pleads payment, and the statute of limitations, and under these pleas insists that the payments of each year must be applied to the service of the corresponding year, and that, when they are so applied, whatever balance there was on account of service rendered prior to July, 1883, (decedent having died July 3, 1885,) is barred by the statute of limitations, and that this will show that all the service rendered since that time has been fully paid for or nearly so. We know of no law, and we are cited to none, which will support such a contention. On the contrary, in a case like this, of several obligations, where neither party has made any express application of the fund paid to any particular obligation, the law itself applies each payment to the extinguishment of the obligation earliest in date of maturity. Civil Code, § 1479. So applied, no part of this claim is barred by the statute of limitations. The court found in favor of the plaintiff for the full amount of his claim, $772, and the evidence sustains the findings. Judgment and order affirmed.

We concur: PATERSON, J.; WORKS, J.

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80 Cal. 460

HERRLICH v. McDONALD. (No. 12,235.)

(*Supreme Court of California.* Sept. 7, 1889.)

TROVER AND CONVERSION—PLEADING.

A complaint alleged that plaintiff placed in defendant's hands $3,600 with which to buy mining stock, which she agreed to use for that purpose; that on a certain day defendant bought, for account of plaintiff, $600 worth of stock; on a certain other day, $1,500 worth; and on another day, $1,500 worth. *Held*, that the complaint contained a sufficient allegation of the value of the property to support a money judgment for the amount for which defendant had sold it.

Department 1. Appeal from superior court, city and county of San Francisco; OLIVER P. EVANS, Judge.

Action by Herrlich against McDonald. Judgment for plaintiff. Defendant appeals.

Whittemore & Sears and *W. B. Tyler*, for appellant. *Charles F. Hanlon*, for respondent.

WORKS, J. This action was brought by the respondent against the appellant to recover certain mining stock, and the dividends thereon, or their value. It was alleged in the complaint, and the court found, in substance, that the plaintiff had intrusted to the defendant a large sum of money with which to purchase mining stock for the former; that she, the defendant, purchased the stock and retained it, and collected the dividends; that the plaintiff demanded said stock and dividends, but the defendant refused to surrender or pay the same. The court found that the defendant had invested for the plaintff the sum of $3,600 in mining stock, and had sold the same at a profit, and had realized therefrom net, over and above all payments made to the plaintiff, $4,950, and found certain credits in favor of the defendant which reduced the amount to $4,705, for which sum judgment was rendered.

The appellant contends that the complaint contained no allegations upon which the money judgment was proper, and that the findings do not support such a judgment. The claim is that the action was one to recover the stock, and that the complaint contained no allegation as to the value of the stock as a basis for a money judgment. The complaint is not as specific in this respect as it should have been, but we think that it was sufficient. It alleges that the plaintiff placed in the hands of the defendant, with which to purchase the stock, the sum of $3,600, which she agreed to use for that purpose, and "that on the first day of November, 1876, or thereabouts, the defendant bought, for account of plaintiff, six hundred dollars' worth of mining stock; and on the first day of April, 1877, or thereabouts, the defendant purchased for the plaintiff fifteen hundred dollars worth of other mining stock; and on the first day of May, 1877, or thereabouts, the defendant purchased for the plaintiff fifteen hundred dollars worth of other mining stock." This was a sufficient allegation of the value of the stock to support the judgment.

A demand and refusal was alleged, which was sufficient, with the other allegations of the complaint, to show a conversion of property belonging to the plaintiff, and a judgment for its value was proper. The court found the value of the property, and that the defendant had converted it to her own use, which was sufficient to warrant the judgment rendered. There is no merit in this appeal. It is obvious that it was taken for delay. The judgment is affirmed, with 15 per cent. damages.

We concur: PATERSON, J.; FOX, J.

(80 Cal. 472)

HERRLICH v. McDONALD. (No. 12,161.)

(*Supreme Court of California.* Sept. 11, 1889.)

INSOLVENCY—DISCHARGE.

1. On a motion to discharge an execution because of defendant's discharge in insolvency it appeared that the findings in the action in which the judgment on which the execution issued was rendered, were made and filed in 1881, but that the judgment was not recorded until 1886. *Held*, that defendant had had no opportunity to set up as a defense a discharge in insolvency, obtained between these dates, and hence it could not be held that she had waived her right to assert it on the motion to discharge the execution.

2. Though insolvency act Cal. § 53, makes the certificate of discharge *prima facie* evidence of the regularity of such discharge, she is still bound to show that the debt sought to be avoided is one which was affected thereby.

3. The complaint alleged that defendant was a dealer in mining stocks; that plaintiff employed her to purchase mining stock, and gave her a certain sum to be used for that purpose; that defendant purchased stock worth that sum, and collected the dividends thereon; and that plaintiff demanded the stock and dividends, but defendant refused to deliver them. The court found that defendant had sold the stock at a profit, for the amount of which judgment was rendered. *Held*, that the debt was created "while acting in a fiduciary capacity," and under insolvency act, § 52, was not discharged.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

W. B. Tyler and *W. H. Sears*, for appellant. *Charles F. Hanlon*, for respondent.

WORKS, J. This is an appeal from an order refusing to recall and set aside an execution. The judgment upon which the execution was issued has been affirmed by this court. Herrlich v. McDonald, ante, 298, (opinion filed September 7, 1889.) The ground upon which the motion to recall the execution was made, if there was such a motion, seems to have been that the defendant had been discharged in insolvency. The record on this appeal is in an anomalous condition. It appears that a notice was given that on a certain day a motion would be made to recall and set aside the execution on certain grounds stated; but no such motion appears in the transcript, nor is it shown in any proper way that any such motion was made. The grounds of the motion, if one was made, do not appear in any way. The notice was that the defendant would make such a motion on certain grounds, but whether she did make it or not on those or any other grounds is left wholly to conjecture. We presume the appellant expects us to infer that because she said she would make the motion she did make it. The only thing tending to show that a motion was made is a recital in the order appealed from that the "cause came on to be heard this day on defendant's motion to vacate and set aside writ of execution issued December 31, 1886." There is no bill of exceptions, and the certificate of the judge as to what papers were used recites that "upon the motion to recall execution in the above-entitled action the following papers were read and referred to." Neither of these show that a motion was actually made, but, if they did, the grounds upon which it was made nowhere appear. This being the state of the record, we might properly affirm the order on the ground that no error is made apparent. The practice in this respect seems to be extremely loose. Counsel seem to confound the notice of motion with the motion itself. The notice is not a motion, and should not be so treated. The careful practitioner will either prepare and file his motion in writing, stating the grounds thereof, or have the same entered in the minutes. This is not necessary, however. The motion may be made orally; but in every case, whether the motion is made in writing, entered on the minutes, or stated orally, the same should be preserved by a bill of exceptions and brought to this court in that way, on appeal, so that we can see from the record that a motion was made, and the ground upon which it was made. It is also a matter of serious question whether any of the papers claimed to have been used on the alleged motion are properly authenticated. As we have said, there is no bill of exceptions. The only authentication is by the certificate of the judge of the court below, at the close of the transcript, as follows: "I, T. H. Rearden, judge of department seven of said court, hereby certify that upon the hearing of the motion to recall the execution in the above-entitled action, the following papers were read and referred to: 'The judgment roll in said action; adjudication of insolvency, stay of proceedings, and order of publication of notice to creditors upon petition in insolvency of M. H. McDonald, filed August 4, 1882, herein; certificate of final discharge of defendant, M. H. McDonald, in insolvency, filed January 30, 1883, in the insolvency proceedings; affidavit of defendant, filed March 18, 1882; affidavit of Julia Herrlich, filed March 27, 1882; affidavit of Marguerite Beneux, filed March 27, 1882, and notice of motion to recall execution, filed January 26, 1887; the execution, with its return and indorsements.' T. H. REARDEN, Judge of said Court, Department Seven. Dated March 17, 1887." Formerly it was expressly provided that on motion for a new trial affidavits used might be identified by indorsement by the judge or clerk, at the time, as having been read or referred to on the hearing. St. 1861, p. 590; Hayne, New Trials & App. 790. The present Code has no such provision. It is simply provided that "on appeal from a judgment rendered on an appeal or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below." Code Civil Proc. § 951. We are of the opinion that without a statutory provision authorizing the authentication of copies of papers in some other way, the only proper way that they can be brought into the record and identified is by bill of exceptions. There are decisions of this court, however, in which it has been rather taken for granted that a certificate of the judge is sufficient. Walsh v. Hutchings, 60 Cal. 228; Nash v. Harris, 57 Cal. 243; Larkin v. Larkin, 76 Cal. 323, 18 Pac. Rep. 396. And in one case it was held in department that, as the statute prescribed no mode in which such papers should be authenticated, "this court had power to prescribe by rule how such papers should be brought before it on appeal; and if it had power to make such a rule in advance, it had the power to ratify the mode adopted by the court below;" and upon this proposition was founded the decision in that case that the certificate of the judge of the court below was sufficient. Pieper v. Land Co., 56 Cal. 173. But the Code does provide, in express terms, how all papers, proceedings, and exceptions, not otherwise a part of the record, may be made such, viz., by a bill of exceptions or statement. Code Civil Proc. §§ 646, 649-651. In case of an appeal from any decision made after judgment a bill of exceptions is the proper, and, in our opinion, the only proper, mode of authentication. Id. § 651. But the respondent has not asked us to affirm the order on the ground that the question is not properly presented, and in view of this fact, and considering the state of uncertainty in which the question is left by the decided cases, we prefer to decide this case on its merits. We must say, however, that if this court has the power to determine that papers to be used on appeal may be authenticated in a way not provided for by statute, when a different way is provided for,—which we very much doubt,—it should be done by a rule adopted in advance, and made applicable to all cases, and not be left for the court to say in each case whether or not the mode adopted in that case is sufficient.

The respondent contends that the discharge in insolvency, relied upon by the appellant, could not avail her on this motion, for the reason that she had such discharge before the judgment was rendered against her, and the same was not pleaded as a defense. This position would no doubt be unanswerable if it were true that the judgment was rendered after the discharge was given. But it does not so appear. The findings of the court were made and filed November 28, 1881, and the judgment bears the same date, but it is indorsed, "Recorded June 24, 1886," and the execution complained of recites the judgment as of the latter date. Now, conceding that the judgment could not have been enforced or appealed from until it was recorded, it does not follow that the defendant was at fault in not pleading her discharge. At the time of the trial and rendition of the judgment she had not procured her discharge, and consequently could not have pleaded it, nor could she have pleaded or set up such discharge in any way, to make the same available, between the rendition and recording of the judgment. Therefore, having had no opportunity to plead and prove her discharge at the trial, she cannot be held to have waived the right to assert it in the manner attempted in this motion.

It is further claimed by the respondent that the order of adjudication and certificate of discharge was not sufficient, without the other proceedings in insolvency, to show that the discharge was valid. Section 53 of the insolvency act provides that the certificate shall be *prima facie* evidence of the regularity of such discharge. This being so, it was sufficient to introduce the certificate alone. But while the certificate was sufficient *prima facie* to show a valid discharge from all debts from which the appellant was dischargeable, it does not follow from this that her case was made out by such proof alone. There are certain obligations from which she could not be discharged. Insolvency Act, § 52. We think it was incumbent upon her to show, not only that she had been discharged, but that the debt sought to be avoided was one which was affected thereby. Whether this was shown by the complaint on which the judgment was rendered will necessarily be considered in passing upon the next point made by the respondent.

It is also claimed that the debt for which the judgment was recovered was one created "while acting in a fiduciary character," and that for that reason it was not discharged. Section 52 of the insolvency act provides: "No debt created by fraud or embezzlement of the debtor, or by his defalcations as a public officer, or while acting in a fiduciary character, shall be discharged under this act, but the debt may be proved, and the dividend thereon shall be a payment on account of said debt; and no discharge granted under this act shall release, discharge, or affect any person liable for the same debt for or with the debtor, either as partner, joint contractor, indorser, surety, or otherwise." The question is, therefore, whether the complaint on which the judgment was recovered was for a debt contracted while acting in a fiduciary capacity. The complaint alleges, in substance, that the defendant was a dealer in mining stocks, but whether on her own account or as a broker or factor does not appear; that the plaintiff employed the defendant to purchase mining stock for her, and gave her $3,600 to be used for such purpose; that she purchased stock worth that sum, and retained and collected the dividends thereon; that the plaintiff demanded the stock and dividends, but she refused to deliver the stock or pay the dividends. The prayer of the complaint was for the stock and dividends, or their value. In addition to the facts alleged in the complaint, the court found that the defendant had actually sold and disposed of the stock at a profit, and for the amount for which the judgment was rendered. The appellant contends that this does not show that the debt was created by fraud or embezzlement, or while acting in a fiduciary character, but that the defendant was shown to have been acting as a factor, and that such a debt is dischargeable in insolvency. There are authorities holding that where a party doing business as a factor had money in his hands, received in the course of his business, or has used the same for his own purposes, the claim of one dealing with him for the money due him was not within the provision in the federal bankrupt law, similar to that of our insolvency act, against the discharge of a debtor from fraudulent or fiduciary debts. Chapman v. Forsyth, 2 How. 202; Zeperink v. Card, 11 Fed. Rep. 295; Woolsey v. Cade, 15 N. B. R. 238; In re Smith, 18 N. B. R. 24; Upshur v. Briscoe, 37 La. Ann. 138. So it is held that the claim relating to debts fraudulently created was meant to apply only to cases of "positive fraud or fraud in fact involving moral turpitude or intentional wrong, and not implied fraud, or fraud in law, which may exist without the imputation of bad faith or immorality." Neal v. Clark, 95 U. S. 704; Hennequin v. Clews, 111 U. S. 676, 4 Sup. Ct. Rep. 576; Strang v. Bradner, 114 U. S. 555, 5 Sup. Ct. Rep. 1038. There was no direct allegation of fraud in the complaint in this case, nor was it averred that the defendant was engaged in the business of a factor or commission merchant, or that she acted as such in this instance.

The reason for holding that a factor is not one acting in a fiduciary character within the meaning of the bankrupt laws, in the class of cases mentioned, is apparent. The money received by him is not the money of the party for whom he does business. It is his own money; but on an accounting he is bound to pay over to his customers the amounts due them. The claim of the customer is a simple debt, and, independent of actual fraud, there is no reason why a factor should not be discharged from his debt, as well as any other business man. The factor may buy and sell in his own name, and mingle the money of his customers in the same way. Slack v. Tucker, 23 Wall. 321, 329. The question presented here is an entirely different one. The allegations of the complaint present a case in which the plaintiff intrusted money to the defendant to buy mining stock for her. When purchased, the stock was the property of the plaintiff, and the defendant held it as a trustee for her, and upon demand she was legally bound to deliver the stock and account for the dividends she had received. She was simply an agent to buy property in the name of her principal, and stood in a fiduciary relation. Her refusal to deliver the stock, and the sale of it by her, was a conversion of the property, and the proceeds remained in her hands in trust for the plaintiff. Matteson v. Kellogg, 15 Ill. 548. It is manifest that such an obligation could not be affected by a discharge in bankruptcy. Clark v. Pinckney, 50 Barb. 226; Matteson v. Kellogg, 15 Ill. 548; Woolsey v. Cade, 15 N. B. R. 243; White v. Platt, 5 Denio, 271; Stoll v. King, 8 How. Pr. 298; Flagg v. Ely, 1 Edm. Sel. Cas. 206; Fulton v. Hammond, 11 Fed. Rep. 291. The distinction between this case and those relating to general factors is well expressed in Matteson v. Kellogg, 15 Ill. 549. In that case it was said: "Under this act the supreme court of the United States, in the case of Chapman v. Forsyth, 2 How. 202, decided that money received by a factor on the sale of the goods of his principal does not create a fiduciary debt within the meaning of that act. The reason assigned for that decision is that, according to the course and usage of the trade, the factor is permitted to carry such money into account, and mingle it with his own money, whereby it ceases to be the money of the principal, and becomes the money of the factor, who becomes debtor to the principal to that amount. If there is an implied agreement between the principal and the factor that the latter may take and use the money in his business till called for, by being thus carried into general account, it becomes an ordinary debt, the same as money loaned, subject to call. But such was not the character of this transaction. The money was here placed in Wright's hands for a particular purpose, with no authority to use it in his general business, or appropriate it in any way different from the trust which he assumed when he received the money. It continued to be the principal's money in Wright's hands, as much as it was in Blish's hands, or even in their own; and using it any way different from his instructions and his agreement was a breach of the trust which he had assumed. He did not become debtor to his principals till he misapplied the funds. Had he bought the land intended to be purchased, or any other lands, with this money, and taken the deed to himself, a resulting trust would have arisen in favor of the principals whose money was thus invested. Had the principals consented that he might use the money in his business, and then, at a convenient season, purchase the land with his own funds for their use, then it would have become an ordinary debt so soon as he used the money in pursuance of such consent. I understand the rule to be, where one receives the money or property of another as agent or bailee, the title to which is to remain in the principal, and which is to be paid over or delivered to him, or to be used in a particular way or for a specific purpose for his use, that then the money or property is received or held in a fiduciary capacity, or as trustee. In such a case a special trust and confidence is reposed beyond that of mere credit, and it was against the violation of such confidence that congress designed to provide by the exception quoted." It will be found upon an examination of the cases holding that the liability on the part of a factor is discharged by bankruptcy, that they apply to cases where the factor has moneys in his hands growing out of the general business of such factor, and not to a case like this, where money is given him with which to buy property for his principal. Besides, the cases relied upon by the appellant were decided under the earlier bankrupt law, which differed materially from the latter statute on that subject, and from our insolvency act. But we do not regard this as material in this case, as it is not within the decisions relied upon, even if the language of the statutes were the same. There are numerous cases holding that under the later bankrupt law the debt of a general factor for a balance in his hands for sales made was not discharged by his bankruptcy; but, as we have concluded that the appellant cannot, under the allegations of the complaint, be treated as a factor, we need not cite them. It is the law of this state, however, that such a debt is not affected by a discharge in bankruptcy. Treadwell v. Holloway, 46 Cal. 547. The allegations of the complaint and findings of the court show that the appellant was acting in a fiduciary capacity, and that her appropriation of the stock and dividends was in bad faith and fraudulent. For both these reasons her discharge in insolvency did not affect her liability. Order affirmed.

We concur: PATERSON, J.; FOX, J.

(80 Cal. 440)

HART *et al.* v. BRITISH & F. M. INS. Co.
(No. 12,553.)

(Supreme Court of California. Sept. 6, 1889.)

MARINE INSURANCE—APPLICATION—CONCEALMENT.

H., when he applied for policy of insurance on a cargo of wheat, said nothing about the arrival or non-arrival of the barge on which it was due. Contrary to the practice, he insisted on paying the premium when the risk was passed. On the same day, after it was learned that the barge had been lost, he told the manager of the company that he knew when he made the application that a barge had been lost, but that he did not know that it was this special barge. In an action on the policy the consignee of the barge and his clerk testified to conversations held on that day with H., in which they informed him of the loss of a barge, and told him that if his barge was not insured he "had better get insured pretty quick." H. had been expecting the barge for one or two days. *Held*, that the evidence was sufficient to support a verdict for the company, on the ground that H., when he procured the policy, knew and failed to communicate the material facts and information concerning the probable loss of the overdue barge.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Henry E. Highton and *W. C. Belcher*, for appellants. *Milton Andros* and *Page & Eells*, for respondent.

FOOTE, C. This action was brought to recover on an insurance policy for a marine loss on a cargo of wheat, shipped on a barge called the "Grand Island" for a voyage from Colusa to San Francisco. The owners of the wheat were Messrs. Hart and Harrington, the plaintiffs here. Some time about the middle of the night or in the early morning of the 10th day of December, 1878, the barge suddenly sank in the bay of San Francisco, when just below "Red Rock," a well-known place in that body of water. Her cargo, consisting of the plaintiff's wheat, was a total loss. The night was not very dark, and a light north wind was blowing. The barge was being towed, about the usual course for such vessels over that water-way, and there is nothing to show any sunken rocks or other obstructions to navigation which would have caused her loss at the place where she was overtaken by disaster. Her pilot does not, from his testimony, seem to have any definite idea of the cause of her loss, except that she sprung a leak, the origin of which he was unable to determine. When afterwards the craft was raised, and her bottom examined, it was found that three of her planks were broken and splintered.

The defenses set up to the action were: (1) That the barge was unseaworthy. (2) That the plaintiff Hart, at the time he made application for the policy, fraudulently concealed from the defendant the facts known to him, viz., that the barge was overdue and probably lost, of which facts the defendant had no knowledge, and which at the time it had no means of knowing or ascertaining. (3) That Hart, at the time of the application, had knowledge of the loss of the barge, which fact, then unknown to and beyond the reach of the defendant, he fraudulently concealed. Which facts, it was alleged, avoided the policy. After the plaintiffs had rested their case, the defendant was not allowed to introduce proffered evidence to sustain the issues of fraudulent concealment; the plaintiffs claiming, and the court concurring, that, assuming such facts as alleged to be true, they did not in law avoid the policy, but gave the defendant the right only of rescinding the contract, and that, as the exercise of that right had not been pleaded by way of defense, the proposed evidence was inadmissible. By permission of the court the answer was so amended as to allege the required rescission. The trial was prosecuted to a conclusion, the jury finding generally "in favor of defendant." From the judgment, and an order refusing a motion for a new trial, this appeal is taken.

The reasons brought forward why the judgment and order should be reversed are because, as is claimed—*First*, the court committed errors in ruling on the allowing of amendments to the pleadings, and in the admission of evidence; *second*, the insufficiency of the evidence to sustain the verdict; *third*, the refusal of the court to charge as requested by the plaintiffs.

We perceive no abuse of discretion in allowing the amendment of the answer. The evidence sought to be admitted was of a written character, well known to the plaintiffs long before the trial. They could not have been surprised by its production; and it was eminently just, in order to settle the rights of the parties upon the merits, that the proof should be admitted. Conceding, without deciding, that Mr. Touchard's evidence as an expert as to what effect the knowledge of the barge being overdue would have had in determining the amount of premium was inadmissible, yet the plaintiffs suffered no injury. The witness stated that the time during which it was shown in evidence the barge in question was overdue would not have influenced the amount of the premium.

We perceive no necessity to go into the question of whether the evidence was insufficient to support the verdict as to the defendant's first ground of defense, viz., that when the barge left Colusa to begin her voyage she was unseaworthy, because we think the evidence does support the verdict, upon the ground that when Hart procured the policy he knew, and failed to communicate to the defendant, of which it was ignorant, the material facts and information in his possession concerning the probable loss of the overdue barge. But it is claimed by the plaintiffs as a matter of law that such facts as Hart possessed and failed to communicate were not material facts as understood in the law of insurance. The sections of the Civil Code bearing upon the point raised are as follows: Section 2561: "A neglect to communicate that which a party knows, and ought to communicate, is called a 'concealment.'" Section 2562: "A concealment, whether intentional or unintentional, entitles the injured party to rescind a contract of insurance." Section 2563: "Each party to a contract of insurance must communicate to the other, in good faith, all facts within his knowledge which are, or which he believes to be, material to the contract, and which the other has not the means of ascertaining, and as to which he makes no warranty." According to the evidence on the part of the defendant, Hart, the plaintiff, when he applied for the policy of insurance, said nothing about the arrival or non-arrival of the barge on which was the wheat which he wished insured. He desired to pay for the policy when the risk was passed by the manager of the marine department of the agents for the insurance company. Woods, the manager, told him to let it lie as usual until his account was furnished. Hart said he preferred to pay for it. Woods saw Hart again that day about noon, and asked him about the circumstances of the insurance, it having then become known that the barge was lost. Hart told Woods that he (Hart) was aware at the time of the placing the insurance that a barge was lost, but that he did not know that it was this special barge. He admitted this fact before Mr. Balfour, one of the agents for the insurance company, but said that he did not consider himself bound to make that known. He was then informed that the insurance was not obtained by fair means, and that the company would not admit its responsibility. "Hart expressed himself as accepting the situation; that he expected it; that he would press his claims; and whoever won it was all right." Thereupon a letter from the agents of the company was handed Hart by Woods, rescinding the contract of insurance, and tendering Hart the premium he had paid them. Hart took the letter, but declined the money. Prior to Hart's applying for the policy on the morning of the loss of the barge containing his cargo of wheat, he was talking with the consignee of the barge, Mr. McNear, and was then asked by Mr. Marble, who was present, if this wheat was insured. Hart said, "No;" that he was just talking with McNear about it. Marble remarked: "If you are going to get insured at all, you had better get insured pretty quick." Hart or McNear or both asked, "Why?" Marble answered that he had been round the water-front, and that he had heard a rumor that a barge had been lost near Red Rock. Marble did not know what barge, or what kind of a barge. This was about 9:30 in the morning. Mr. McNear stated that between 8 and 10 o'clock on that morning Hart came to his office and asked if his barge was reported. Witness said not. There was some discussion. Hart stated that he had always insured except that time. Something was said about the barge being overdue; that it was a good time to get her insured. McNear's clerk, Marble, came in, and said a barge was reported lost up above Red Rock. McNear told Hart he had better go and get his barge insured. Hart then left the office. On cross-examination McNear stated that he did not know whether Hart said he would insure before the clerk came in. Hart had been expecting the barge for one or two days. The barge was expected to arrive on the morning of the taking out of the policy, before it was taken out, which took place about 9:30 A. M. of that day. It also appeared in evidence that usually, if a barge was due early in the morning, if it was not heard from by 10 or 11 o'clock, the agent of a certain wood company would make inquiries; that such barges were sometimes expected for a week; and that Hart and McNear, his broker, were expecting the particular barge in question, which was due when the conversation of McNear, Marble, and Hart took place.

There was a conflict in the evidence, as appears from the bill of exceptions, as to whether the plaintiffs communicated to the defendant when they applied for the policy, that the barge was overdue, if she was overdue; but the plaintiffs conceded that at the time of the application they did not inform the defendant that they had heard the rumor communicated by Mr. Marble, or any information whatever as to the loss of the barge, and it did not appear that they possessed any information of such loss beyond that furnished by Mr. Marble. The fact that Hart was inquiring about the barge when she was some hours overdue went to show that he was perturbed over the matter. Immediately upon hearing what Marble communicated, he sought the insurance office to get a policy on his property. This, and his anxiety evinced in insisting in paying for it out of the usual way, his neglect to inform the agent of what he had heard, all looked as if he feared that his wheat was lost, and wished, if possible, to saddle its loss on the insurance company, who knew nothing, and could have known nothing, of what Marble had said, and which Hart deemed material to the risk. Was this fair towards the company? Was it not Hart's duty to place the defendant in possession of the knowledge which made him so precipitate and persistent in getting out a policy before it should be absolutely known that the barge was lost? Is it not fair to presume that if he had done so the insurance company would have been as swift to decline to issue the policy as Hart was earnest to obtain it? The jury evidently thought so. They heard all the evidence, and saw the witnesses, and we are not prepared to say that the uncontradicted evidence of McNear and Marble as to Hart's acts in the premises, together with the evidence of the other witnesses, with which there is some conflict in the evidence, did not warrant the conclusion arrived at. The conviction is irresistible that Hart feared his wheat was lost, hoped to get out a policy before the loss was known, and did not deal fairly with the defendant, because he did not place the insurance company in a situation such as he occupied, to know all the necessary facts and circumstances believed by Hart to be material attending the non-arrival of the barge. Such, at least, is the view that an unbiased and fair-minded jury may have taken of the matter from all the evidence in the record, and we are not disposed to interfere with their determination.

We perceive nothing in the action of the court as to the matter of instructions which is erroneous, and advise that the judgment and order be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

81 Cal. 58

WILSON v. TREADWELL. (No. 12,324.)

(*Supreme Court of California.* Oct. 5, 1889.)

LIABILITY OF LANDLORD—DEFECTIVE PREMISES.

Civil Code Cal. § 1941, which provides that the lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it in a condition fit for occupation, and repair all subsequent dilapidations which render it untenantable, does not render a landlord liable to an employe of his tenant of business property for injuries caused by a defective stairway on the premises; there being no covenant by the landlord to repair.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Fisher Ames, (*Jarboe, Harrison & Goodfellow*, of counsel,) for appellant. *John H. Dickinson*, for respondent.

WORKS, J. This is an action by an employe of a tenant of business property against the landlord for damages for personal injuries resulting from a defective stairway on the premises used in conducting the business of the tenant. The controlling question in the case is whether or not the landlord was legally bound to make necessary repairs. There was no covenant in the lease to that effect. This question was ruled against the defendant in the court below, and verdict and judgment went against her. At common law the landlord was not bound to make repairs, and the tenant alone was liable to third parties for injuries resulting from negligence in this respect. 1 Thomp. Neg. 317, 323; City of Lowell v. Spaulding, 4 Cush. 277; 2 Shear. & R. Neg. (4th Ed.) § 708; Clancy v. Byrne, 56 N. Y. 133; City of Brooklyn v. Railroad Co., 47 N. Y. 483; Nelson v. Brewery Co., L. R. 2 C. P. Div. 311; Marshall v. Heard, 59 Tex. 266. And the rule that the landlord was not liable to strangers for a failure to repair applied with equal force to the tenant and his employes. 1 Thomp. Neg. 323; O'Brien v. Capwell, 59 Barb. 497. The respondent contends that this rule has been changed by section 1941[1] of our Civil Code, and that the landlord is thereby bound to repair, precisely as if he had covenanted to do so in the lease. But this court has held directly to the contrary in the case of Van Every v. Ogg, 59 Cal. 563, in which it is said: "It is insisted that the section last cited, by operation of law, inserts in every lease a covenant on the part of the landlord to repair. But bearing in mind that at the common law no such covenant was implied, and reading the two sections together, the intent seems clear that the obligation of the landlord should be limited by the extent of the privilege conferred upon the tenant; that it is the duty of the landlord to repair upon notice, and if he does not perform this duty he is to be compelled to pay, by deduction from the rent, to the extent of a month's rental, or, at the option of the tenant, the term be concluded without redress to the landlord."

It follows that the complaint did not state a cause of action, and that none was shown by the evidence. Judgment and order reversed.

We concur: FOX, J.; PATERSON, J.

81 Cal. 44

RICHARDS *et al.* v. DOWER *et al.* (No. 13,107.)

(*Supreme Court of California.* Oct. 1, 1889.)

MINES AND MINING—ABANDONMENT—FINDINGS—EVIDENCE.

1. In an action for two town lots, plaintiffs claimed under a town-site patent from the United States, issued in 1869. It appeared that for many years before 1869 a gold vein within the limits of the lots had been profitably worked by various parties, successively, but that there had never been any location or conveyance of the vein before 1869, and defendants did not pretend to connect themselves with those who mined there before that time. Work on the vein was abandoned in 1869, before the patent issued, and none was afterwards performed until 1884, when defendants made the location under which they claimed. There was evidence that some work had been done on the vein, outside the limits of the lots, about 1876. *Held* not a mine, within 14 U. S. St. at Large, 541, providing, in relation to town-site grants, that "no title shall be acquired under the provisions of this act to any mine of gold," etc., and that defendants acquired no interest by locating a mining claim in 1884.

2. The evidence showed that the vein had been worked from 1851 until 1869, when the work was discontinued, the excavations filled up, and buildings erected. One witness testified that about 1876 work was done on the vein, some 400 yards outside the limits of the lots in question. *Held* sufficient to sustain a finding that the work was abandoned in 1869, and that none was afterwards done until defendants made their location, in 1884.

3. The mere possession of shafts, dumps, etc., on an exhausted vein which has been abandoned, does not amount to a mining claim.

4. Evidence that the claim of the person who last worked the vein was sold, in probate proceedings, for $500, two years after the patent was issued, is immaterial, as it only tends to prove that the purchaser thought that the interest of such claimant was at that time worth $500.

In bank. Appeal from superior court, Nevada county; E. A. BRIDGFORD, Judge.

H. L. Gear, for appellants. *P. F. Simonds* and *Fred Searls*, for respondents.

BEATTY, C. J. This is an action to recover two lots in the city of Nevada. Plaintiffs had judgment; from which, and an order denying a new trial, defendants appeal. The facts out of which the case arises are as follows: A patent for the town-site of Nevada was issued by the United States, July 1, 1869, and whatever title to these lots passed by the patent was vested in the plaintiffs at the commencement of the action. But the defendants claim that the portion of the lots which is in their possession was not granted by the patent, being reserved or excepted out of its operation by reason of the fact—by them alleged—that it contained a gold-bearing quartz vein, the existence of which was known at and before the date of the patent, and which has since that date been located by them in pursuance of the mining laws of the United States. From this general statement it will be seen that the question to be decided is whether or not the premises in controversy were reserved out of the land patented for a town-site. The determination of this question involves a construction of the laws of the United States relating to town-sites and mineral lands, and a consideration of the state of facts existing and known at the date of the patent.

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[1] Sec. 1941. The lessor of a building intended for the occupation of human beings must, in the absence of an agreement to the contrary, put it into a condition fit for such occupation, and repair all subsequent dilapidations thereof, which render it untenantable, except such as are mentioned in section nineteen hundred and twenty-nine.

And, first, as to the facts. It appears from the findings of the superior court, and from the evidence, that for many years prior to the year 1869 a gold-bearing quartz ledge was known to exist within the limits of these lots, extending across the lots, and for a considerable distance outside of them. As early as the year 1851, it was known as the "Wagner Ledge," and was worked, apparently, at a profit, by a man of that name. It does not appear that the vein, or any part of it, was ever regularly located in accordance with the law, or local miners' rules, prior to the town-site patent, or that any title or right of possession in it was ever transferred by deed or other mode of conveyance from one to another of the various parties who at different times have mined upon it. The defendants do not pretend to connect themselves in any way with those who mined there prior to the issuance of the town-site patent. After Wagner ceased to work on the vein, other parties, in succession, worked there, from time to time, until the winter of 1868–69, at which time, and prior to the issuance of the patent,—according to the findings,—work on the ledge was abandoned, and none was thereafter performed until defendants, in 1884, made the location under which they claim. It is contended by the appellants that this finding is in conflict with the evidence; and it is true that one witness did testify that he saw "a man named Smith" at work on the vein after 1869; perhaps as late as 1876. His testimony, however, was extremely vague and uncertain. He could not fix the time when, or the place where, he saw Smith at work. He says it was on the vein, but not inside of these lots, and was perhaps as much as 400 yards distant from them. But, even if his testimony had been much more positive than it was, we cannot say that the court would have been bound to accept it. The fact sought to be established, viz., the working of a gold mine within the limits of a populous town, would necessarily, if a fact, have been known to many persons, and, considering the important effect attributed to it, ought to have been proved by stronger evidence, than the uncertain testimony of one witness. But, aside from this, the question here is as to the existence of a mine known at the date of the patent within the boundaries of these lots; and even if it had been clearly proved that one man worked on the Wagner vein as late as 1876, at a point 400 yards outside of the lots, that would have been a circumstance of very slight evidentiary value with reference to the matter to be proved. He might have found nothing where he was at work; and, if he did find gold in paying quantities at that point, it would not have proved that the same grade of ore was to be found at a distance of 400 yards. It is well known that veins rich at one point are often barren at a few yards distance. But what is more to the purpose here is that veins are frequently worked out and abandoned from point to point on their course until they are wholly exhausted. The evidence in this case shows that the Wagner vein was scarcely more than a foot in thickness; that some hundreds of tons of rock had been extracted from it within the boundaries of these lots prior to 1869; that it had been worked down to the water-line by means of shafts, drifts, tunnels, etc. Add to this the fact that from 1869 to 1884, a period of more than 15 years, it lay idle and untouched in the midst of one of the busiest and most enterprising mining regions of the state, and the conclusion is irresistible that from the time work on it ceased, in the winter of 1868–69, it was regarded as a worked-out and valueless lode; so much of it, at least, as was embraced within the lines of these lots. It is true, there is no express finding of the superior court to this effect, and the judgment for plaintiff seems to have gone upon other grounds; but certainly the evidence would have sustained such a finding, if an issue upon the specific point had been raised by the pleadings. There was, however, no such issue. The complaint merely alleges ownership, and right of possession, which is denied by the answer. The answer, it is true, goes further than a mere denial, and attempts to state a special defense, by averring that plaintiffs have no right except under the town-site patent, and that the demanded premises were reserved in the patent; but the only allegation of fact upon this point is "that the said Wagner ledge, and the portion thereof which crosses the said lands, was known to be a gold-bearing ledge, and was held, possessed, worked, and mined as such long prior and subsequent to said patent." Other allegations to the effect that the mine was reserved, that it is part of the public mineral lands of the United States, etc., are mere conclusions of law. It was unnecessary, therefore, for the court to make a specific finding as to the value of the mine, or its supposed value at the date of the patent. The fact that it was of no apparent value at that date will, if necessary to support the judgment, be deemed to be embraced in the more general findings in response to the issues raised. Assuming, then, that at the date of the issuance of the town-site patent that part of the Wagner ledge embraced in these lots was regarded as worked out, and as of no further value for mining purposes, we find that the predecessors of plaintiffs purchased the lots from the patentee, went into possession of them, fenced them, divided them into different inclosures, built valuable houses and outhouses upon them, planted them with fruit trees, filled up the old mining excavations, and, in short, devoted them to the purposes of a home. After 15 years and more, during which there was a complete cessation of mining on the lode, the defendants entered upon the possession of the plaintiffs, made a location of the ledge, claiming 300 feet of surface on each side of the croppings,—a strip 600 feet in width across plaintiffs' lots,—and proceeded to dig up their garden and orchard, demolish their fences and undermine their houses. All this the defendants justify upon the ground that the ledge and adjacent surface which they have located was reserved by the United States out of the land patented to the town-site trustee. It remains to consider whether they are correct in their construction of the law upon this point. They rely upon the following clause of section 2392 of the Revised Statutes of the United States: "No title shall be acquired, under the foregoing provisions of this chapter, to any mine of gold, silver, cinnabar, or copper, or to any valid mining claim or possession held under existing laws." This clause of the Revised Statutes had no existence in its present form at the date of the patent for the Nevada town-site. At that date the revision had not been made; and we must look to the town-site laws in the Statutes at Large to ascertain whether they contained equivalent provisions. The laws referred to are the act of March 2, 1867, (14 St. at Large, 541,) and the act of June 8, 1868, (15 St. at Large, 67.) The first contained the following proviso: "That no title shall be acquired under the provisions of this act to any mine of gold, silver, cinnabar, or copper." The second, which was amendatory of the first, contained the following proviso: "That no title under said act of March 2, 1867, shall be acquired to any valid mining claim or possession held under the existing laws of congress." The appellants contend that in July, 1869, both these provisos were in force. The respondents, on the contrary, claim that the second was substituted for the first, and that nothing was reserved at the date of the patent in question except "valid mining claims or possessions held under existing laws of congress." We find it unnecessary to decide which of these opposing views is correct. For the purposes of this case, we will assume, without deciding, that the appellants are right, and that not only mining claims, but all known mines, whether claimed or not, were reserved from the grant. The question, then, is reduced to this: What was a mine of gold within the meaning of the act of 1867? Without the aid of any judicial or legislative construction, we should say without hesitation that one essential requisite of a gold mine would be a natural deposit of rock or earth containing a sufficient quantity of gold to admit of profitable working. If lands are known to contain precious metals, but in quantities so small as not to justify the attempt to extract them, they are not properly called "mineral lands;" and even if they might be mined at a very small profit, but are clearly of more value for agriculture than for mining, they are agricultural, rather than mineral, lands. There is abundance of authority for this view. We know of nothing in the statutes of the United States as they existed in July, 1869, which indicates a more jealous policy with respect to mineral lands than is manifested by the following provision of the Revised Statutes: "In all cases lands valuable for minerals shall be reserved from sale, except as otherwise expressly directed by law." Section 2318. This is a clear declaration that the present policy of the government is to reserve only such mineral lands as are valuable as such; and there is no reason to suppose that it ever had a different policy.

In the case of Deffenback v. Hawke, 115 U. S. 392, 6 Sup. Ct. Rep. 95, a case much relied on by appellants, although the decision was in favor of the mineral claimant, who held a patent for his mine, and against the town-lot claimant, who had no patent, the carefully guarded language of the opinion of the court, limiting the operation of the principles decided, has all the force of a direct adjudication against the appellant on the point we are considering. We quote the following, (page 404, 115 U. S., and page 100, 6 Sup. Ct. Rep.:) "It is plain from this brief statement of the legislation of congress, that no title from the United States to land known at the time of sale to be valuable for its minerals of gold, silver, cinnabar, or copper can be obtained under the pre-emption or homestead laws or the town-site laws, or in any other way than as prescribed by the laws specially authorizing the sale of such lands. * * * We say, 'land known at the time to be valuable for its minerals,' as there are vast tracts of public land in which minerals of different kinds are found, but not in such quantity as to justify expenditures in the effort to extract them. It is not to such lands that the term 'mineral,' in the sense of the statute, is applicable. In the first section of the act of 1866, no designation is given of the character of mineral lands which are free and open to exploration. But in the act of 1872, which repealed that section, and reenacted one of broader import, it is 'valuable mineral deposits' which are declared to be free and open to exploration and purchase. The same term is carried into the Revised Statutes. It is there enacted that 'lands valuable for minerals' shall be reserved from sale, except as otherwise expressly directed, and that 'valuable mineral deposits' in lands belonging to the United States shall be free and open to exploration and purchase. We also say 'lands known at the time of their sale to be thus valuable,' in order to avoid any possible conclusion against the validity of titles which may be issued for other kinds of land, in which, years afterwards, rich deposits of mineral may be discovered. It is quite possible that lands settled upon as suitable only for agricultural purposes, entered by the settler, and patented by the government, under the pre-emption laws, may be found, years after the patent has been issued, to contain valuable minerals. Indeed, this has often happened. We therefore use the term 'known to be valuable at the time of sale,' to prevent any doubt being cast upon titles to lands afterwards found to be different in their mineral character from what was supposed when the entry of them was made and the patent issued." And again, on pages 406, 407, 115 U. S., and pages 101, 102, 6 Sup. Ct. Rep., note the following language: "While we hold that a title to known valuable mineral land cannot be acquired under the town-site laws, and therefore could not be acquired to the land in controversy under the entry of the town-site of Deadwood by the probate judge of the county in which the town is situated, we do not wish to be understood as expressing any opinion against the validity of the entry, so far as it affected property other than mineral lands, if there were any such at the time of the entry. The acts of congress relating to town-sites recognize the possession of mining claims within their limits. And in Steel v. Smelting Co., 106 U. S. 449, 1 Sup. Ct. Rep. 391, we said that 'land embraced within a town-site on the public domain, when unoccupied, is not exempt from location and sale for mining purposes. Its exemption is only from settlement and sale under the pre-emption laws of the United States. Some of the most valuable mines in the country are within the limits of incorporated cities, which have grown upon what was, at its first settlement, part of the public domain; and many of such mines were located and patented after a regular municipal government had been established. Such is the case with some of the famous mines of Virginia City, in Nevada. Indeed, the discovery of a rich mine in any quarter is usually followed by a large settlement in its immediate neighborhood, and the consequent organization of some form of local government for the protection of its members.' It would seem, therefore, that the entry of a town-site, even though within its limits mineral lands are found, would be as important to the occupants of other lands as if no mineral lands existed. Nor do we see any injury resulting therefrom, nor any departure from the policy of the government, the entry and the patent being inoperative as to all lands known at the time to be valuable for their minerals, or discovered to be such before their occupation or improvement for residence or business under the town-site title."

These extracts from the opinion of the highest judicial tribunal of the country show very clearly and precisely what are the limitations upon the right which the defendants are attempting to assert, and what is the effect of the provisos, above quoted, reserving mineral lands, mines, and mining claims from the operation of town-site patents. A mine is not reserved unless it is not only known, but known to be valuable, at the date of the patent, or discovered to be so before the occupation or improvement of the lots containing them for residences or business under the town-site title. Here the defendants admit that the lots in controversy are within the description of the patent, and they must assume, as they have in fact done, the burden of showing that they are of the class of lands excepted from its operation. This they have failed to do, both in their allegations and in their proofs, by failing to show that that portion of the Wagner ledge included within the boundaries of these lots was known to be valuable for mining purposes at the date of the patent, or discovered to be so before plaintiffs and their predecessors occupied and improved them for the purposes of residence under the town-site title. The tacit assumption upon which appellants base their whole argument, viz., that this ledge, having once been profitably worked, must be deemed to have continued valuable, cannot be admitted. It is a matter of universal knowledge that California is full of quartz veins, which have been worked at a profit for a time, and have been finally abandoned,—often after sinking more money in them than had ever been taken out of them; and there are large areas where placer mining was formerly conducted successfully, which now, after being exhausted of their gold, are held and occupied as farming and grazing lands under patents from the United States. When, upon lands of this character, mineral discoveries are made, the agricultural claimant is protected against mining locators. Cowell v. Lammers, 10 Sawy. 246, 21 Fed. Rep. 200.

The foregoing views dispose of the main contention of the parties to this appeal, but we will notice briefly some specific assignments of error. The finding of the court that work on the ledge was abandoned prior to the issue of the town-site patent is not contrary to the evidence. Our reasons for this conclusion have been already stated. The *possessio pedis* of Hughes and Lovey and Sigourney & Co. of the shafts, tunnels, inclines, dumps, and stopes on the vein, even if it had actually continued down to the date of the patent,—and it is not shown to have done so,—would not have had the effect of preventing the land in which they were situated from passing by the town-site patent. If there was no mine of value, and if they had abandoned all work on the mine, as the evidence shows they had done, their possession of the shafts, dumps, etc., would not have amounted to a mining claim, and nothing but a mine or a mining claim was reserved. Besides, the evidence was sufficient to prove an actual intention of these old miners to abandon the mine at the time they ceased to work it, in the winter of 1868-69. The court did not err in excluding evidence offered to show that in 1871, after the death of Hughes, his interest in the Wagner ledge was sold, under proceedings in probate, for $500. The most that such evidence could possibly have proved was that the purchaser, two years after the patent, thought that Hughes had an interest in the vein which was worth $500. As we have seen, the vein extended far beyond these lots, and, according to one witness, was worked at a point 400 yards distant from them in 1876, or thereabouts. Hughes' claim may have included this portion of the vein; but, whatever it included, the opinion of the purchaser, two years after the patent, is not competent evidence of the known or estimated value of the vein at the date of the patent. We find no error in the record. Judgment and order affirmed.

We concur: McFARLAND, J.; WORKS, J.; SHARPSTEIN, J.; THORNTON, J.; PATERSON, J.

RICHARDS *et al.* v. DOWER *et al.* (No. 13,108.)

(*Supreme Court of California.* Oct. 1, 1889.)

In bank. Appeal from superior court, Nevada county; E. A. BRIDGFORD, Judge.

H. L. Gear, for appellants. *P. F. Simonds* and *Fred. Searls*, for respondents.

Beatty, C. J. This is an action by the same plaintiffs against the same defendants as in case No. 13,107, ante, 304. The suit is to quiet the title of the plaintiffs to the same lots in controversy in the other action, and to enjoin the defendants from trespassing thereon. Defendants appeal. On the authority of that case the judgment and order appealed from are affirmed.

We concur: McFarland, J.; Works, J.; Thornton, J.; Paterson, J.; Sharpstein, J.

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80 Cal. 559

Powell v. Sutro. (No. 11,728.)

(*Supreme Court of California.* Sept. 20, 1889.)

Change of Venue.

In an action before a justice to recover taxes paid for defendant, the answer averred illegality of the taxes; whereupon, as required by Code Civil Proc. Cal. § 838, the cause was certified to the superior court of the county. *Held*, under section 396, providing that the trial may be had in the county in which an action is brought, though it be not the proper county, unless defendant, at the time he appears and answers or demurs, demands in writing that the trial be had in the proper county, that a demand for change of venue, made in the superior court, was too late. Beatty, C. J., and Fox and Works, JJ., dissenting.

In bank. Appeal from superior court, Alameda county; W. E. Greene, Judge.

For opinion on hearing in department, see 21 Pac. Rep. 436.

Edmund Tausky, for appellant. *Moore & Reed*, for respondent.

McFarland, J. After argument on hearing in bank, we adhere to the conclusion reached in department. The action was commenced in the justice's court in Alameda county, to recover $155.38 for certain taxes alleged to have been paid by plaintiff for defendant. Defendant filed a verified answer, in which he averred the illegality of the taxes. This answer made it necessary, under section 838 of the Code of Civil Procedure, for the justice to suspend all further proceedings, and certify the case to the superior court of Alameda county, which was accordingly done. After the case had been transferred to the superior court, the defendant demanded and moved for a change of venue to the county of San Francisco, upon the ground that his place of residence was in the latter county. The superior court denied the motion, and defendant appeals.

The right to have a change of the place of trial of an action pending in a superior court upon the ground of residence is purely statutory; and it can be successfully asserted only by a party who brings himself clearly within the statutory provisions on the subject. (There is no such right on the ground of residence in a justice's court.) It is the established law that, under the provision of section 396[1] of the Code of Civil Procedure, a motion for a change of venue, after demurrer or answer, is too late. Appellant filed his answer in the justice's court, and, of course, his demand for a change of venue in the superior court was after answer. It is not necessary to determine here what his position would have been if, when he filed his answer in the justice's court, knowing that it would cause a transfer to the superior court, he had then and there made his demand for a change. When he did make his motion, he was inevitably in the position of one who makes such a motion too late. It is vain to say that he could not have made his motion any sooner in the superior court. He is still seeking a privilege which can come only from a compliance with a statutory provision with which he had not complied. If there was no way in which he could have complied with the statute, then the fair inference is that the legislature intended that a motion for a change of venue should be allowed only in those cases which get into the superior court in the usual way,—where the complaint shows upon its face jurisdiction in that court,—and not in the few comparatively trivial cases where the amount sued for is within the jurisdiction of justices' courts, and where the cases are transferred on account of some averment in the answer. Order affirmed.

We concur: Thornton, J.; Sharpstein, J.; Paterson, J.

Works, J. I dissent. When the verified answer was filed ousting the jurisdiction of the justice's court, that court could take no further steps in the case. It was the duty of the justice to immediately certify the case to the superior court, and that court then had "over the action the same jurisdiction as if it had been commenced therein." Code Civil Proc. § 838. No affidavit could properly have been filed, or motion made for a change of the place of trial, in the justice's court. If that court had jurisdiction of the case, it would have been improper, because a change to another county cannot be had from a justice's court. If the justice had not jurisdiction, it would have been idle to file the affidavit there, because that court had no power to act upon it. The defendant made the necessary affidavit as soon as the case reached a court having jurisdiction to act upon it, and before any act was done by him in that court, or any other step taken therein. This was using the utmost expedition in the assertion of his rights that could be reasonably required under the statute. It is well enough to say that the "right to a change of the place of trial is purely statutory, and a party must bring himself clearly within the provisions on the subject;" but it is quite another thing for the courts to so construe a statute as, in certain cases, to deprive a party of the right entirely, and thus, in such cases, to nullify the statute itself. If the doctrine declared in the prevailing opinion is to obtain, all a plaintiff will have to do hereafter, in order to prevent a defendant from asserting his right to be tried in the county of his residence, is to bring his action in a justice's court, which has no jurisdiction, thereby compelling the defendant to be tried before the justice, or file such an answer as will cause the transfer of the case to the superior court of that county; in either of which events, if such a construction is to prevail, he is entirely cut off from his right to a change to the proper county. In my judgment, a plain statutory right should not be denied a party, even in a "comparatively trivial case," by any such strict construction of the provisions of the statute. The law is the same in all cases, and the courts cannot deny the right given by it because the court may regard the case in hand as comparatively trivial. I think the change should have been granted, and that the order denying it should be reversed.

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[1] "Sec. 396. If the county in which an action is commenced is not the proper county for the trial thereof, the action may, notwithstanding, be tried therein, unless the defendant, at the time he appears and answers or demurs, files an affidavit of merits, and demands, in writing, that the trial be had in the proper county."

BEATTY, C. J., and FOX, J. We dissent. The case is a trifling one, as to the amount of money involved, but it involves a principle which it is important should be settled correctly. Under section 395, Code Civil Proc., it is a matter of absolute right, on the part of the defendant, that he shall have the case tried in the county where he resides. This section is mandatory in its terms, and so plain as not to be open to construction, either as to its meaning, or as to the intention of its framers. On the other hand, section 396, cited in the leading opinion, is a mere provision of the mode of procedure to secure the right. The right itself being absolutely established by legislative enactment, if no mode of procedure had been provided for its enforcement, it would be the duty of the court to prescribe one. Section 396 has prescribed one for all the ordinary cases arising in the course of practice; but here happens to come a case, as sometimes occurs in the conduct of human affairs, that the mode of procedure provided, if we follow the literal language of the statute, does not meet, and we have a case of a right without a remedy. In such a case it is the duty of the court, if possible, to provide a remedy. Examining the general remedy which has been provided, we find that the controlling idea of the framers of the statute was that the party seeking to avail himself of the right guarantied to him by section 395 should make his application therefor upon his first appearance in the court having jurisdiction to act thereon. That was done in this case. The answer was necessarily filed in a court which had no jurisdiction, either to try the case, or to transfer it to another county. That court, as in duty bound, transmitted it to a competent court of its own county; and, immediately upon the filing of the papers in the court to which it was so transmitted, the application for change of venue was made. It should have been granted.

80 Cal. 611

LAMBERT v. HASKELL *et al.* (No. 11,503.)

(*Supreme Court of California.* Sept. 30, 1889.)

INJUNCTION BOND—LIABILITY OF SURETIES—PLEADING.

1. In an action against the sureties on an undertaking on a preliminary injunction, the complaint alleged the pendency of the injunction suit, and the making of an order requiring an undertaking conditioned that said sureties on said undertaking would pay to the said parties enjoined, all damages that they might sustain by reason of said injunction, if said court should finally decide that said A. and M. were not entitled to the same; said damages not to exceed $10,000. It then alleged that an undertaking had been given in compliance with said order, and annexed the undertaking as an exhibit, making it a part of the pleading by reference. *Held*, that this was a sufficient showing of the terms of the contract of the sureties, and the condition on which their liability was to arise, and that it was not necessary to set forth the nature of the obligation.

2. The complaint also alleged that the business of the defendants in the injunction suit was the removal of dead animals, and "trying out dead animals, and selling the oil, bones, hides, and other products." It then alleged that an injunction was issued, which was annexed and referred to, "enjoining and restraining said plaintiff B. et al. from carrying on said business, as in said injunction particularly expressed." The injunction restrained defendants "from maintaining your certain order-boxes mentioned in the complaint, * * * and from removing, or in any manner interfering with or disposing of, * * * any dead * * * cattle, within the limits," etc. The undertaking was given "in order to continue in force said injunction restraining said plaintiff B. et al. from carrying on their said business." *Held*, that the complaint was not objectionable on general demurrer as failing to show the acts sought to be restrained, and whether the injunction restrained defendants from commission of the acts referred to in the undertaking.

3. A preliminary injunction was first issued, and afterwards the court ordered the injunction dissolved, unless defendants should give an undertaking in a much larger sum, which was given. It recited the commencement of the suit, and was conditioned "in case said injunction shall issue," etc. The complaint in the action on the undertaking alleged the granting of the injunction and the making of the order requiring a further undertaking, and that in compliance with such order, "and in order to continue in force said injunction," the undertaking in suit was given. The answers denied that defendants caused the undertaking to be filed, and averred that plaintiffs in the injunction suit caused it to be filed, and further averred that defendants had no knowledge of the "order and character" of the prior proceedings in the suit. *Held*, that if defendants executed the undertaking for the purpose mentioned, it is immaterial whether they or their principals caused it to be filed; also that, as the undertaking recited the pendency of the suit, defendants were bound to take notice of the order, and character of the proceedings therein; and therefore that the pleadings admitted that the undertaking was given to continue in force the injunction previously issued, and defendants could not contend that the words "shall issue" in the undertaking referred to a final injunction in the suit.

4. Civil Code Cal. § 2837, provides that in interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts. Section 1643 requires that a contract be interpreted so as to make it capable of being carried into effect, if it can be done without violating the intention of the parties. *Held*, that as no undertaking could be required on final injunction, Code Civil Proc. providing only for undertakings on preliminary injunctions, the words "shall issue," in the undertaking, must be construed under these Code provisions as meaning "shall be continued in force."

5. Plaintiff can recover for profits which he would have made had he not been prevented by the injunction from carrying on his business.

6. The sureties on an undertaking on a preliminary injunction are not liable for losses or counsel fees accruing after the final decree making the injunction perpetual, as a preliminary injunction is merged and ceases to have effect when a decree for perpetual injunction is rendered.

7. Even if the undertaking expressly covered such losses, it would be, to that extent, inoperative, as Code Civil Proc. Cal. provides only for an undertaking on the preliminary injunction, and any statutory undertaking beyond what is required by statute is void.

8. The sureties are not liable for loss of profits or counsel fees incurred or expended before the giving of the undertaking, nor for counsel fees expended in defense of the suit, but only those expended solely or principally in procuring a dissolution of the injunction.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by W. P. Lambert against J. L. Haskell and Christian Westphal, on an injunction bond. Judgment for plaintiff, and defendants appeal.

C. H. Parker and *R. Percy Wright*, for appellants. *Lloyd & Wood*, for respondent.

HAYNE, C. Action against the sureties on an undertaking on a preliminary injunction. Verdict and judgment for plaintiff. Defendants appeal from the judgment, and from an order denying their motion for a new trial. We think that the judgment and order appealed from must be reversed. But as some of the questions will arise upon a retrial, we have examined them.

1. We think that the complaint states a cause of action. The argument against it is that material allegations are omitted, and that such omission cannot be supplied by a copy of the undertaking annexed to the complaint; and the case of Los Angeles v. Signoret, 50 Cal. 298, is cited. The objection goes, in effect, to the long-existing and well-established practice of pleading by setting forth in full the instrument upon which the action or defense is founded; for there can be no difference between setting forth such instrument in the body of the pleading and in annexing it as an exhibit, and making it a part of the pleading by a proper reference. In each case the copy is part of the pleading. The only difference is in the arrangement or sequence of the parts. And this difference is entirely unimportant upon the question whether the pleading states a cause of action. The objection, therefore, as above stated, goes to the propriety of pleading an instrument by setting it forth in full. This, however, is a recognized mode of pleading in this state. In Stoddard v. Treadwell, 26 Cal. 303, the court distinctly stated that "a contract may be declared on according to its legal effect or *in hæc verba*." And the same rule has been laid down in other cases. Murdock v. Brooks, 38 Cal. 603; Joseph v. Holt, 37 Cal. 253; Hallock v. Jaudin, 34 Cal. 175; Wills v. Kempt, 17 Cal. 98. In Joseph v. Holt it was said that if there was any preference between the two modes of pleading it was more in harmony with our system to set forth the instrument. This does not mean that the party may plead matters of mere evidence. The instrument must be one on which the action or defense is founded. And the instrument set forth must be free from defect or ambiguity; if not, the pleader must put some construction upon it by averment. Durkee v. Cota, 74 Cal. 315, 16 Pac. Rep. 5. And the practice seems to be recognized by express provisions of the Code. Code Civil Proc. §§ 447, 448. The case of Los Angeles v. Signoret is not at all in conflict with the decisions above cited. It merely establishes what seems to us to be an obvious and necessary qualification of the rule, viz., that matters of substance, which are preliminary or collateral to the instrument pleaded, cannot be supplied by the recitals of the instrument. This must be true. All that is accomplished by setting forth an instrument in full is to allege its existence and character. It does not involve an assertion of the truth of preliminary or collateral matters recited in the instrument. Whatever may be the effect of such recitals as evidence, they cannot serve as allegations in pleading. The facts of the case relied upon will illustrate this. The action was upon a street assessment. The street law required certain preliminary steps to be taken to give the municipal authorities jurisdiction to make the assessment. The complaint was silent as to the taking of these steps. The only thing to show that they had been taken was the fact that they were recited in the assessment. This did not amount to an assertion by the pleading that the steps had been taken. It was at most an assertion that the officer who made the assessment had asserted that they had been taken, which was clearly insufficient. Now, in the case before us the complaint sufficiently alleges the existence of the preliminary facts. It alleges the pendency of the injunction suit, and the making of an order requiring an undertaking with specified conditions, viz., an undertaking "conditioned that said sureties on said undertaking would pay to said Wm. P. Lambert, B. W. Brown, et al., the said parties enjoined, all damages that they might sustain by reason of said injunction, if said court should finally decide that said Alpers and Mowry were not entitled to the same; said damages not to exceed $10,000." It then alleged that an undertaking had been given in compliance with said order, and annexed said undertaking as an exhibit, making it a part of the pleading by reference. This was a sufficient showing of the terms of the contract of the sureties, and "the condition upon which their liability was to arise." The "nature of the obligation" set forth was a matter of law, which it was not necessary to allege. Nor do we think that appellants are right in their contention that the complaint does not show the acts which were sought to be restrained, and that it cannot be seen from the pleading whether the injunction restrained the defendants from the commission of the acts referred to in the undertaking. The complaint first alleged that the business of the defendants in the injunction suit was the removal of dead animals, "and of trying out dead animals, and selling the oil, bones, hides, and other products derived from them." It then alleges that an injunction was issued, which was annexed as an exhibit, and referred to, "enjoining and restraining said plaintiff Brown et al. from carrying on said business as in said injunction particularly expressed." The injunction restrained the defendants "from maintaining your certain order-boxes mentioned in the complaint in this action, to which your attention is hereby directed, and from removing, or in any manner interfering with or disposing of, the carcass or carcasses of any dead horse, horses, or cattle within the limits of the city and county of San Francisco." The undertaking was given "in order to continue in force said injunction restraining said plaintiff Brown and others from carrying on their said business." This was sufficient, at all events, as against a general demurrer. The fulfillment of the conditions of liability, and the damages sustained, are sufficiently stated.

2. The appellants make several points, which rest upon the assumption that it does not appear that the undertaking in suit was given upon the preliminary injunction by which the parties were restrained, and that it appears that the undertaking was not so given. The facts out of which these objections grow are as follows: Shortly after the action was commenced a preliminary injunction was issued upon an undertaking in the sum of $2,000. Afterwards the court made an order that the injunction should be dissolved, unless the defendants should within 10 days give another undertaking in the sum of $10,000, with specified conditions. Such an undertaking

was given within the required time, and is the one in suit; the one previously given having been released. It recited the commencement of the suit, and proceeded as follows: "Now, therefore, we, the undersigned, J. L. Haskell and C. Westphal, in consideration of the premises and of the issuing of said injunction, do jointly and severally undertake in the sum of ten thousand dollars, and promise to the effect that, in case said injunction shall issue, the said plaintiffs will pay to the said parties enjoined such damages, not exceeding the sum of ten thousand dollars, as such parties may sustain by reason of said injunction, if the said district court finally decide that the said plaintiffs were not entitled thereto." It is argued that the phrase "in case said injunction shall issue" shows that some injunction to issue in the future was intended, and that it must be held that the undertaking was upon the final injunction, to be issued in case judgment should be ordered for the plaintiffs upon the trial. But we do not think so. If the language had been "in case said injunction 'shall be continued in force'" instead of "shall issue," there could have been no doubt. The question is, therefore, whether the words "shall issue" can be construed to mean "shall be continued in force." Now, we think that there might be cases in which the circumstances would show that the two phrases were used as equivalent to each other. There is no provision of statute expressly authorizing the requirement of an undertaking as a condition for "continuing" an injunction. The only provision is that an undertaking may be required "on granting" an injunction. But it cannot be doubted that the court has power, where it appears that the injunction was issued on an insufficient undertaking, to order (as it did in the case in question) that the injunction should be dissolved unless a sufficient undertaking should be given; or, in other words, should be continued in force only on condition that a sufficient undertaking should be given. Such a proceeding would be sustained upon the theory that the words "on granting" were broad enough to mean "on continuing in force;" for the transaction would be in substance and effect, though not in form, the "granting" of an injunction. And the same would be true if the lanuage had been "on issuing," instead of "on granting," the injunction. We think, therefore, that the two phrases mentioned may be held to be in some cases equivalent in meaning, if the circumstances show that such was the intention. And the circumstances here clearly show that such was the intention, for it is admitted by the pleadings that the undertaking in suit was given to continue in force an injunction. The complaint first alleged the granting of the injunction and the making of the order requiring a further undertaking, and then that in compliance with such order, "and in order to continue in force said injunction," the undertaking in suit was given. The answers deny that the defendants caused the undertaking to be filed, and aver that the plaintiffs in the injunction suit caused it to be filed. But if they executed the undertaking for the purpose mentioned, it is unimportant whether they or their principal caused it to be filed. This denial, therefore, is immaterial. The defendants further aver that they had no knowledge of "the order and character" of the prior proceedings in the suit. But the undertaking recites the pendency of the suit; and this recital is conclusive of their knowledge of the suit, (Pierce v. Whiting, 63 Cal. 540;) and, having such knowledge, they are bound to take notice of the "order and character" of the proceedings therein. It is therefore admitted by the pleadings that the undertaking was given to continue in force the injunction previously issued. In the face of this admission, can the defendants maintain that the undertaking was not given to continue in force said injunction? There are other considerations which lead to the same result. It is perfectly true that a surety cannot be held beyond the express terms of his contract. But the meaning of the terms used is a matter of interpretation; and "in interpreting the terms of a contract of suretyship the same rules are to be observed as in the case of other contracts." Civil Code, § 2837. One of these rules is that a contract must be interpreted so as to make it operative, and capable of being carried into effect, if it can be done without violating the intention of the parties. Id. § 1643. But to give the undertaking the construction contended for by the appellants would be to make it inoperative, and of no effect. They say that it means that it was given upon "the perpetual injunction to be obtained by the judgment of the court as the result of the action." And the counsel are driven to this position; for unless it means either the continued injunction or the final injunction, it does not mean anything. But it is obvious that it cannot mean the final injunction, for, aside from the absurdity of requiring an undertaking a long time prior to the judgment upon which it was to be given, and the uncertainty as to which party would prevail upon the trial, it is manifest, for reasons stated below, that no undertaking could be required upon the final injunction; so that to adopt the construction contended for would be to make the order requiring an undertaking ridiculous, and the undertaking itself futile. Such a construction will not be adopted if a reasonable one be fairly open, which we think that we have shown is the case.

3. It is objected that the respondent was allowed to recover damages for the profits which he would have made had he not been prevented by the injunction from carrying on his business. We think that this was proper. It must be true that where a party is wrongfully prevented by injunction from carrying on a profitable and established business he can recover damages therefor. And if the profits which he would have made are not to be allowed, what damages is he to recover? Would it be adequate compensation to reimburse him merely for his expenditures, and for the losses which he might sustain from being prevented from fulfilling existing engagements, and the depreciation of his stock in trade? If this were true, there would be a very convenient way of getting rid of a business rival. A business might be destroyed by a preliminary injunction before the truth of the allegations upon which it was obtained could be in-

quired into. The best-considered cases agree that, where an established business is wrongfully injured or destroyed, the owner of the business can recover the damages sustained thereby, and that upon this question evidence of the profits which he was actually making is admissible. Terre Haute v. Hudnut, 112 Ind. 550 et seq., 13 N. E. Rep. 686; Allison v. Chandler, 11 Mich. 558 et seq; Chapman v. Kirby, 49 Ill. 219; Simmons v. Brown, 5 R. I. 299; Gibson v. Fischer, 68 Iowa, 30, 25 N. W. Rep. 914; Goebel v. Hough, 26 Minn. 256, 2 N. W. Rep. 847; Shafer v. Wilson, 44 Md. 268. The damages must be proximate, and not too speculative and remote. Thus it has been held that the profits which a party claims that he would have made from a contemplated extension of his business are too remote. Railway Co. v. Howison, 86 Ill. 215. But we think that the facts of the present case bring it within the rule above stated, although the business had only been established a short while.

4. We think, however, that the court erred in allowing the plaintiff to recover damages accruing after the final decree made in February, 1881. By it the court decreed that "the temporary injunction heretofore granted be made perpetual, and that said defendant be enjoined for the space of twenty years," etc. An appeal was taken from this decree, and it was reversed. The *remittitur* was filed in the lower court on July 5, 1882. Shortly afterwards the suit was dismissed upon motion. The trial court in the present case evidently proceeded upon the theory that the plaintiff herein was entitled to recover damages for the whole period from the giving of the undertaking down to the dismissal of the suit in 1882. It overruled an objection to evidence raising this question, to which ruling an exception was taken, and it is assigned as error; and subsequently (though not immediately) evidence was admitted in accordance with the ruling. The jury were distinctly instructed that the recovery, if any, should be for the whole period up to July 4, 1882; and it is evident from the record that the jury must have acted on this theory. The exceptions to the charge are probably too general. But we think that the record fairly presents the question in at least one way, if not in several. And the respondent claims to be entitled to damages for the whole period, and does not raise any question as to the sufficiency of the record. The position of the appellants is that all that could be recovered in any view was "such damages as were sustained by the parties enjoined by reason of the loss of profits of their business from the time the undertaking was given until the injunction was made perpetual by the court, *i. e.*, between January 27, 1880, and February 5, 1881;" and we think that this position must be sustained, both as to the loss of profits and as to counsel fees. The condition of liability expressed in the undertaking is, "if the said district court finally decide that the said plaintiffs were not entitled," etc. This seems to us to point to the final decree to be made after trial of the case. But even if it were otherwise, even if the undertaking had expressly provided for a subsequent liability, if such provision be outside of what is required by the statute, it would be void; for it is settled that a statutory undertaking beyond what is required by the statute is to that extent without consideration and inoperative. Powers v. Crane, 67 Cal. 65, 7 Pac. Rep. 135; People v. Cabannes, 20 Cal. 528. The question is, therefore, what is the undertaking required by statute, and what liability does it impose? It seems plain that the undertaking provided for by the Code of Civil Procedure is upon the preliminary injunction. No other injunction is provided for therein; and, ordinarily, no undertaking could be required on the final decree. Possibly there may be exceptional cases in which the relief sought is of such a character as to make it proper for the court, under its general powers in deciding a case in equity, to require an undertaking from the plaintiff as a condition of relief; but ordinarily no undertaking could be required on the final decree. None could have been required upon the final decree in this case, and none was required. Hence, as above stated, it is plain that the undertaking provided for is upon the preliminary injunction only. Being upon the preliminary injunction, it can last only as long as such injunction continues, and expires with it. How long, then, does the preliminary injunction last? We think that the whole theory of a preliminary injunction is that it is to preserve the rights of the party until the truth of the charge can be regularly investigated. It is called by the Code a "provisional remedy." When the truth of the charge has been investigated, and a final decree made, there is no longer any necessity for a preliminary injunction. It has served its purpose and its functions cease. If its functions do not cease, then, of course, it remains in force. But the final decree is also in force. The injunction awarded by a final decree is not suspended by an appeal. Heinlen v. Cross, 63 Cal. 44. Hence, if the preliminary injunction does not cease, there would be the anomaly of two injunctions in the same case, each restraining the same act, and each valid. But, overlooking this anomaly, how could it be said in such a case that the party is injured by the preliminary injunction? If it were out of the way he would still be restrained by the final injunction. He would be no better off if the preliminary injunction were annihilated. What difference, then, does it make to him? How can he be said to suffer damages from it? The practical effect of giving the party a remedy upon the undertaking after the final decree is to require a bond upon the final decree, which is not authorized by law. The proposition we have endeavored to state was recently expressed by the court of appeals of New York, in reasoning to a different point, as follows: "An injunction by order is a provisional remedy, and temporary in its character. It assumes a pending litigation, in which all questions are to be settled by a judgment, and operates only until that judgment is rendered. If by that a permanent injunction is granted, the temporary one is, of course, ended, and equally so, if a permanent injunction is in the end denied." Jackson v. Bunnell, 113 N. Y. 220, 21 N. E. Rep. 79. The same doctrine was laid down, and the very point which is involved here decided, in Webber v. Wilcox, 45 Cal. 302. The material facts of that case were identi-

cal with the material facts of the case before us. A preliminary injunction was granted, and, after trial, a final injunction was decreed. The final decree was appealed from, and was reversed, and the suit was thereupon dismissed. In an action upon the undertaking it was held that there could be no recovery against the sureties for costs, or counsel fees expended after the rendition of the final decree in the court below; and the supreme court said: "When the decree for a perpetual injunction was rendered, the order for a preliminary injunction was merged, or ceased to have any further effect, and thereafter the case stood in the same condition, in respect to damages, as it would have done had no preliminary order been made." This case holds that the function of a preliminary injunction ceases upon the rendition of the final decree. And upon the same principle (differently applied) it has been held that the functions of a restraining order, pending the issuance of a preliminary injunction, cease upon the issuance of the latter. Cohen v. Gray, 70 Cal. 85, 11 Pac. Rep. 508. It results that the plaintiff cannot hold the sureties in damages, either for loss of profits or counsel fees accruing after the final decree in the court below.

The case of Webber v. Wilcox was not overruled by Porter v. Hopkins, 63 Cal. 53, as contended for the respondent. It is true that it was there held that counsel fees in the supreme court could be recovered from the sureties on the preliminary injunction. But this was held with reference to counsel fees on appeal from the order refusing to dissolve the injunction, and not with reference to counsel fees on appeal from the final decree. It is obvious that the party may move to dissolve the injunction without waiting until the trial of the cause, and may at once appeal from the order denying his motion. This appeal may possibly be disposed of before the final decree is made. In such case the preliminary injunction would not be merged in the final decree, for the simple reason that there would be no final decree; and the counsel fees on appeal from the order would be incurred in procuring a dissolution of the injunction, and would, therefore, be properly allowed as damages. Even if a final decree be rendered after the appeal from the order, and before such appeal be disposed of, it would seem reasonable that, inasmuch as it was taken before the decree, the party would be entitled to have it disposed of without reference to facts subsequently occurring in a different line of procedure. Now we have examined the report of the case of Porter v. Hopkins, in connection with the record on which the decision was rendered, (see volume 305, Supreme Court Records,) and we think that the most that can be claimed for it is that it decides—*First*, that the party enjoined is entitled to counsel fees upon appeal from the order refusing to dissolve the preliminary injunction, where such order is made and appealed from before the final decree is made; and, *second*, that, even when the final decree is made after such appeal, but before it is disposed of, the party is entitled to have his appeal disposed of, and may in a proper case recover his counsel fees thereon. We do not desire to be understood as expressing a positive opinion upon the second proposition, or as asserting that it was decided in the case. We merely say that the two propositions are the most that any one could claim to have been decided by the case. Neither of the propositions is in conflict with the doctrine of Webber v. Wilcox.

In the present case it does not appear that any appeal was taken except from the final decree itself; and, as has been stated, the plaintiff, under these circumstances, cannot recover either for loss of profits or for counsel fees after the making of this decree. The cases of Clark v. Clayton, 61 Cal. 634, and Dougherty v. Dore, 63 Cal. 170, are not in conflict with this conclusion.

It is unnecessary to consider whether the reversal of a final decree would revive a preliminary injunction previously granted. It is probable that it would. It is probable that the preliminary injunction in such case would stand "in the same attitude in all respects as before the former trial." See Hess v. Winder, 34 Cal. 270. But that is a question which is not presented by the record here.

Inasmuch as the case must be reversed for the above reasons, there are two observations which we think should be made with reference to a retrial. In the first place, the liability of the sureties commences with the giving of the undertaking. They are not liable for counsel fees or loss of profits previously expended or incurred, although evidence of the previous condition of the business is admissible for the purpose of showing its extent and character. In the second place, the counsel fees for which the sureties may be held are not those expended for the defense of the suit, but only those which have been expended solely or principally in procuring a dissolution of the injunction. Newton v. Russell, 87 N. Y. 531; Bustamente v. Stewart, 55 Cal. 115. And the evidence must show a case within the rule. It is not sufficient to show the value of service rendered in the case generally. Mitchell v. Hawley, 21 Pac. Rep. 833, No. 11,987, filed May 28, 1889. We advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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81 Cal. 93

MORGAN v. BALL. (No, 13,220.)

(*Supreme Court of California.* Oct. 8, 1889.)

FRAUDULENT GIFTS.

A husband, when perfectly solvent, made a gift of personal property to his wife, who duly accepted it. After delivery the husband at all times represented, claimed, and admitted that the property was the separate property of the wife, and whenever it was loaned to others it was by the direction and consent of the wife, and not of the husband. The latter, however, continued to use the property as before, and there was nothing in its use by the wife that was inconsistent with ownership by the husband, or from which the public could determine that the title had passed to the wife. The husband afterwards left the state, and the property was for a while in litigation, and in the hands of the sheriff, but otherwise the wife had the exclusive possession and use thereof. *Held,* that there was an "immediate delivery, followed by an actual and continued change of possession," within Civil Code Cal. § 3440, which makes every other transfer of personal property made by a person having possession and control fraudulent as to his creditors while he remains in possession, and the successors in interest of such creditors, etc.

Commissioners' decision. In bank. Appeal from superior court, Butte county; Phil W. Keyser, Judge.

Action by Belle M. Morgan against John M. Ball for the recovery of certain personal property or its value. Judgment for plaintiff, and defendant appeals.

Reardan & Freer and *H. V. Reardan*, for appellant. *John Gale*, for respondent.

Foote, C. This action is for the recovery of the possession of certain personal property from the hands of the defendant, or, if delivery cannot be had of the property, for its value. The court below gave judgment as prayed for, and from that this appeal is taken.

In a former adjudication by the appellate court the property concerning which this litigation is now had was declared to be that of the plaintiff, derived by gift from her then husband, W. J. Morgan, and made by him without any fraud as to his existing creditors. Morgan v. Hecker, 74 Cal. 540, 16 Pac. Rep. 317. It appears from the findings in the present cause that the property, consisting of a mare, her colt, and a buggy, were given to the plaintiff, Belle M. Morgan, then the wife of W. J. Morgan, by him in good faith, when he was solvent, and able to pay his debts, and that at the time of the making of the gift the property was delivered to and accepted by his wife. Several years after the gift was so made, delivery and acceptance had, the husband became indebted upon a promissory note to one Daniel McCarthy in the sum of $300. After the note became due, on the 3d of May, 1888, it having been transferred to Fred Hecker, he commenced an action to recover what was due upon it. On the day the action was begun an attachment was issued in aid of it, and on the 3d of May, 1888, was levied by the sheriff of Butte county, the defendant here, upon the property involved in this discussion. On the 18th of May, 1886, Belle M. Morgan filed an inventory of her separate property, including the mare and buggy, but not the colt, in accordance with the provisions of sections 165, 166, Civil Code. About the month of May, 1886, W. J. Morgan, the husband of the plaintiff, left the state of California, and has never returned. At the time of his departure, and on the 23d of March, 1886, when he became indebted to McCarthy on the note afterwards transferred to Hecker, Morgan was greatly in debt and insolvent. It is further found that after the 6th day of July, 1883, the day on which Morgan gave and delivered possession of the property to his wife, as set forth heretofore, and until his departure from this state in 1886, he used it jointly with her, with her consent and knowledge, and that his use of it was the same after as before the gift; that there was nothing in the use of the same property by the plaintiff, Belle M. Morgan, which was inconsistent with its ownership by her husband, the donor, or from which the public could determine that the title of the property had passed, by gift or otherwise, to the plaintiff; that the colt was the foal of the mare, and all the expense of its getting and rearing was paid by the husband; that the use of the colt by him after its birth was identical with his use of the mare and buggy; but that at all times after the gift and delivery of possession was made the husband represented, claimed, and admitted that the property in question was the separate property of his wife, and whenever it was loaned out to or used by any other person than the wife or her husband it was loaned out and used by the direction and consent of the wife, and not by that of the husband; that during nearly all of the time since the departure of the husband from the state, and from whom it seems at this time the wife is divorced, the property has been the subject of litigation, and in the hands of the sheriff of Butte county; that during such times as it has not been in the hands of the sheriff the said plaintiff has had the exclusive possession and use thereof.

Upon this state of facts the appellant contends that the transfer to the plaintiff of the personal property now under consideration was fraudulent and void as against the successor of the husband's creditors, because, as is claimed, such transfer is not shown to have been accompanied by "an immediate delivery, and followed by an actual and continued change of possession of the thing transferred," so as to satisfy the provisions of section 3440, Civil Code. In this connection it is urged that for the wife to be able to maintain her claim she must have complied with sections 165, 166, Id., as otherwise the use by her husband of the property in a similar manner after as before the gift would be obnoxious to the provisions of section 3440, supra; and, as she did not so comply until the creditors' rights had attached, it was of no avail. Admitting, as the defendant contends, that sections 165, 166, supra, were intended as a means to enable a wife to protect her rights, because of the difficulty resulting from her relations as wife, in showing an immediate delivery and actual and continued change of possession to her from her husband, yet it seems to us that the provisions of section 3440, supra, have in this instance been fully met. The property was delivered to her, and she took immediate possession of it, when her husband was solvent, and could legally invest her with title. Her possession was actual and continuous so far as it could be, considering the relations she bore to her husband. His use of it was the same, so far as he was concerned, as it had always been. Her use was not inconsistent with his ownership, but the use of it by all other persons was openly as her property. It was proclaimed by her husband that the property was hers, and it seems to have been publicly known and recognized as hers by all who used it. In what other better way could the wife, consistent with her relations as wife, have maintained and had an immediate delivery of possession, followed by an actual and continued change of possession? She did not refuse her husband the use of it, but she did take it into possession at once, and continuously keep and use it as hers as to all the world, and it was not in any way used or possessed by her husband, except as subordinate to her dominion, possession, and control. The object of section 3440, supra, as contended for by the defendant, is to require an immediate delivery and continued change of possession of personal property after its transfer, in order, as he says, to give notice to the world that ownership has changed. If that is so, then, when a husband in solvent circumstances gives his wife personal property, which is at once delivered to her, and the possession is not resumed or continued by the husband as the owner of the property, but he simply continues to use it as he has hitherto done, and the wife has actual possession and claims it openly as owner, he declares it as hers, and all their acts show to the public that the property is hers from the date of the gift, she uses it as a wife ordinarily does, and all others use it as hers, acknowledging and owning it as hers, it seems to us that the object of the law is accomplished. It has been held that it is sufficient if there are circumstances which authorize the inference of a change of ownership. Clark v. Rush, 19 Cal. 394. It cannot be that the circumstance of a mere use by the husband of property given by him to his wife when he is solvent and can legally present her with it, such use being the same after as before making the gift, will make the gift void as to debts contracted by him while so using it, if a delivery of possession was made immediately to the wife, and that possession has been continuous, and such as is usual when a gift of this sort is made by a husband to a wife; and the acts and declarations of both these parties, and the acts of all other persons who use the property, both before and after the debt is incurred by the husband, are openly declarative and in acknowledgment of the wife's ownership and control over it, as distinct and changed from her husband to her. We perceive no prejudicial error, and advise that the judgment be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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81 Cal. 64

DEWEY v. SUPERIOR COURT *et al.* (No. 13,299.)

(*Supreme Court of California.* Oct. 9, 1889.)

COMMITMENT FOR CONTEMPT.

1. A judgment enjoined defendant from maintaining a certain dam or other obstructions in a certain creek, and from maintaining a certain ditch or canal in any condition that would interfere with the rights of plaintiff. Afterwards, on proceedings for contempt for violating the injunction, the court found that it was within defendant's power to obey the judgment, "and to remove said dam, and to fill up the mouth of said ditch, * * * and to cease to divert the waters of said creek;" and the court ordered that defendant be committed to the custody of the sheriff, and confined in jail till the dam or obstruction be removed, and the ditch be filled. *Held*, that the order committed defendant for omission to perform an act not commanded in the injunction, and, as Code Civil Proc. Cal. authorizes imprisonment only for contempt which "consists in the omission to perform an act which is yet in the power of the person to perform," the court exceeded its jurisdiction.

2. Under Code Civil Proc. Cal. § 949, providing that the perfecting of an appeal (with certain exceptions not covering an appeal from an injunction) stays proceedings in the court below, an appeal from an order granting an injunction stays proceedings on all parts of the order commanding some act to be done, and the court had no power, pending appeal, to punish for omission to comply with the order to remove the dam, or fill the ditch.

THORNTON, J., dissenting.

In bank. Writ of review to superior court, Merced county; CHARLES H. MARKS, Judge.

Jarboe, Harrison & Goodfellow and *J. W. Knox*, for petitioner. *Law & Law*, for respondent.

FOX, J. This is a proceeding by writ of review to re-examine, vacate, and set aside an order of the superior court of the county of Merced, made after judgment, and in proceedings for contempt for violation of a judgment for injunction. The facts, as stated in the petition and appearing from the return, are that in a certain suit pending in said court, wherein one Turner was plaintiff, and Dewey, the petitioner here, was defendant, a judgment was made and given enjoining the defendant from maintaining a certain dam or other obstructions in Mariposa creek, and from maintaining a certain ditch or canal of defendant in any condition that would interfere with the rights of plaintiff, as in the said judgment and in the findings and conclusions of the court set forth; it being thereinbefore set forth that the plaintiff had the right to all the waters flowing in the Mariposa creek, without interruption by the defendant, down the bed, along the natural water channel of said creek, except at such times as there may be a surplus of water running in said creek. The judgment also awarded the plaintiff $1,000 damages. From this judgment an appeal was perfected to this court, and the statutory stay bond for the money judgment and bond for costs were duly given. After the perfection of such appeal, proceedings were instituted in the same case, and in the manner prescribed by the statute, to punish the defendant for violation of such injunction; the defendant was duly cited to appear and show cause, etc., and upon the hearing the defendant was adjudged guilty of contempt, and was fined in the sum of $150, and it was also ordered that he be committed to the custody of the sheriff of Merced county, and confined in the county jail until all dams and obstructions placed in said Mariposa creek by him, or through his procurement, which would obstruct the flow of the water therein, be dug out and removed therefrom, and until the ditch leading from said creek be filled up substantially, so that the waters of said creek cannot be diverted thereby. It is contended that this order requires of the defendant, petitioner here, things which were not required by the original judgment; imposes on him obligations not imposed thereby; and punishes him for the non-performance of duties which the judgment did not require him to perform.

The court clearly had jurisdiction of the proceedings for contempt, and upon the hearing of that proceeding it appears that evidence was taken, upon which the court found, among other things, that the defendant had, in violation of said injunction, "diverted and permitted the waters of said creek to be diverted from said creek, and from the lands of plaintiff, and deprived the plaintiff * * * of the use thereof." The evidence upon which such finding is based is not sent up. The finding itself is within the issues, and the jurisdiction of the court, and its judgment of conviction thereon rendered is final and conclusive. Code Civil Proc. § 1222. But the court further finds "that it is now, and was at all the times herein mentioned, within the power of said defendant, Henry Dewey, to fully obey said judgment, and to remove said dam, and to fill up the mouth of said ditch where it enters the said creek, and to cease to divert the waters of said creek therefrom, and from the lands of said plaintiff."

We have looked in vain in the "said judgment" for anything commanding or requiring the defendant to "remove said dam," or to "fill up the mouth of said ditch," either in express terms or by any fair implication. The dam was a wing-dam, reaching part way across the creek only, and both dam and ditch were constructed and owned by this defendant and two others in common, and in equal parts, but for the use and benefit of separate tracts of land held by the several parties in severalty, and said two other persons were never made parties to this suit. This fact is alleged under oath, and not disputed, and it furnishes a very good reason why the original judgment should have been prohibitory only against the defendant, and not mandatory, requiring of him an act which he could not do without making himself liable to others not parties to the suit, and over whom the court had no jurisdiction. But, notwithstanding the omission of all words of a mandatory character in the original injunction, we find the court, in this proceeding for contempt, and upon the faith of the finding above quoted, "ordered, adjudged, and decreed that he, the said Henry Dewey, be committed to the custody of the sheriff of Merced county; and that said sheriff confine him in the county jail of this county until all dams and obstructions placed in said Mariposa creek by said Dewey, or through his procurement, which will obstruct the flow of the water therein, be dug out and removed therefrom, and until the ditch leading from said creek be filled up substantially, so that the waters of said creek cannot be diverted thereby." This order we think was clearly in excess of the jurisdiction of the court. It is an order which can only be made upon and in consequence of a conviction for contempt which "consists in the omission to perform an act which is yet in the power of the person to perform," and which has been required by the terms of the original order which the party is charged with having violated. Code Civil Proc. § 1219. The original order or injunction did not require him to perform the act which is by this order enjoined upon him, and for the on-performance of which it is now ordered hat he be imprisoned.

Again, even if, by implication, the original injunction required the defendant to perform the act required of him by the last-named order, the court had no jurisdiction, at the date of entering said order in the proceedings for contempt, to require him to perform the act, or to punish him for its non-performance. At the date of that order an appeal to this court had been perfected from the judgment of the court below, the effect of which was to stay all proceedings for the enforcement of the judgment, except that of enforcing and punishing for a violation of the prohibitory injunction alone. An appeal, perfected as this was, under section 949, Code Civil Proc., stayed all proceedings upon every part of that judgment "commanding some act to be done." Mining Co. v. Fremont, 7 Cal. 130; Bliss v. Superior Court, 62 Cal. 544. A prohibitory injunction remains in full force, pending such an appeal, and the court below may enforce obedience thereto; but a mandatory injunction is stayed by the operation of such appeal, the object of the rule in both cases being to preserve the *status quo*. Otherwise the result of the final adjudication might often be a barren victory. During the pendency of the appeal, the court below could do no act which did not look to the holding of the subject of the litigation just as it existed when the decree was rendered. In the exercise of its authority, it was empowered to punish, as for contempt, for the violation of any provision of the injunction, where the parties were not allowing the property to remain as it was at the date of the decree. Mining Co. v. Mining Co., 13 Pac. Rep. 174, citing Hovey v. McDonald, 109 U. S. 161, 3 Sup. Ct. Rep. 136, and other cases. So in this case, the defendant may be punished for the actual diversion of the waters of Mariposa creek, pending the appeal, if done by himself, his agents, servants, or employes, or by his procurement, to the injury of plaintiff; but he cannot be punished for failure to remove the dam or fill up the ditch—*First*, because no such mandate is found in the judgment for injunction; and, *second*, because if there were such a mandate its execution would be stayed by the appeal, which has been perfected. It is therefore ordered that so much of the order of the superior court of the county of Merced made and entered on the 1st day of June, 1889, in the case wherein Nicholas Turner is plaintiff and Henry Dewey is defendant, as directs that the said defendant be committed to the custody of the sheriff of said county, and confined in the county jail of said county until all dams and obstructions placed in said Mariposa creek by him, or through his procurement, which will obstruct the flow of water therein, be dug out and removed therefrom, and until the ditch leading from said creek be filled up substantially so that the waters of said creek cannot be diverted thereby, be, and the same is, hereby vacated and set aside.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; PATERSON, J.; WORKS, J.

I dissent: THORNTON, J.

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80 Cal. 253

BRIGGS *et al.* v. BRIGGS *et al.* (No. 12,866.)

(*Supreme Court of California.* Sept. 2, 1889.)

DEPOSITIONS IN FORMER ACTIONS.

Code Civil Proc. Cal. § 2034, provides that where a deposition has been once taken in an action it may be read by either party in any other action between the same parties upon the same subject. Section 1910 provides that the parties are to be deemed the same, where those between whom the evidence is offered were on opposite sides in the former case, and a judgment could in that case have been made between them alone, though other parties were joined with both or either. *Held*, in accordance with section 4, declaring that "the provisions of this Code shall be construed liberally," that the term "parties," in said sections, includes successors in interest; and a deposition taken in a former action is admissible in an action touching the same subject, and upon the same issues, wherein the plaintiffs are the former defendants, and the defendants are the grantees of the land in controversy from the former plaintiff.

Commissioners' decision. In bank. Appeal from superior court, Tulare county; W. W. CROSS, Judge.

W. C. Burnett, for appellants. *Morrow & Stratton* and *N. O. Bradley*, for respondents.

HAYNE, C. This suit was brought by one Frank T. Briggs and Mary E. Briggs, his wife, against his brothers, John G. and Albert L. Briggs, and one Mary J. Briggs, (which last made no defense,) for the purpose of setting aside a deed made by the plaintiff Frank to his father, Joseph W. Briggs. Judgment was given in favor of the defendants John and Albert, and the plaintiffs appeal.

The sole point made for the appellants is that the trial court erred in admitting in evidence the deposition of the father, Joseph W. Briggs. This deposition was taken in a suit brought by the father against the plaintiffs here. During the pendency of the father's suit he made a deed of gift of the property to the defendants John and Albert, and subsequently died. Thereupon the plaintiffs commenced the present suit as aforesaid. It is stipulated that the subject-matter of the father's suit "was identical with that of the suit at bar," and that "the issues in both cases were in all respects the same," with certain unimportant exceptions. It is further stipulated that the plaintiffs herein were "regularly notified of the taking of said deposition of said Joseph W. Briggs; that said Frank T. Briggs and Mary E. Briggs appeared by their counsel, W. C. Burnett, at the taking of said deposition, and were granted, and so exercised, the privilege of cross-examining said Joseph W. Briggs;" and that "said deposition was in all respects proper, and the same was taken upon full compliance with all provisions of law." The provisions of the Code of Civil Procedure in relation to the matter are as follows: Section 1870, subd. 8, provides that evidence is admissible of "the testimony of a witness deceased, or out of the jurisdiction, or unable to testify, given in a former action between the same parties, relating to the same matter." Section 2034: "When a deposition has been once taken, it may be read by either party, in any stage of the same action or proceeding, or in any other action between the same parties upon the same subject, and is then deemed the evidence of the party reading it." And in the chapter in relation to public writings, and in connection with provisions with respect to the conclusiveness of judgments, the same Code defines the word "parties" as follows: "The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or other determination could in that case have been made between them alone, though other parties were joined with both or either." Code Civil Proc. § 1910. The question is whether the phrase, "the same parties," in the above provisions, can be construed so as to include "successors in interest." It must be admitted that the strict and literal and ordinary meaning of the term is as appellant claims. But there is a larger, though less usual, meaning, which includes "all persons who are represented by the parties, and claim under them, or in privity with them." 1 Greenl. Ev. § 523. And a more liberal construction was given in the case of Fredericks v. Judah, 73 Cal. 608, 15 Pac. Rep. 305. There the testimony of a deceased witness, given in a former action brought against the plaintiff by the executrix of the person of whom the defendant was heir, and through whom he claimed, was proved by the introduction of the reporter's notes. It was held that there was no error, and PATERSON, J., delivering the opinion, after quoting from section 1870, above referred to, said: "Although in that action Mrs. Judah, as executrix, was plaintiff, it was an action between the same parties, within the meaning of this provision, for the executrix represented the heir therein, and the judgment in such cases is binding upon the heirs, whether they be made parties or not." That case is not absolutely identical with the case before us, for a successor in interest is not "represented" by his predecessor in the way that an heir is represented by the executor; but it affirms the principle that the phrase "the same parties" is not confined to the persons who are parties by name to the record. And we think that this principle is a sound one. Aside from the provisions of the Code, it is well settled that depositions taken in an action between two parties are admissible in actions between their successors in interest. 1 Greenl. Ev. §§ 164, 553, and 3 Greenl. Ev. § 326; Atkins v. Anderson, 63 Iowa, 743, 19 N. W. Rep. 323; Wade v. King, 19 Ill. 301; Goodrich v. Hanson, 33 Ill. 498; Adams v. Raigner, 69 Mo. 363; Cooper v. Smith, 8 Watts, 536; Kerr v. Gibson, 8 Bush, 130; Coke v. Fountain, 1 Vern. 413; Nevil v. Johnson, 2 Vern. 447; Starkie, Ev. *415; Pow. Ev. 187, 188; Steph. Dig. Ev. 48, 49. This rule was sanctioned by long experience, and was beneficial in operation. It is not an unsafe rule; for, while the successor in interest may not have had an opportunity to cross-examine the witness, yet the person in whose shoes he stands had, and this is sufficient for every practical purpose. The question arises, therefore, whether a long-settled and beneficial rule of evidence is to be abrogated by a somewhat strict construction of a phrase which is capable, without being strained, of a construction which would preserve the rule. We do not think that it should. The Code itself provides that its provisions "are to be liberally construed, with a view to effect its objects, and to promote justice." Code Civil Proc. § 4. And we think that if it had been the intention to change a well-settled and important rule such intention would have been expressed in plain terms. In this case there was a succession of interest on one side only. The appellants were parties to the suit in which the deposition was taken, and were notified of its taking, and were represented by counsel thereat, and were permitted to cross-examine the witness upon precisely the same issues as are involved here. We think that the ruling complained of was right, and we therefore advise that the judgment and order appealed from be affirmed.

We concur: Belcher, C. C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(81 Cal. 87)

Wright v. Roseberry *et al.* (No. 12, 811.)

(*Supreme Court of California.* Oct. 9, 1889.)

Ejectment—Evidence.

1. The surrender of certificates of purchase of lands for the purpose of obtaining a patent therefor, as required by law, (Pol. Code Cal. § 3519,) does not destroy their value as evidence of ownership, in ejectment.

2. Nor does the issue of a patent for a portion of the land only, on the surrender of such certificates, destroy their effect as evidence of ownership of the remainder, in the absence of evidence as to why the patent was not issued for the whole.

3. Such certificates, and indorsements thereon, showing that patents had issued for part of the land described therein, together with the testimony of the surveyor general that patents had issued as noted in such indorsements, is sufficient proof of the patents to establish a *prima facie* case of ownership of the land patented, in the absence of an objection that the evidence is secondary, or on motion for nonsuit.

4. Where the certificates were produced on the trial by the surveyor general, who was examined and cross-examined in regard to them and the indorsements, and were left by him in the custody of the court, under its order, they will be considered as in evidence.

Commissioners' decision. In bank. Appeal from superior court, Yolo county; C. H. Garoutte, Judge.

C. P. Sprague, for appellant. *J. C. Ball* and *S. C. Denson*, for respondents.

Hayne, C. Ejectment. The plaintiff was nonsuited at the trial, and appeals from the judgment upon a bill of exceptions. The question is whether the plaintiff's evidence was sufficient to make a *prima facie* case. His evidence consisted of two certificates of purchase, and certain other documentary evidence, tending to show that the land was swamp land, and certain testimony in relation to said certificates. The case has been before the supreme court of the United States, and that court held that the documents made a *prima facie* case for the plaintiff. Wright v. Roseberry, 121 U. S. 517, 7 Sup. Ct. Rep. 985. That decision is conclusive in favor of the plaintiff, unless there is some material circumstance which was not presented to or considered by the court. The respondents contend that it now appears that said certificates had been surrendered and canceled, and that they are therefore no longer evidence of title. The certificates were produced at the trial by the surveyor general, who testified that they had been surrendered when the application for the patent was made, and were then in his office; that patents had been issued for a portion of the land; and that a notice of indorsement had been made upon each certificate as follows: On certificate No. 1,659 the following: "S. W. ¼ of S. E. ¼ of section 24, patented to Tierry Wright, April 14, 1884;" and on certificate No. 1,660 the following: "S.W. ½ and N. W. ¼ of sec. 36, patented to Teirry Wright, April 14, 1884." The witness testified that patents were issued for the portions designated in said indorsements, and were for part of the lands "described in the certificates." And the descriptions in the certificates show the number of the township, range, and meridian. The receipts upon the certificates show that the principal and interest thereon had been fully paid up. It will be observed that this evidence presents two cases, viz., one in which no patent had been issued; and the other, in which a patent had been issued.

1. As to the land for which no patent has been issued, we think that the certificates made a *prima facie* case. The indorsement does not constitute a material alteration. It does not purport to change the tenor or character of the instrument, but was a mere minute or memorandum of subsequent action; and such memorandum does not purport to be a cancellation of the certificate, and was not so, unless such a consequence results as a matter of law from the transaction appearing from the memorandum, viz., from the surrender of the certificates and the issuance of patents for a portion of the land described therein. The mere surrender of a certificate of purchase does not destroy its validity as evidence of title. The law requires that it shall be surrendered before a patent can issue. Pol. Code, § 3519; Duncan v. Gardner, 46 Cal. 25. And it cannot have been the intention that the holder should lose anything by complying with the law. The surrender is not absolute, but is for a certain purpose only; and upon such surrender (and until the patent has issued) the officer is the custodian of the document for the benefit of the person entitled. It is not impossible that the officer may be negligent. Or some mistake or inadvertence may occur, through which a considerable period may elapse before the patent is issued. And if during such a period a stranger should intrude, or be in possession, the owner of the certificate has the same right to have such person ejected that he had before his evidence of title was surrendered. It affirmatively appears that the surrender here was for the purpose of obtaining a patent; and therefore the surrender did not of itself destroy the effect of the certificate as evidence of ownership. Nor do we think that, if the certificate is otherwise valid, the fact that the officer has issued a patent for a portion of the land operates to destroy the certificate as to the remaining portion. We have not been referred by counsel to any provision of law which would work such a result; and the record does not show why the patent was not issued for the whole tract. It may be that the non-ac

tion of the officer as to the omitted portion was mere inadvertence, or was the result of a clerical error; or it may be that the omission was owing to an erroneous view of the law on the part of the officer. In such case it might be considerable time before the error could be corrected; and we do not think that in the mean time the land is open to occupation by the public. If strangers intrude upon it, and the certificate be in fact valid, the owner should not be deprived of his recourse to the courts for redress, by the error or inadvertence of the officer. If the certificate be in fact invalid for any reason, such invalidity can be shown in such suit; but if it be otherwise valid the mere fact that patents have been issued for a portion of the land does not destroy the effect of the certificate as evidence of ownership. In the present instance no reason for holding the certificate invalid (other than the foregoing) is shown. If there were any such reason it should have been made to appear.

2. When a patent has been issued for the land called for by a certificate of purchase, the latter is superseded by the patent, and becomes *functus officio*. In this view the plaintiff's certificate was no longer evidence of ownership of the portion for which a patent had issued; but we think that, so far as this portion was concerned, the plaintiff made a *prima facie* case by the above-mentioned proof of his patents. As above stated, the surveyor general distinctly testified that patents had been issued, as noted in the indorsements upon the certificates, for part of the land "described in the certificates," and, taking his testimony in connection with said indorsements and certificates, the time when the land for which and the person to whom the patents were issued sufficiently appears. This, indeed, was not shown by the best evidence. But it is settled that, if a party permits his adversary to prove his case by secondary evidence, he cannot afterwards object that better evidence should have been produced. The secondary evidence is, under such circumstances, sufficient. Goode v. Smith, 13 Cal. 84; St. John v. Kidd, 26 Cal. 270; Janson v. Brooks, 29 Cal. 223; Rewrick v. Goldstone, 48 Cal. 555; Frink v. Alsip, 49 Cal. 103. There is a statement towards the close of the bill of exceptions that "all of the documentary evidence was objected to by the defendants, and each of them, upon the grounds of irrelevancy, incompetency, and immateriality." This does not show whether said objections were made at the time the evidence was offered, or towards the close of the trial. From the place in the bill of exceptions where the objection is inserted, the latter inference might perhaps be drawn. If such is the proper construction of the record, the objections were too late; for it is a familiar rule of practice that the party must make his objections to evidence at the time it is offered. If, therefore, the record is to be construed as showing that the objections were not made until towards the close of the trial, they were too late, and the case stands as if no objections were made. But without saying what the proper construction is, and assuming in favor of this branch of the respondents' case that the objections were made at the time the evidence was introduced, the same result follows; for, even where evidence is erroneously admitted against objection, but tends to prove something, full effect must be given to it upon motion for nonsuit, and upon the question of the insufficiency of the evidence to support the decision. This has been decided with reference to the insufficiency of the evidence. McCloud v. O'Neall, 16 Cal. 397; Pierce v. Jackson, 21 Cal. 636. And we think it plain that the same rule applies on motion for nonsuit. For reasons stated below it sufficiently appears that the certificate was admitted in evidence; and hence, upon any construction of the record, in this respect, there was sufficient proof of the patents to make a *prima facie* case as to the portion of the tract embraced therein.

Now, if either of the above positions is correct,—that is to say, if the plaintiff's evidence made a *prima facie* case either as to the land for which patents had been issued to him, or as to the land for which patents had not been issued,—the nonsuit cannot stand; for it cannot be seen from the record that the motion for nonsuit was made as to any particular portion of the tract sued for, (assuming that such a course would have been proper.) The record states that the motion for nonsuit was made "upon the several grounds then and there duly specified and stated," but it does not show what such grounds were, or whether the motion was as to a whole or a portion of the tract. Consequently, if either of said positions be correct, the judgment against plaintiff for the whole tract was erroneous.

3. It is contended for the respondents, however, that the certificates of purchase were not, as a matter of fact, introduced in evidence. They certainly were not formally introduced. They were at the time in the custody of the surveyor general. He was called as a witness, and produced and identified them. And the record states that the certificates of purchase were then placed in the hands of the reporter by the following order by the court: "It is ordered that the surveyor general leave them in the custody of the court until the conclusion of the case, thereupon to be returned to him at his office." The parties examined and cross-examined the surveyor general concerning them, and concerning the indorsements thereon. Furthermore, it is not entirely clear that the respondents' objections above quoted were not made to them; but, whether they were or not, it would seem clear from the other circumstances mentioned that both the court and the counsel for the appellant understood that the documents were in evidence; and under the circumstances they should be so considered. Compare Landers v. Bolton, 26 Cal. 414, 415; Pearson v. Pearson, 46 Cal. 628. We therefore advise that the judgment be reversed, and the cause be remanded for a new trial.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded for a new trial.

80 Cal. 452

BORN v. HORSTMANN *et al.* (No. 12,586.)

(*Supreme Court of California.* Sept. 20, 1889.)

WILLS—CONSTRUCTION—CONDITIONS.

A bequest to testator's daughters, to take effect "in the event of any of my said daughters becoming a widow, or otherwise becoming lawfully separated from her husband," is not void as against public policy by encouraging the legatees to become separated from their husbands.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

For opinion on application to modify stay of proceedings, see ante, 169.

Charles A. Summer, (*M. T. Moses*, of counsel,) for appellants. *E. J. Linforth* and *A. H. Loughborough*, (*Henry N. Clement*, of counsel,) for respondent.

WORKS, J. One Margaretha Faulhaber died the owner of certain real estate, and left surviving her four daughters and one son; some, if not all, of whom had children, who still survive. The deceased left a will, by which she conveyed her property to one Peter Schenkel and the defendant Horstmann, to be held and disposed of as follows, after the payment of certain specific bequests: "(4) To quarter-yearly equally distribute and pay unto my hereinafter named son and four daughters, during the term of their natural lives, the net income of the remainder of my said estate, in their own right, share and share alike, viz., Frank Faulhaber; Magdalena Ellen, now the wife of Henry Lux; Caroline, now the wife of Charles Born; Elizabeth, now the wife of George W. Zimmer; and Mary, now the wife of Christian Scheiffler. (5) And in the event of the death of any of my said children, then to equally distribute, transfer, and convey the net one-fifth part of the remainder of my said estate unto the surviving lawful issue of such deceased child, in her, his, or their own right, share and share alike. (6) In the event of the death of any of my said children without having any lawful issue surviving the same, then to quarter-yearly equally distribute and pay such proportion of the said income as the deceased should be entitled to receive (if living) by this will unto such of my said children as may survive the deceased in their own right, share and share alike. (7) And in the event of any of my said daughters becoming a widow, or otherwise becoming lawfully separated from her husband, then to distribute, transfer, and convey unto such of my said daughters the net one-fifth part of the remainder of my said estate, in her own right, and in lieu of the further distribution and payment to her of any of the said income." Horstmann alone accepted the trust. The will was probated, the estate settled, the specific bequests paid, and the residue of the property distributed to Horstmann, to be held in trust by him as provided in the will.

The plaintiff in this action was one of the daughters named in the will. After the property was distributed as above stated she was divorced from her husband, and the trustee, acting under the seventh clause of the will, conveyed to her the undivided one-fifth of the real estate, and this action was brought by her for a partition of the property, and to have her interest therein set off to her. The other daughters, who were made defendants, answered, among other things, as follows: "That it was the intention of said testatrix, in and by the said will, to give to each of her said daughters in fee-simple, an undivided one-fifth interest in the said land, upon condition that they should respectively separate or become divorced from their respective husbands, and that said condition was annexed to the said devise by said testatrix with intent to incite and encourage her said daughters to live separate or be divorced from their said respective husbands. That the said condition, and the provisions of the said will, in that behalf, are contrary to good morals and the policy of the law, and the trusts for that purpose created are null and void." We are pleased to see that this allegation is not verified by the daughters, but by their attorney, who cannot be charged with having reflected upon a dead mother in order to obtain possession of her property. The children of the son, who was deceased, and of the daughters, were also made defendants, and answered by guardian *ad litem.* The court below found the facts substantially as above stated, and also "that it was the intention of said testatrix, in and by said will, to give to each of her said daughters, in fee-simple, an undivided one-fifth interest in the said real estate, upon condition that they should respectively separate or become divorced from their respective husbands, and that said condition was annexed to said devise by said testatrix with intent to incite and encourage her said daughters to live apart or be divorced from their respective husbands." As conclusions of law the court below found that the above-named conditions were void; that the daughters all took the property absolutely freed from said condition, and that their children had no interest in the property; and rendered judgment of partition accordingly. The children of the daughters, by their guardian *ad litem*, appeal.

Both the appellants and the respondent now agree in contending that the condition in the will which affected their rights to the property in case of a separation from their husbands otherwise than by death, was void; but they do not agree as to the effect of the provision being so held. The appellants contend that, construing that clause to be invalid, the daughters were not entitled to the property until the death of their husbands· while the respondent and the other daughters contend that the clause referred to being void, they were, as held by the court below, entitled to the property at once. We regret that we are unable to agree with counsel on either side, or with the court below, as to the proper construction of this clause in the will. In our judgment there is nothing in the conditions referred to that can be held to be against public policy. There are cases holding that a condition in a will which holds out to the legatee an inducement to live separate and apart from her husband is void as against public policy. Thus, in Brown v. Peck, 1 Eden, 140, the will provided that the legatee should be paid two pounds per month if she lived with her husband, but if she lived from him, and with her mother, she should be paid five pounds a month. In Wren v. Bradley, 2 De Gex & S. 49, the bequest was "to my daughter, Ann Jefferies Wren, the wife of Abraham Wren, in case she shall be living apart from her said husband, the said Abraham Wren, and shall continue so to do during the life-time of my said wife, an annuity of £30, by equal quarterly payments, the first of such payments to be made at the expiration of three calendar months next after my decease. And I do hereby further direct that, if at any time the said Ann Jefferies Wren shall cohabit with the said Abraham Wren, the said annuity hereinbefore given to her shall, during the time she shall so cohabit, absolutely cease and determine." In Conrad v. Long, 33 Mich. 79, the clause of the will was as follows: "To my brother, Frederick S. Conrad, I give and bequeath the one-half so remaining, and the other half I give and bequeath to my sister, Elizabeth Long, upon this condition: if at any time subsequent she should conclude not to live with her present husband, Henry Long, as his wife. But if she continue so to live as the wife of the said Henry Long until her death, then, in that case, I give and bequeath all my property, real and personal, remaining after the burial of my mother aforesaid, to my aforesaid brother, Frederick S. Conrad." In all of these cases the conditions quoted were very properly held to have been void. The reason is apparent. They held out a direct inducement for the legatees to live separate and apart from their husbands. The result may have been to bring about the separation and violation of their marital duties and obligations without any just cause, and in an unlawful manner. This is not so in the case at bar. The condition under consideration could not be complied with except by a legal separation, and for causes found by a court of justice to be sufficient. This being so, there was nothing unlawful in the condition. It is true it may be said that it would have a tendency to induce the wife to assert her legal right to a divorce and separation, and that but for such inducement such right might have been waived, but it can hardly be said that it is against public policy to attach to a legacy such a condition as will tend to induce a legatee to do a lawful act in a lawful way.

The precise question presented here has been before the supreme court of Vermont, in which the will provided that the legatee should have the income of the estate, and such further sums as her wants might demand, so long as she remained the wife of I. A. Thayer; but if she was "left a widow, or for any cause should cease to be the wife of said Thayer," the whole estate should be given to her. In that case the court said: "The ground upon which it is claimed that the provision of the will violates public policy is that it furnishes an inducement to the wife to become the widow of her husband, or to separate herself from him in such a manner that she would cease to be his wife. The appellants, to sustain this claim, rely upon the rule as stated in 2 Redf. Wills, 293; 1 Story, Eq. Jur. 291, and the case of Conrad v. Long, 33 Mich. 78. The cases cited in support of the rule laid down in Redfield and Story it will be found on examination do not sustain the rule as here sought to be applied. They are generally cases in which an inducement was directly held out to encourage a voluntary separation of husband and wife, and where the intent to encourage such a separation could be found in the language employed in making the bequest. They are none of them so similar in their facts to the case at bar that they can be considered authorities in it The first object is to ascertain, if possible, what the intention of the testatrix was; and we find no difficulty in reaching the conclusion that it was to have her estate disposed of just as it has been by the probate court. It was a wise and prudent provision to make for her daughter. While she should remain a wife, her husband would be under obligation to support her, and hence the income only was absolutely left her during the continuance of that relation; but when she should cease to be a wife, and so become dependent upon her own resources, it was just and wise to provide that she should have the entire estate." Thayer v. Spear, 58 Vt. 327, 2 Atl. Rep. 161. We fully concur in this view of the law. Not only may there be a good and sufficient reason, as stated in the opinion cited, for providing that the legatee shall not have the bulk of the property until she is deprived of the support of a husband, but there may be the best of reasons for placing the same in such condition that she cannot be improperly induced by a worthless or profligate husband to squander it, while she continues to be his wife, and, it may be, under his influence and control. We think such a condition in a will is not only valid, but that under certain circumstances it may be just and commendable. For these reasons the judgment of partition in favor of the plaintiff was proper, but so much thereof as authorized the balance of the property to be set off to the daughters who were still married was erroneous. It was error, also, to hold and adjudge that the children of the daughters last mentioned had no interest in the property. They are entitled to have the property remain undisposed of until the conditions of the will are complied with, and to inherit the same upon the death of their mother before the condition shall happen. Judgment and order reversed, and cause remanded for further proceedings in accordance with this opinion.

We concur: FOX, J.; PATERSON, J.

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80 Cal. 553

HUDEPOHL v. LIBERTY HILL CON. MIN. & WATER CO. (No. 12,570.)

(*Supreme Court of California.* Sept. 20, 1889.)

MINES AND MINING—CONSTRUCTION OF AGREEMENT.

Defendant, a corporation, agreed to lease to plaintiff, for one year, the right to work and mine certain mining ground, the gross products thereof to be equally divided between plaintiff and defendant. *Held*, that such agreement was not a lease, even though the parties so termed it, and so was not within the statute (St. Cal. 1880, p. 131) declaring all leases of mining ground by corporations unlawful unless ratified by the stockholders, but was an agreement for the working of a mine on shares, and a promissory note given to plaintiff for his share of the products was upon a valid consideration.

Department 1. Appeal from superior court, Nevada county; J. M. WALLING, Judge.

Byrne & Cross, for appellant. *H. L. Gear, Gaylord & Searls;* and *C. A. & F. P. Tuttle*, for respondent.

WORKS, J. Action on a promissory note. Answer, want of consideration. Trial and judgment for the plaintiff. The defendant appeals on the judgment roll. The court found that the defendant, being a corporation, entered into the following contract with the plaintiff and one Buckman, through its superintendent: "Know all men by these presents that I, S. Wheeler, superintendent of the Liberty Hill Consolidated Mining & Water Company, for and on behalf of said company, have leased, and by these presents do lease, to C. Hudepohl and B. S. Buckman, for the term of one year from the date hereof, the right and privilege to work and mine the ground at or near Little York, in Nevada county, Cal., known as the 'Empire' and 'Manzanita' claims, on the following terms and conditions, to-wit: The said Liberty Hill Company to make all the improvements necessary for commencing and carrying on the work of mining. Said improvements to consist of putting in flumes and under-currents in Scott's ravine, and a short piece of flume in the Big Tunnel emptying into said ravine; to furnish sufficient iron pipe and hydraulic machines, and all the water in what is known as the 'Lower Bear River Ditch;' in consideration for which the said Hudepohl and Buckman are to work and mine the said ground in an energetic and workman-like maner, bearing all expenses for the same, and to have and receive one-half of all the gross products thereof, including leases of cuts, tunnels, flumes, and bed-rock, which they may have run through and over during the existence of this lease. The other half of such gross products to be paid over to the said Liberty Hill Company immediately on clean-ups or leases or sales being made. Prior to each and every clean-up being made, the superintendent of the Liberty Hill Company shall be notified thereof in time to be present if he chooses, and he shall have the custody of all the bullion and the other products until a division be declared. In witness whereof I have hereunto subscribed the name of the corporation, this October 10, 1881." That said agreement was never ratified by the stockholders of the company. That the plaintiff and Buckman worked the mines described in the contract, and delivered the bullion to said Wheeler, who deposited it with the bankers, and drew on them during the lease to pay the expenses of the mining, including the wages of plaintiff and Buckman and their hired help. That when they ceased work there remained in the hands of said superintendent $3,422.01 of their one-half of the proceeds of the mines taken out by them, and that the note sued on was given for that sum of money, instead of delivering to them the money or bullion itself. That the president and secretary of the defendant were authorized, by a resolution of the board of directors of the defendant, to execute the note. That the said board of directors consisted of five members. That one was absent, one voted against the resolution, and three in favor of it. That one of the directors who voted for the resolution was indebted to the plaintiff in the sum of $500 on a promissory note, and shortly after the resolution was passed the plaintiff surrendered said note to said director without consideration. Buckman assigned his interest in the note sued on to the plaintiff before this suit was commenced.

The appellant contends that the agreement above set out was the only consideration for the note. That said contract was a lease of the real estate of the corporation, and as such was void, for the reason that the same was not ratified by the stockholders as required by the statute of 1880, which provides: "Section 1. It shall not be lawful for the directors of any mining corporation to sell, lease, mortgage, or otherwise dispose of the whole or any part of the mining ground owned or held by such corporation. * * * unless such act be ratified by the holders of at least two-thirds of the capital stock of such corporation. Such ratification may be made either in writing, signed and acknowledged by such stockholders, or by resolution duly passed at a stockholders' meeting, called for that purpose." St. 1880, p. 131. If the agreement could be construed to be a lease of the real estate of the defendant, it may be conceded that the point made against its validity would be well taken; but we do not regard it as a lease. It is true the parties so term it in the instrument itself, but that cannot affect its legal construction. As we construe the agreement, it was one for the working of the mine on the shares, and the parties became tenants in common of the products of the mine when taken out. Bernal v. Hovious, 17 Cal. 545; Smyth v. Tankersley, 20 Ala. 212; Ponder v. Rhea, 32 Ark. 435; Somers v. Joyce, 40 Conn. 592; Scott v. Ramsey, 82 Ind. 330; Dinehart v. Wilson, 15 Barb. 597; Aiken v. Smith, 21 Vt. 172; Haywood v. Rogers, 73 N. C. 320. Such a contract does not create the relation of landlord and tenant, but fixes a rule of compensation for services rendered. It is, in all its essential features, a contract for labor to be performed and to be paid for by a share of the profits realized from such labor. Civil Code, § 1965; Crowley v. Mining Co., 55 Cal. 273; Gardenhire v. Smith, 39 Ark. 280; Jeter v. Penn, 28 La. Ann. 230; Adams v. McKesson's Ex'x, 53 Pa. St. 81; Hoy v. Gronoble, 34 Pa. St. 9. So construing this agreement, it was not within the prohibition of the statute of 1880, above referred to. The plaintiff was the absolute owner of the share of the products of the mine, ascertained and declared by the parties to have been $3,422.01, and the note given by its officers therefor was upon a valid consideration, and binding upon the defendant.

It is further contended that it appears from the findings that one of the directors of the defendant was induced to vote in favor of the resolution authorizing the execution of the note, by the surrender of or agreement to surrender to him his note held by the plaintiff. But the court does not so find, and there is no allegation in the pleadings upon which to base such a contention. It is found that the director voted for the resolution, and that his note was afterwards surrendered to him by the plaintiff without consideration, but the transaction is in no way connected with his action as such director, and the finding is wholly outside of any issue made in the pleadings. Judgment affirmed.

I concur: Fox, J.

Paterson, J. I concur. With the money in its treasury for which this note was given, it would be grossly inequitable to allow the corporation, after full performance, practically to retain the money which should have been turned over to H. & B. in specie as their share of the proceeds. I think the corporation is estopped by its acts. Argenti v. San Francisco, 16 Cal. 266.

3 Cal. Unrep. 145

California Powder Works v. Blue Tent Consolidated Hydraulic Gold Mines of California, Limited. (No. 11,896.)

(*Supreme Court of California.* Oct. 8, 1889.)

Mechanics' Liens—Mines and Mining.

1. The claimant of a lien for materials furnished set out in its notice that the claimant undertook to furnish to a certain mining company explosives in such quantities as it might require, each parcel to be paid for at delivery, or as soon thereafter as might be, with interest upon such payments in case of delay. *Held*, that this notice was in substantial compliance with Code Civil Proc. Cal. § 1187, requiring such claimant to state the terms, time given, and conditions of his contract, wherein the words "time given" mean the time of payment for the materials furnished.

2. Code. Civil Proc. Cal. § 1187, which provides that the notice of such claim must be filed within 30 days after the completion of the improvement, alteration, etc., does not refer to the operation of the mine, which may be continuous in its nature, as the thing to be completed.

3. As the right to a lien does not attach until the materials have been used, plaintiff does not lose such right by a failure to file its claim within 30 days after the materials were furnished.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Olney, Chickering & Thomas, for appellant. *Pillsbury & Blanding*, for respondent.

BELCHER, C. C. This action was brought to recover judgment for a balance due for powder and other explosive materials, sold by plaintiff to defendant for use, and actually used, upon defendant's mining property in Nevada county, and to enforce a lien therefor on the property. The complaint was demurred to on the ground of ambiguity, the demurrer was overruled, and thereupon the defendant answered. After trial, judgment was rendered in favor of plaintiff for the amount prayed for, including an attorney's fee, and the whole amount was declared to be a valid lien upon the property. The appeal is taken by defendant from the judgment, and an order denying a new trial.

The court found upon every issue in favor of plaintiff. The appellant concedes that the finding as to the amount of the indebtedness was authorized, and no objection is made to the judgment in so far as it relates to that indebtedness; but it is contended that plaintiff was not entitled to a lien, and that the part of the judgment which awarded an attorney's fee, and declared the judgment a lien upon the property, was erroneous. It is admitted that, if plaintiff was entitled to a lien, the amount awarded as an attorney's fee was reasonable and proper. The material facts of the case are, in substance, as follows: Plaintiff was a corporation, organized in this state, and engaged in the business of manufacturing powder and other explosives. Defendant was a foreign corporation, engaged in the business of mining in Nevada county, in this state. In 1875, defendant, by its attorney in fact and general manager, Thomas Price, entered into a contract with plaintiff, by which plaintiff agreed to furnish defendant with all the powder, caps, and fuse it should need to develop and work its mine, the materials so furnished to be paid for upon the delivery of each parcel thereof, or as soon thereafter as might be, and, in case of delay in payment, the amount delayed to bear interest at the rate of 1 per cent. per month. No specific quantity was named, but plaintiff was informed that, under the contract, defendant would probably need from eight to ten car-loads a year. No time was named for the completion of the contract, and it remained in force without any change of terms till within 30 days prior to November 1, 1883. Under the contract plaintiff furnished defendant with explosives from time to time, as they were ordered, up to the 16th day of July, 1883; and all the materials thus furnished were used by defendant in the construction of ditches and tunnels, and in other work upon its mine. Payments on account of such supplies were made from year to year, whenever a clean-up was made. The last clean-up was made about the 1st of September, 1883, and the last payment on the 4th day of that month. General work upon the property ceased at the time of the last clean-up, but some work to protect and keep the property in repair continued to be done till the 1st of November. On the 31st day of October, 1883, an account was stated between the plaintiff and defendant, the defendant acting by its attorney in fact, Thomas Price, and the amount found and agreed to be due plaintiff for materials furnished under the contract was $77,447.76. On the next day, November 1st, plaintiff filed its claim of lien for this sum, and thereafter, in proper time, commenced this action.

1. The demurrer was properly overruled. We see no material ambiguity or uncertainty in the complaint, and no argument upon this point is made for appellant.

2. It is contended that the notice of lien was insufficient, because the contract set out had no date, and the notice did not specify any time when the contract was made, or when any transaction was had between the parties. All that the law required a claimant to state in his claim of lien, as to the contract, was "the terms, time given, and conditions of his contract." (Code Civil Proc. § 1187;) and it has been held that the words "time given" mean not the date or time when the contract was made, but "the time of payment for the work and labor performed and materials furnished, as agreed on and expressed in the contract," (Hills v. Ohlig, 63 Cal. 104.) The terms, time given, and conditions of the contract under which the materials were furnished in this case, as stated in the claim of lien, were that the plaintiff (naming it) "should, and it undertook that it would, thereafter, continuously, and from time to time, and in such quantities as the said" defendant (naming it) "should thereafter request, furnish to said" defendant, and that the said defendant "should take and receive of and from the said" plaintiff, "in such quantities as said" defendant "might require in its said business, the said blasting powder, caps, and fuse; and that said material so delivered should be paid for upon delivery of each parcel, or as soon thereafter as might be; and that in case of delay in payment the said" defendant "should pay interest upon the amount so delayed at the rate of one per centum per month."

We find nothing in the law requiring any statement in the claim of lien as to the date of the contract, or as to when the transactions were had between the parties, and in our opinion the notice filed by plaintiff was in substantial compliance with the requirements of the statute.

3. It is next contended that the notice of lien was prematurely filed. This contention is based upon the provisions of the Code of Civil Procedure, fixing a time within which a notice of lien must be filed. The provision is that all persons other than original contractors (and that plaintiff was not an original contractor, see Sparks v. Mining Co., 55 Cal. 389, and Schwartz v. Knight, 74 Cal. 432, 16 Pac. Rep. 235) must file the notice within 30 days after "the completion" of the improvement, alteration, etc. It is alleged in the complaint that "the construction, alteration, and repair of said mining claim, ditch, ditches, aqueducts, tunnels, and other structures on said premises, has been, during all said time, kept up by said defendant, and the same has not been completed." And it is argued that if there had been no "completion" the notice was premature. The rec-

ord shows that the defendant's mining claim embraced 640 acres of mineral land; that defendant had been mining on the claim for 8 years, and only about 15 acres had been worked off; that the operations carried on were the ordinary operations of hydraulic mining, and that the powder used for the mine was used in blasting down the banks, and in pulverizing the cement. It is evident that work upon a mine like this is continuous in its nature and has no definite completion, but may go on for 50 years or more. The statute, therefore, cannot have reference to the work upon the mine as the thing to be completed. To hold otherwise would, in effect, be saying that the legislature was guilty of the absurdity of referring to the completion of a thing which has no necessary completion, but may go on indefinitely. We do not think the claim was filed prematurely.

4. It is next urged that the claim, if not filed too soon, was filed too late, and was therefore invalid. The argument is based upon the fact that all the materials for which a lien is claimed were sold and delivered by plaintiff to defendant more than 30 days prior to November 1, 1883. But the right to a lien did not attach when the materials were furnished. To give it that right it was necessary for the planitiff to show not only that it had sold the materials to be used on the defendant's mine, but that they had actually been so used. Silvester v. Mine Co., ante, 217, (opinion filed Sept. 11, 1889.) Evidently when a party obtains blasting powder to be used in mining operations, as in this case, very little if any of it, would ordinarily be used on the day of its delivery, and most or all of it might not be used for days or months thereafter. Here it appears that all the powder furnished by plaintiff had been actually used by defendant when the lien was filed, but it does not appear at what particular time or times the last of it was so used. It must follow, therefore, that the plaintiff did not lose its right to a lien because of its failure to file its claim within 30 days after the materials were furnished.

5. It is not questioned that a materialman may have a lien in a case like this, and that he can have one. See Powder Co. v. Flume Co., 20 Pac. Rep. 419. This being so, the question remains, was the plaintiff's claim filed in time? The only provision of the statute upon the subject is that "every person, save the original contractor, claiming the benefit of this chapter, must, within thirty days after the completion of any building, improvement, or structure, or after the completion of the alteration or repair thereof, or the performance of any labor in a mining claim, file for record," etc. Code Civil Proc. § 1187. There was, however, as we have seen, no completion of the improvement of the mine, or of the alteration or repair thereof. The language quoted is therefore not strictly applicable to the case in hand, and no definite time was fixed, within which the claim was required to be filed, unless the use of the material or the suspension of work on the mine should be treated as the completion referred to. See Schwartz v. Knight, supra. But if no definite time was fixed by statute, then it was necessary only that the claim be filed within a reasonable time, and we cannot say that it was not so filed. If, on the other hand, the 30 days commenced to run when the last of the material was used, or when work was suspended on the mine, still we cannot say that the filing was not in time. The court found that "the defendant was engaged in the mining business upon the premises described in the complaint in this action, and was using the said premises, and the whole thereof, including the said ditches, flumes, aqueducts, reservoirs, tunnels, and other structures and improvements for that purpose, and had been so engaged in the business of mining upon said premises, and using the same for that purpose, within the period of thirty days next prior to said first day of November." This finding is assailed as not justified by the evidence, and it is specified that "the evidence shows that the defendant herein was not engaged in the mining business upon the premises described in the complaint at any time after the first day of October, 1883." But we think there was evidence tending to support the finding. A witness for the plaintiff testified that "there was more or less work being done all the time in 1883 upon this property, to keep it in repair and condition up to the time this lien was filed." And, again: "The defendant operated the mine all the time, down to the filing of the lien." At most it can only be said, we think, that there was a conflict of evidence upon this subject.

It results, in our opinion, that the judgment and order should be affirmed.

We concur: FOOTE, C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(81 Cal. 122)

McROSE v. BOTTYER. (No. 13,225.)

(*Supreme Court of California.* Oct. 11, 1889.)

HIGHWAYS—PRESCRIPTION—ABANDONMENT.

1. Pol. Code Cal. § 2631, provides that, "by taking or accepting land for a highway, the public acquire only a right of way, and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this and the Civil Code provided." Civil Code, § 806, provides that "the extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired," and is extinguished, when acquired by enjoyment, by disuse "for the period prescribed for acquiring title by enjoyment." *Held* that, where the public have acquired a right to use a highway by five years' user, as prescribed by statute, non-user for less than that period will not create an abandonment by operation of law.

2. Under Act. Cong. 1866, (Rev. St. U. S. § 2477,) granting the right of way for the construction of highways over public land, it is immaterial that the land over which such right of way was acquired was at that time, and at the time the use ceased, public lands of the United States.

Commissioners' decision. In bank. Appeal from superior court, Butte county; JOHN GALE, Judge.

Reardan & Freer, for appellant. *John C. Gray,* for respondent.

GIBSON, C. Action by plaintiff, as road overseer, to enjoin the defendant from obstructing an alleged public highway. Trial before the court without a jury. Judgment for plaintiff, from which defendant appeals.

From the findings it appears that in the year 1858, and prior thereto, a strip of land leading from the defendant's brick store, at Thompson's Flat, in the county of Butte, in a north-easterly direction to and beyond the "old school house" site at said Thompson's Flat, was and had been used by the residents of Thompson's Flat as a street or way to and from their places of residence. This use was discontinued after the year 1858, and for more than 20 years prior to the commencement of this action. On or about the year 1858 the trustees of the Thompson's Flat school-district established and built a public school-house, for public school purposes, at the north end of the strip of land, and continuously thereafter, and until 1884, used the same as and for a public school. In the latter year the trustees sold the land upon which the school-house was located, and removed the school-house therefrom. From 1858 continuously until the removal of the school-house the strip of land was used as a means of ingress and egress to and from the school-house by the children attending school, and by the teachers and other persons having business at the school-house. This was the only use made of the strip from 1858 until 1884, and since the latter year it has not been used by the public for any purpose. The right of the public to the use of the strip for the purposes of a highway was acquired by its use as a street until 1858, and thereafter as a way to and from the school-house until 1884. This right has never been declared abandoned or discontinued by the board of supervisors of Butte county, or by any one having authority to so abandon or discontinue the same. The strip of land in question was at all times prior to the year 1887 public land of the United States. In 1887 the defendant acquired the title of the United States government to it, and in 1888 caused the same to be inclosed with a fence, which fence is the obstruction complained of, and which was thereafter removed by the plaintiff as road overseer.

The court, in rendering judgment for the plaintiff upon these facts, evidently proceeded upon the theory that it having been established that the strip in question was once used as a public way, it continued as such, irrespective of its non-user, because it had not been abandoned by an order of the board of supervisors.

Appellant contends that as the necessity for the use and the use ceased, the right of the use was abandoned by operation of law. By section 2621 of the Political Code, it is provided that "a road laid out and worked and used as provided in this chapter shall not be vacated or cease to be a highway until so ordered by the board of supervisors of the county in which said road may be located. * * *" This section, if it were the only one relating to the same subject-matter, would support the conclusion of the trial court; but there is a provision of section 2619 of the same Code which must be construed with it. Babcock v. Welsh, 71 Cal. 402, 12 Pac. Rep. 337. It is as follows: "All public highways, once established, shall continue to be public highways until abandoned by order of the board of supervisors of the county in which they are situated, or by operation of law, or judgment of a court of competent jurisdiction." This section adds two additional methods by which an abandonment may be effected, viz., by operation of law and by a judgment of a court of competent jurisdiction. As the findings show that the use of the strip as a public way was not abandoned by an order of the board of supervisors, it becomes necessary to determine whether the right was extinguished by operation of law; that is to say, by the application of legal rules to the facts appearing in the findings.

An act entitled "An act concerning roads in the county of Butte," approved March 20, 1874, (St. 1874, p. 503,) provides that all roads used as such in the county of Butte for a period of five years shall be public highways. The public, having used the strip of land in question as a public way for five years prior to the passage of that act, acquired the right to use the same as a public way. Bolger v. Foss, 65 Cal. 250, 3 Pac. Rep. 871; Gloster v. Wade, 21 Pac. Rep. 6. "By taking or accepting land for a highway, the public acquire only the right of way, and the incidents necessary to enjoying and maintaining the same, subject to the regulations in this and the Civil Code provided." Pol. Code, § 2631. "The extent of a servitude is determined by the terms of the grant, or the nature of the enjoyment by which it was acquired," (Civil Code, § 806;) and is extinguished, "when the servitude was acquired by enjoyment, by the disuse thereof by the owner of the servitude for the period prescribed for acquiring title by enjoyment," (Id. § 811.) These provisions are part of chapter 3, pt. 2, tit. 2, of the Civil Code, which relates to private easements and servitudes; but they are made applicable to a public easement of the character in question by section 2631 of the Political Code, supra. The reason of the law is clearly to protect the public in the use of public highways by preventing an abandonment of the right to the use being presumed from the cessation of the use for any period less than that by which the right may be acquired. In this respect public highways are placed upon the same plane with private rights of way. The period by which the public acquired the right to the use of the right of way in question was fixed at five years by the act of 1874. This action was brought on February 11, 1888, and the use by the public of the right of way, as such, was not discontinued until 1884, therefore the period of non-user was less than five years, and insufficient to support a presumption of an abandonment by operation of law.

The fact that the land was public land of the United States at the time the right to use it as a public way was acquired, and also at the time the use of it ceased, makes no difference. The act of congress of 1866 (section 2477, Rev. St. U. S.) granted the right of way for the construction of highways over public land not reserved for public uses. By the acceptance of the dedication thus made the public acquired an easement subject to the laws of this state, and, the easement not having been extinguished by the operation of such laws, when the defendant acquired the title to the land, she took it subject to the easement. For illustration of the application of this principle see De Necochea v. Curtis, 20 Pac. Rep. 563, and further opinion on rehearing. (ante 198,) filed Aug. 31, 1889.

We therefore advise that the judgment be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(81 Cal. 81)

CHALMERS v. CHALMERS. (No. 13,012.)

(*Supreme Court of California.* Oct. 9, 1889.)

PARTNERSHIP—ACCOUNTING—PLEADING.

1. The complaint in an action for an accounting alleged a partnership between plaintiff and two defendants, which was denied. The proof showed that one of the defendants was not a partner, and a nonsuit was granted as to him. *Held*, that under the issue made there remained the question of the relation between plaintiff and the other defendant, which could be tried without amendment of the complaint. WORKS and FOX, JJ., dissenting.

2. Where evidence as to the disposition of fixtures is not admissible under the complaint in such an action, which alleges only a conversion by defendant of a stock of goods, upon a new trial an amendment should be allowed which will bring into the accounting all the partnership effects, in order to arrive at a fair adjustment of the partnership matters.

3. One partner should not be charged with a debt due to the partnership on the ground that through his neglect it was barred by the statute of limitations, where the other partner was familiar with the debts due the partnership, and could have enforced payment of the same.

Commissioners' decision. In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

W. L. Dudley, for appellant. *Baldwin & Campbell*, (*Edward I. Jones*, of counsel,) for respondent.

FOOTE, C. The plaintiff brought this action as a partner of the defendant, Alexander Chalmers, and one Brown for an accounting. He claimed that he and the defendants were members of a firm engaged in carrying on a dry goods business, and that the defendants forcibly took from his possession, and without his consent, a stock of goods composed of a general assortment of dry goods, dress goods, and fancy goods, and that the firm had outstanding book-accounts to the value of $2,500, which goods the defendants converted to their own uses, and deprived plaintiff of any use or ownership of them. That the book-accounts were collected, and were being collected, by the defendants, and converted to their own use. The defendants denied these allegations, a trial was had, and a nonsuit moved for, which was granted as to Brown, he not appearing to have been a partner in the commercial business, but an employe. The motion for a nonsuit was denied as to Alexander Chalmers, and, without an amendment of the pleadings, the trial proceeded as between him and the plaintiff on special issues submitted to the jury as follows: "(1) Were George Chalmers and Alexander Chalmers partners in the dry goods business prior to February 12, 1885? (2) Was the property taken from the store of Chalmers & Brown on the 12th day of February, 1885, partnership property? (3) Were the book-accounts that were taken from the store of Chalmers & Brown on the 12th day of February, 1885, partnership property?" To all of which, answers of "Yes" were returned by the jury. Thereupon the court made an order appointing August Muenter referee to take an account between George and Alexander Chalmers, and their partnership, to report his findings of fact, and a judgment as to the state of said account. The order was obeyed, and, according to the report and findings of the referee as to facts and conclusions of law thereon, it was found that there was due to the plaintiff from the defendant the sum of $1,909.34, with interest from the 12th day of February, 1885, at legal rates. Whereupon the court adopted the findings of the jury, and made other findings of fact based upon the findings and report of the referee, and upon them and its conclusions of law gave judgment for the plaintiff for $1,909.34 principal, $417.10 interest, making $2,326.44, and costs. After the motion for a new trial had been heard, the court, in an order then made, recited "that the judgment of this court, based upon the findings of the referee, is for $800 too much, and, plaintiff's attorney consenting thereto, it is hereby ordered that said judgment be, and the same is hereby, modified by deducting therefrom said sum of $800, and the defendant's motion for a new trial is denied." Upon the appellant's motion that order was amended by striking out the words "eight hundred" and inserting in lieu thereof "nine hundred and seventy-seven 64-100 (977.64.)" The order was made *nunc pro tunc* as of November 19, 1888.

Although the appellant does not complain of this method of reducing the judgment, we may remark in passing that it strikes us as being not the proper method to have pursued in the affair, and that it would have been the correct procedure to cause the plaintiff, by his attorney or himself, to enter a *remittitur* for the amount. The appeal is taken from the judgment as modified, and from the order denying a new trial.

It is urged that in the condition of the pleadings no such judgment is admissible; that the nonsuit ought to have been granted, because the proof showed no such partnership as alleged; that there was no finding upon the material issue whether the partnership, as alleged and denied existed or not. The allegation was that a partnership existed between three persons, doing business under the style of Chalmers & Brown. The proof was that two of the persons—that is, the plaintiff, George Chalmers, and the defendant, Alexander Chalmers—were such partners, but that Brown was not a partner. This necessitated the granting of the nonsuit as to Brown, and the trial of the question as to whether a partnership, as alleged, existed between the other two. When the issue was disposed of as to Brown, a part of it was determined. The undetermined part had to be tried. The allegation that the three were partners necessarily included as a part of it that the two Chalmers were partners in that firm, as the greater includes the less. The issue as to Brown's relation to the other two parties being determined, still left the relations between the two Chalmers brothers to be determined. Therefore the refusal of the nonsuit as to them, considering the proof made, was not improper. So the issue to be tried included the assertion on one side and a denial on the other that all three of the above persons were partners, and that the two Chalmers were such partners as well as Brown. When the relation in which Brown stood was determined by the nonsuit as to him, the question still remained to be declared, under the issue made, what the relations and acts of George and Alexander Chalmers were. This could properly be ascertained under the pleadings without an amendment.

It is further claimed that the court should not have refused instructions to the jury to the effect that certain evidence was before them, and could be considered in making up their verdict. It is true that the granting of the instructions would not have been error, because the evidence alluded to in them had been admitted, and was before the jury without objection. Yet, this being so, it is not perceived why any harmful error was committed in not telling the jury what they already knew; that is, that the evidence was before them for consideration. From the books it appeared, and the evidence is not contradicted, that Alexander Chalmers collected accounts due the firm to the amount of $2,015.35, and that of this sum he paid out $544.41 in liquidation of the indebtedness of the firm. The finding, therefore, of the referee that the defendant had only paid the sum of $197.74 is unsupported by the evidence. He did not get credit for the difference between $197.74 and $544.41,—that is, $346.67; and the court was not warranted in giving judgment against the defendant without allowing him credit for the full sum of $544.41.

As to the matter of fixtures, which entered into the referee's statement of the account between the parties, it may be that under the allegations of the complaint no evidence of what disposition was made of them was admissible, and that a finding as to the proportion which each partner took of them was outside of the issues made by the pleadings; that is to say, construing the language of the complaint strictly against the pleader, it is not clear that fixtures are a part of a stock of goods, although a part of the stock in trade of this partnership. Yet it is plain that, to arrive at a fair adjustment of the partnership matters, the portion of the fixtures which each partner appropriated, or any other property belonging to the partnership effects, should enter into the accounting, and a proper amendment of the pleadings to that end should be allowed, as the case must be retried upon other grounds.

We are of opinion that it was erroneous to charge Alexander Chalmers with the James E. Brown account, viz., $693.40 and interest. The finding upon the point is not explicit in declaring that the debt was lost wholly by the neglect of the defendant, Alexander Chalmers, causing the bar of the statute of limitations to attach, nor does the evidence show that it was so lost by his carelessness. It is true that the defendant had the firm books in his possession and out of the control of the plaintiff. Nevertheless the plaintiff did collect some of the accounts contained in those books, and having been the managing partner, and in charge of the business, was familiar with what kind and amount of debts were due the partnership, and could have demanded the payment of the Brown account, and brought an action therefor if payment was refused.

We fail to perceive from the record wherein the partnership was indebted to George Chalmers in the sum of $162.12, as found in the fifth finding of fact of the referee. George Chalmers had due him as salary from the 1st of September, 1884, to the 12th of February, 1885, at $150 per month, the sum of $810. Of this he drew $800. He collected accounts to the amount of $244.45, and took from the receipts of the business $206.83. How, upon this state of facts, the partnership owed him $162.12 we must confess our inability to understand. For these reasons we advise that the judgment and order be reversed.

We concur: Belcher, C. C.; Van Clief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed.

We concur in the judgment, but do not wish to be understood as agreeing to the proposition that a party can allege a partnership consisting of three persons, and recover upon proof of a partnership consisting of two of such persons, even under the circumstances of this case. Works, J.; Fox, J.

Paterson, J., took no part in the decision of this cause.

81 Cal. 135

People v. Buelna. (No. 20,544.)

(*Supreme Court of California.* Oct. 11, 1889.)

Larceny—Instructions.

1. On a trial of an indictment for larceny, defined generally in Pen. Code Cal. § 484, a charge in the language of section 485, that one who finds lost property under circumstances which give him knowledge of or means of inquiry as to the true owner, and who appropriates such property to his own use, without first making reasonable and just efforts to restore the property, is guilty of larceny, is proper where there is some evidence of the facts stated, as the two sections do not define distinct offenses.

2. Where there is evidence that the property alleged to have been stolen was the property of M., and was bought by him from certain persons, and also that M's. interest was merely that of an agister, and that the property was found by defendant as lost property, and appropriated by him in bad faith, a charge that, if there was a reasonable doubt whether M. had bought the property of those persons, defendant should be acquitted, is properly refused.

3. In view of such evidence, a charge that "if A. takes cattle from B. to pasture, and any cattle are stolen from the possession of A., it is larceny, and the property may be alleged to be the property of A.," is correct and not misleading.

4. Instructions that, if the property belonged to a partnership composed of M. and certain others, or if it belonged to others, and M. had an interest in the increase, defendant must be aquitted, are

properly refused where there is no evidence of any partnership between M. and the others, and no evidence that there was any increase of the property.

5. An instruction that, if defendant gave "an honest account of how he came by" the stolen property, it is incumbent on the people, unless such account was unreasonable or improbable on its face, to show that it was false, is properly refused, as an "honest account" is necessarily a true account.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG. Judge.

Graves, Turner & Graves, for appellant. *G. A. Johnson,* Atty. Gen., for the People.

PER CURIAM. The defendant in this case was accused by information of grand larceny. He was convicted as charged. From the judgment rendered upon the verdict of the jury, and an order denying a new trial, he appeals. He contends that an instruction of the court in reference to the appropriation of lost property by the finder thereof is erroneous. The language complained of is as follows: "One who finds lost property under circumstances which give him knowledge or means of inquiry as to the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without making reasonable and just efforts to find the owner, and restore the property to him, is guilty of larceny." It is not denied that the instruction is correct as an abstract proposition of law, but it is insisted that it was improper, under the charge contained in the information. The defendant argues that the acts defined in section 485 of the Penal Code constitute a different kind of larceny from that set out in the provisions of section 484 of the same Code. The two sections read thus: Sec. 484. "Larceny is the felonious stealing, taking, carrying, leading, or driving away the personal property of another." Sec. 485. "One who finds lost property under circumstances which give him knowledge of, or means of inquiry as to, the true owner, and who appropriates such property to his own use, or to the use of another person not entitled thereto, without first making reasonable and just efforts to find the owner and restore the property to him, is guilty of larceny."

It will be seen at a glance that it was not the legislative intent to create, by the enactment, of these provisions of law, any two distinct kinds of larceny such as the defendant insists upon. The first section defines larceny generally; the second section declares a rule of evidence, which, being fulfilled, constitutes the crime as defined in the first section. It is plain that the charge was correct under the information, and there was evidence in the case, proceeding from the defendant and his witnesses, which tended, in some degree at least, to show that the defendant did find and appropriate a stray steer, not then in the actual possession of Mosher, in whom the title was laid in the information, and that such appropriation was made without first making reasonable and just efforts to find the owner and restore the property to him. The instruction of the court was intended to meet this view of the case as presented by the defendant himself, in the attempted justification of his act of appropriation. On the other hand, the proof first adduced by the prosecution went to show that Mosher owned the steer; had bought it of Meade and Goldtree Bros. Then, upon further investigation, there was evidence tending to show that Mosher only had a special interest in it as an agister for the Vachel Bros. Thus there was evidence upon which the jury were to pass involving several propositions: *First,* whether the property was Mosher's absolutely, or that in which he had a special interest; *second,* whether the property was stolen from his possession either as the owner or agister; *third,* whether it was taken from Mosher's actual possession, or was, as claimed by the defendant, found by him as lost property, and taken up in good faith, to be accounted for to the true owner, or taken up and appropriated as lost property in bad faith, and with an intention to deprive the owner of it. Under this state of the evidence it was the duty of the court to instruct the jury as to the law bearing upon each class of facts as presented in the evidence, leaving it to the jury to determine which was the true state of facts. If Mosher owned the property, and it was stolen from his possession, the defendant would be guilty if he took or drove it away; but if Mosher did not own it by purchase from Goldtree Bros. and Meade, yet if he had a special interest in it, as agister or otherwise, it would not prevent the jury from finding the defendant guilty of larceny if the other facts warranted; so that the instruction to the jury asked by the defendant, and refused by the court, that "it is contended by the people that the steer mentioned in the information was purchased by I. E. Mosher from Goldtree Brothers and Meade, and, if you find from the evidence that there is a reasonable doubt that the said Goldtree Brothers and Meade sold said steer to I. E. Mosher, you will give the defendant the benefit of the doubt, and find the defendant not guilty," was wrong and properly refused. It took away from the jury all consideration of the other inculpatory facts in evidence, as affecting the question whether the defendant stole the property from Mosher as an agister, or found and appropriated it as lost from Mosher's possession as said agister, and without effort to return it to him. This instruction was given also: "If A. takes cattle from B. to pasture, and any cattle are stolen from the possession of A., it is larceny, and the property may be alleged to be the property of A." In view of the facts in evidence upon the question of Mosher's agistment of the stolen property, and the other instructions in the case, it is plain that this instruction was to the effect, and could only be understood as saying to the jury, that if Mosher took cattle from the Vachel Bros. or any other person to pasture, and any of such cattle were stolen from Mosher, it would be larceny, and the property may be alleged in the information to be the property of Mosher; and therefore the instruction was not misleading or wrong as a proposition of law. Taking the instruction by itself, and without considering all the evidence and the other instructions, it might be subject to the nice criticism put upon it by the ingenious counsel for the defense; but to a fair-minded person, in view of all the facts, circumstances, and other instructions, we cannot see that the defendant could have suffered any prejudicial error through the instruction as given. There was some evidence in the case that Mosher had a special interest in the property, and had it in possession as agister upon a special contingent contract with the owner. This being so, it was for the jury to say whether this special interest and possession existed; and that being so, there was no necessity for an allegation in the information of any joint ownership by Vachel Bros. and Mosher, naming each one.

The further claim is made by the appellant that certain other instructions requested to be given were erroneously refused by the court They are as follows: "(*d*) If you find from the evidence that the steer described in the information belonged, at the time of the alleged taking, to a partnership composed of A. H. Vachel, Arthur Vachel, and I. E. Mosher, you must find the defendant not guilty. (*e*) If you believe from the evidence that the steer described in the information belonged, at the time of the alleged taking, to H. A. Vachel and Arthur Vachel, and I. E. Mosher has a half interest in the increase of the value of said steer, you must find the defendant not guilty." The evidence did not disclose any partnership between Mosher and the Vachel Bros. He held the property as an agister in trust for them, and was to have a contingent interest in the increased value of the steer, if any accrued. There is no evidence that any such value did accrue. For this reason, not to speak of others which might be mentioned, the instructions were properly refused.

The court refused instruction marked "*b*," reading thus: "It is also contended by the people that the steer described in the information was sold to Byer Brothers to Goldtree Brothers and Meade, and if you have any reasonable doubt as to whether Byer Brothers did sell said steer to Goldtree Brothers and Meade you must give the defendant the benefit of that doubt, and find the defendant not guilty." If this instruction, as it appears in the bill of exceptions, is exactly as asked, it is plain that it is unintelligible. If it is meant to use the word "by" instead of "to" just before the words "Byer Brothers" where they first occur, then if granted the jury would have been confined to only one theory of the case, and would have been compelled to disregard all other facts in evidence bearing upon the defendant's possible guilt, and the instruction was properly refused.

The refusal of instruction marked "*c*" in the bill of exceptions, as asked for by the defendant, is claimed to be prejudicial to his rights. The instruction is: "If you find from the evidence, beyond a reasonable doubt, that on or about the time mentioned in the information the defendant was in possession of the steer described therein, and that the defendant gave an honest account of how he came by it, or under what authority he took said steer, it is incumbent on the people, unless the account given of the possession by the defendant was unreasonable or improbable on its face, to show that the account of said possession is false." The counsel for defendant probably intended to ask for an instruction to the effect that if his story showed that he was in possession of the property innocently, and his story was reasonable, etc., then the jury could not convict unless the prosecution showed that story to be false; that is, we suppose, directly disapproved it. Even that doctrine would be doubtful. But that was not what defendant asked. When an appellant seeks to reverse a judgment for a refusal to give a certain instruction, he must successfully maintain that the instruction asked clearly stated a correct principle. Here the proposed instruction was that if defendant "gave an honest account of how he came by" the property, it was incumbent upon the people to show that the account was false. Now, the only notion we can have of an honest account is a true account. If, therefore, according to this proposed instruction, a defendant in a larceny case should give an "honest account" of how he got the stolen property, and that account should be that he stole it, it would be incumbent on the people to show that the "account" was false,—that is, that he did not steal it; a proposition which, it may be safely said, is not law.

We see no error in the record. Judgment and order affirmed.

PATERSON, J. I dissent, because in my opinion the evidence is insufficient to support the verdict and judgment.

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81 Cal. 127

PENNIE v. HILDRETH *et al.* (No. 13,127.)

(*Supreme Court of California.* Oct. 12, 1889.)

QUIETING TITLE—PARTIES—PLEADING.

1. Under Code Civil Proc. Cal. § 738, providing that "an action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim," an administrator may maintain an action to quiet title to real property of his decedent.

2. There is no misjoinder of causes of action in a complaint to quiet title to several tracts of land not contiguous, where the adverse claimants are the same.

3. Where separate counts are not necessary, the fact that, where there are several, all of them except the first refer to certain paragraphs of that as true, without alleging the facts therein contained, is not reversible error.

4. In an action to quiet title by an administrator, a general denial puts in issue plaintiff's ownership of the land, and the fact that he is administrator, and is not demurrable on the ground that it does not set up defendant's claim or disclaim.

5. An answer alleging that plaintiff's only interest in the property is by virtue of a mortgage, is not demurrable on the ground that it does not show an offer to redeem or a tender of the amount due.

6. But an answer, alleging that defendant claims under an agreement with plaintiff's mortgagor, whereby defendant is to receive a conveyance of an undivided half of the land on payment of the purchase price, and that an action is pending between defendant and the mortgagor's personal representative, to which plaintiff is a party, to settle partnership accounts and sell the land without alleging payment of the price, or any excuse for failure to pay it, or that, on settlement of the accounts, defendant will be entitled to any interest in the land, is demurrable.

7. An allegation in the answer of another action pending between the parties is immaterial.

In bank. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Milton E. Babb and *Henry E. Highton*, for appellant. *L. D. McKisick*, *Wilson & Wilson*, *Joseph Naphtaly*, and *P. D. Wigginton*, (*Walker C. Graves*, of consel), for respondent.

WORKS, J. The respondent, as administrator with the will annexed of the estate of Charles McLaughlin, brought this action to quiet the title to several tracts of land. Each tract of the land in controversy is made the subject of a separate count of the complaint. Each of the counts, after the first, refers to the first count, and alleges that certain paragraphs therein, which are necessary to the sufficiency of each count, are true, instead of restating such facts. The complaint was unverified. There was a demurrer to the complaint on several grounds; among others, that the same did not state facts sufficient to constitute a cause of action, and that the several causes of action were improperly joined. The demurrer was overruled. The defendant Harper, who alone appeals, answered by a general denial, and by way of affirmative defense set up that he and the deceased Hildreth entered into a contract of copartnership for the purpose of "buying and selling cattle, and of buying and selling cattle ranches." This contract is set out as a part of the answer, and contains this clause: "The purchase of lands shall be confined to the lands in Fresno county known as the 'Hildreth and Jones Ranches' and the lands adjacent thereto, of which said lands said copartners have already purchased the E. J. Hildreth rancho, which now stands in the name of Thomas Hildreth, and have contracted to purchase the said Jones rancho; and it is covenanted that one undivided half of said lands now standing in the name of Thomas Hildreth shall, upon the payment to him of one-half of the cost price and expenses for the purchase thereof, be conveyed by him to said Harper, on request, by good and sufficient deeds thereof, the said cost price to include interest at the rate of 1 per cent. per month." The Hildreth ranch, named in the contract, is the lands in controversy in this action. It is further alleged that the plaintiff's decedent had, at the time of his death, no other or different title or interest in the real estate than such as he obtained by virtue of certain deeds of conveyance from said Hildreth, absolute in form, but which were in fact mortgages to secure the payment of a certain sum of money. It was also averred that an action was pending between said defendant and the defendant Hildreth's executrix, for the settlement of said partnership affairs, to which the plaintiff was a party. The plaintiff demurred generally to the first count of the answer, which, as we have said, was a general denial, and also demurred thereto on the special ground that it did not "state facts sufficient to constitute a cause of action in this: that it does not allege or set forth any title or claim in or on behalf of said defendant to the real estate described in the complaint, or any part thereof, nor does the said defendant in his said first defense, as set forth in said amended answer, disclaim any interest or estate in the property described in the complaint." There was also a demurrer to the affirmative answer, on the ground that it did not state facts sufficient, and on the ground of ambiguity in several particulars specifically stated. There was also a general demurrer to the whole answer. The demurrer to the answer was sustained, and, the defendant declining to answer over, judgment was entered against him, and he appeals.

The first point made by the appellant is that an action to quiet title to real estate cannot be maintained by an administrator, for the reason that he has no title to the property, conceding title in the decedent at the time of his death. If it be conceded that, in order to maintain an action of this kind, the party bringing the action must have title in the property, the argument would have much force. But we do not understand this to be so. The Code provides: "An action may be brought by any person against another, who claims an estate or interest in real property adverse to him, for the purpose of determining such adverse claim." Code Civil Proc. § 738. The letter of this section would authorize any person to maintain the action whether he himself had any interest in the property or not. We are not, however, inclined to give it this broad construction. But it is clearly not necessary that he have title to the property. If he has the right to possession, and another is claiming an estate or interest adverse to such right, he may maintain the action. The language of the Code is broad enough to cover every interest or estate in lands of which the law takes cognizance. Pierce v. Felter, 53 Cal. 18; Stoddart v. Burge, Id. 398; Smith v. Brannan, 13 Cal. 107; Liebrand v. Otto, 56 Cal. 247. An administrator has an interest in the decedent's real estate, within the meaning of this statute, and if another is asserting a claim adversely to such interest, he may maintain the action. Code Civil Proc. § 1452; Curtis v. Sutter, 15 Cal. 259, 264.

It is further contended that there was a misjoinder of causes of action, in that the plaintiff sought in the same complaint to quiet the title to several tracts of land not contiguous to each other. There is no force in this contention. There is no reason, where the adverse claimants are the same as to each, why the rights of the parties in several tracts of land should not be adjudicated in the same action. Indeed we think the adverse parties would have had a much better cause of complaint if separate actions had been brought on account of each tract. The fault of the complaint is that it is made unnecessarily long by pleading for each of the tracts of land in separate counts. They should have been all included in one count. But this fault did not affect the substantial rights of the appellant, except as to the additional cost caused thereby, which the plaintiff should be required to pay.

It is also claimed that all of the counts of the complaint, except the first, are bad, for the reason that instead of alleging the necessary facts they aver that certain paragraphs of the first count are true. This is a slovenly mode of pleading, only convenient to the attorney who writes the pleading, and very inconvenient to opposing counsel and the courts, and should not be tolerated. Each count of a pleading must state a cause of action, and be complete within itself, without reference to any other count, but, as we have said, in this case separate counts were not necessary, and for that reason the cause should not be reversed on this ground.

The appellant insists that the court below erred in sustaining the demurrer to his answer, and rendering judgment against him. This depends upon whether an answer of general denial to an unverified complaint puts in issue any material fact in an action to quiet title. Counsel for respondent contend, with seeming confidence, that such an answer presents no issue to be tried. This is based upon the theory that in this class of cases the only course for a defendant to take is to set up affirmatively his adverse claim to the land or disclaim. They cite in support of this position Tompkins v. Sprout, 55 Cal. 36; People v. Center, 66 Cal. 551, 5 Pac. Rep. 263, and 6 Pac. Rep. 481. These cases do not support the position taken by the respondent. They simply hold that, in order to maintain his defense on the ground of an adverse claim, a defendant must set up such claim, and that the owner in possession may require the nature and character of the adverse estate or interest to be produced, exposed, and judicially determined. But the basis of his right to require the adverse interest to be produced and adjudicated is his own interest in or ownership of the land. This is the one thing necessary for him to prove in order to make out his case. If it is denied, a material issue is raised, which casts upon him the burden of proving such interest or ownership. Until he does this the defendant is not called upon to produce or prove his claim. Therefore the general denial put in issue a fact necessary to the plaintiff's recovery, and the demurrer to it was improperly sustained. City of San Diego v. Allison, 46 Cal. 167; Elder v. Spinks, 53 Cal. 294; Flint v. Dulany, 37 Kan. 335, 15 Pac. Rep. 208. In this case the denial put in issue another material allegation of the complaint. The action being by an administrator, it was necessary for him to allege and prove that he was such administrator, and, it having been denied, he was not entitled to judgment without such proof. It has been held by this court that a denial casts upon the plaintiff the burden of proving that the defendant's adverse claim is unfounded. Elder v. Spinks, 53 Cal. 294; Tompkins v. Sprout, 55 Cal. 35. The correctness of the rule that a plaintiff must prove, under a general denial, either that the defendant claims an interest in the land, or that his claim is unfounded, may be a matter of question, but there is no question in our minds that such an answer renders it absolutely necessary for him to prove his own title or interest in the land, and that, without such proof, he is not entitled to judgment.

The question as to the sufficiency of the special answer of the defendant presents a more difficult question. The respondent attacks it on the ground that the same set up that the only interest in the property was by way of a mortgage in the form of a deed, and that there was no offer to redeem shown or tender of the money due; and that such offer to redeem or tender was necessary to entitle him to relief in equity or deprive the plaintiff of his right to possession under the deed. This might be so if this were an attempt to defeat the mortgage, but it is not. On the contrary, the defendant asserts that the plaintiff has a valid mortgage, and that it is unpaid, and alleges a claim to the property in himself, by way of a contract to convey the same to him by the plaintiff's mortgagor. The position taken by counsel shows, it seems to us, an entire misapprehension of the object and effect of an action of this kind. It is not necessary to the right of a defendant to recover in this kind of action that he should show that the plaintiff has no title or interest in the property. If the plaintiff claims a fee-simple, he may show that he has nothing more than a lien or any interest less than he claims, and that he, the defendant, has an interest also, either paramount or subordinate to that of the plaintiff, and the decree of the court should declare the rights of the parties in the property accordingly. If the defendant had an equitable title to one-half of the property in controversy, whether that interest was subject to the mortgage of the plaintiff or paramount to it, he had a right to have it so decreed and the interest of the plaintiff declared; and a judgment against him on the demurrer that he had no right, title, or interest in the property would have been erroneous if the answer had been sufficient in other respects.

But the answer is not sufficient in other respects. It fails to show any equitable title in the defendant. The agreement under which he claims provided that he was to have an undivided half of the Hildreth rancho deeded to him upon payment to Hildreth of one-half of the cost price and expenses for the purchase thereof, the said cost price to include interest at the rate of 1 per cent. per month. There was no allegation that the defendant had paid this purchase money, or any part of it, nor was any excuse shown by the answer for not having done so. There was an allegation that an action was pending between the defendant and the administrator of the said Hildreth to dissolve the copartnership and settle its accounts, and to have this property sold, and the proceeds thereof first applied to the payment of plaintiff's claim, and that plaintiff was a party to that suit; but there is no allegation that upon a settlement of the accounts the defendant would be entitled to any interest in the land, or that there would be anything due him that should have been applied to the payment of the amount agreed to be paid by him for the one-half interest therein, whereby he was equitably entitled to an interest in the land. For this reason this count of the answer was bad, and the demurrer to it was properly sustained.

Counsel for respondent has contended that the deed under which plaintiff claimed was a deed of trust and not a mortgage. As the case may have to be tried on going down, we may say that we regard it as a matter of no consequence as to the sufficiency of the answer whether it was a mortgage or a deed of trust requiring that the land be applied to the payment of the amount due the plaintiff. The defendant would in either case have the right to a judgment declaring just what interests in the property were held by each of the parties. The allegation of another action pending between the parties was immaterial, and added nothing to the answer. Such an action pending could not bar the right of the plaintiff to have his title or interest in the property, whatever it might be, determined in this action. Judgment reversed, and cause remanded, with instructions to the court below to allow the plaintiff and defendant Harper to amend their pleadings, if they so desire.

We concur PATERSON, J.; SHARPSTEIN J.; FOX, J.

I concur in the judgment: BEATTY, C. J.

MCFARLAND, J., (*concurring*.) I concur in the judgment and in the opinion of the court, except that part of it which states that "each count of a pleading must state a cause of action, and be complete within itself, without reference to any other count." There are cases where several counts are proper and necessary, and where numerous averments of the same facts are necessary to the completeness of each count. In such cases, where the averments of such facts in the first count are referred to in the succeeding counts in a clear and methodical manner, and incorporated by such reference, I see no necessity of rewriting them several times, and thus making the complaint unnecessarily cumbersome. It should be done, of course, clearly, and without uncertainty in the reference; but I do not think that the rule should be laid down that it cannot be done at all.

(80 Cal. 636)

FALKNER (STEEN Substituted) v. HENDY.
(No. 11,761.)

(*Supreme Court of California.* Oct. 1, 1889.)

INTEREST—COMPUTATION.

Plaintiff and defendant entered into an agreement by which plaintiff examined and purchased second-hand machinery, defendant furnishing all funds, and, after repairs were made, both parties used their efforts to sell it, after which defendant was reimbursed for all advances, and the profits evenly divided. Plaintiff, being advised that the contract was a partnership, gave notice of dissolution. He was then indebted to defendant. Defendant continued to make sales and collections, and, when plaintiff sued for an accounting, was indebted to plaintiff. After the action was brought several years elapsed before a receiver was appointed, and defendant still continued the sales and collections. While the contract was in force the parties agreed that interest at 1¼ per cent. per month should be charged on all balances. Defendant used the money collected in his business, but there was no finding as to his profits. *Held*, that the agreement as to interest ended when the business contract ended, and that defendant should be charged with the profits of the fund held in trust by him for plaintiff, or with interest computed as follows: Interest should be allowed on the amount due the defendant from the time of notice of dissolution to the commencement of the suit at the legal rate, and also on the sums collected by defendant during that time, and a balance struck, and on such balance, beginning at that date, it should be compounded annually at the legal rates; also interest on the sums collected by defendant from time to time, at like rates, to the next annual rest,—the amount of these sums forming a new principal; and this rate should be allowed to the time of the first decree in the action, and only simple interest thereafter.

Department 1. Appeal from superior court, city and county of San Francisco. *H. H. Hart* and *E. W. McKinstry*, for appellant. *C. E. K. Royce*, (*Ralph Harrison*, of counsel,) for respondent.

BEATTY, C. J. This action was commenced in March, 1876, by Falkner, as assignee of Steen. In the course of the litigation the cause of action was assigned to Steen, who was thereupon substituted as plaintiff. The complaint alleges the formation of a partnership between Steen and Hendy in 1873, under an agreement, the terms of which are fully set out; the carrying on of business in pursuance of the agreement until May, 1875; the dissolution of the copartnership at that date by plaintiff; retention of all the partnership assets by the defendant, and refusal to account. The prayer is that the partnership be adjudged to be dissolved, for an accounting, receiver, injunction, sale of partnership property, division of the surplus, costs, and general relief. By his answer defendant denies that there had ever been any partnership, but admits an agreement, setting forth its terms, which differ in some particulars from those alleged in the complaint, admits that business was carried on in pursuance of the contract till May, 1875, and admits that plaintiff will be entitled to a share of the proceeds of property in defendant's hands after deduction of the amount of certain notes and other obligations pleaded by way of counterclaim. Upon these issues the cause was tried, and very voluminous findings made by the superior court, upon which judgment was entered for the plaintiff in August, 1885, in the sum of $35,254.24. Defendant moved for a new trial, which was denied, and he prosecutes this appeal from the judgment and order.

A very general statement of the contract relations of the parties, and the circumstances out of which they arose, will be sufficient for the purposes of this opinion. The defendant, in 1872, was, and for some years prior thereto had been, the proprietor of a foundry and machine-shop in the city of San Francisco. He was possessed of means and credit. Plaintiff was an expert machinist, but had no means or credit. His business was partly mining, and partly the buying up of second-hand machinery, which he repaired—sometimes at defendant's shop—and sold as occasion offered. Transactions of this kind seem to have brought him and defendant together. In 1872 defendant, at plaintiff's request, advanced the money to purchase two or three large lots of machinery, under an agreement such as is described in findings 4 and 5 of the superior court: "That about the 1st day of August, 1872, plaintiff ascertained that there was a certain lot of machinery near Santa Barbara, in this state, and the terms and conditions upon which it could be purchased, which, in his judgment, were such that it could be purchased, repaired, and sold at a large profit, and so informed the defendant. That plaintiff and defendant then orally agreed that plaintiff should proceed to Santa Barbara, examine the machinery, and, if satisfied of its value, telegraph that fact to the defendant in this city, where the owner resided. That upon the receipt of such telegram defendant should close the bargain for the purchase thereof; advance the money required therefor, as well as the money required to pay freight thereon from Santa Barbara to the city of San Francisco; take a bill of sale thereof in his own name; receive possession of the machinery when it reached this city, and retain said possession until such property should be sold; make all necessary repairs thereon at his machine-shop; charge the usual shop rates therefor; deliver the property when sold to the purchaser or purchasers thereof; receive the proceeds of any such sale; deduct therefrom, and retain for his own use, the amount due him for such repairs on said machinery; also all moneys advanced by him on account of said machinery, either for the purchase price thereof, freight thereon, or for other purpose, with interest thereon from the date of such advances until the receipt of the proceeds of such sale at the rate of 1¼ per cent. per month, and the residue of the proceeds of such sale to be equally divided between plaintiff and defendant. That plaintiff should superintend the shipping of such machinery, if purchased, from Santa Barbara to this city, both parties to use their best exertions in making sales of such machinery. That the machinery was so purchased in accordance with such agreement, and an account thereof was entered in defendants' individual books of account as 'Matanza machinery.' That on this account the machinery was charged with all expenditures made by defendant on its account, including the amount due defendant for repairs thereon, and credited with all moneys received by defendant from the sale thereof. That the expenses of plaintiff in going to and returning from Santa Barbara were charged against such machinery in this account, and credited to plaintiff upon a personal account previously existing between plaintiff and defendant." This was followed by other similar transactions, and on March 15, 1873, the agreement was made which gave rise to this litigation. This agreement, the manner in which business was conducted under it, and the accounts kept, are set forth in findings 7, 8, 9, of the superior court, as follows: "That on March 15, 1873, the Matanza machinery having been previously brought to defendant's shop, and a portion thereof repaired and sold, plaintiff and defendant entered into a further oral agreement, in which plaintiff stipulated to, and did, cease from dealing in second-hand machinery on his individual account. That thereafter all second-hand machinery purchased, repaired, or sold by either plaintiff or defendant, and all dealings had therein by either plaintiff or defendant, should be for and on their joint account, and any such machinery should be so purchased, repaired, or sold by either plaintiff or defendant, and all dealings had therein by either of them should be on their joint account, and any such machinery should be so purchased, repaired, and sold upon the same terms and conditions as those in relation to the Matanza machinery, and such terms and conditions were to be applied to all machinery then on hand, and all machinery which might be purchased, repaired, or sold by either plaintiff or defendant subsequent to that date. That there was not any mention made in this agreement in regard to any losses which might be sustained on any of the property so purchased, or as to any charges or expenses which might be incurred in relation thereto for storage or rent of any premises required or used therefor, nor was there any mention made as to the method or manner in which the accounts between plaintiff and defendant, in relation thereto, should be kept, or the time during which such agreement should remain in force. That thereafter plaintiff and defendant purchased, repaired, and sold second-hand machinery, under and by virtue of such agreement, until on or about the 2d day of June, 1875. That their manner of transacting the business was substantially as follows: It was conducted in the name of the defendant. The accounts relating to the business were kept by defendant in the same manner and in the same books in which he kept the accounts of his private business transactions, all of which was with the knowledge and consent of plaintiff. That plaintiff occasionally entered the details of orders received in relation to these transactions in the order-book of defendant. That defendant received and disbursed substantially all moneys coming from or connected with the joint transactions of plaintiff and defendant. That the machinery was usually purchased in large quantities, a name given to each particular lot thereof so purchased, and an account, to which plaintiff had access, opened therewith, under the name so given it. Subsequently, however, this was found impracticable, and an account was opened called the 'Merchandise Account,' in which all future transactions of plaintiff and defendant in relation to second-hand machinery were entered, and gradually all accounts in relation thereto were merged." Neither plaintiff nor defendant understood that they were partners, and neither claimed, to the other or to third persons, that they were partners, until plaintiff consulted a lawyer about the time he gave notice of a dissolution. Everything was conducted in Hendy's name, and on his premises. He was exclusively the ostensible owner of all the property involved in the business, and at least believed in good faith that Steen had no interest therein, but only a right to his share of the profits when the property was sold and the profit ascertained.

Hendy kept all the accounts of the business in his own private books, to the knowledge of, and apparently without objection from, Steen. While matters were proceeding in this way Steen found that Hendy had purchased at a discount some of his obligations to third parties, and charged them at their face in his personal account. He took offense at this, consulted an attorney, was advised that he and Hendy were partners, and in May, 1875, gave notice of a dissolution. At this date he was considerably indebted to Hendy, as found by the court. An inventory of the stock in which he claimed a partnership interest was taken, and efforts made to effect a settlement. These failed by reason of the fact that each made claims against the other which he would not admit, and which were not allowed afterwards by the court. Meantime Hendy continued in possession of the property, as by the terms of the agreement (whether partnership or not) he was entitled to do, and continued to make sales and collections, so that at the date of the commencement of the action, March, 1876, as finally determined after a long and tedious trial, he was indebted to the plaintiff. The state of the account at these different dates is exhibited by findings 26 and 42, which are as follows: "That the court, in this accounting, first adjusted all accounts between plaintiff and defendant up to the 2d day of June, 1875, on which last-mentioned day the accounts as adjusted were as follows: '*First.* The plaintiff was indebted to the defendant on the personal account in the sum of $3,739.08. *Second.* The defendant had received on account of sales of property belonging to plaintiff and defendant, in excess of all his outlays and expenditures thereon, the sum of $1,483.51. *Third.* That there were not any debts owing from plaintiff and defendant to other parties on account of their joint transactions. *Fourth.* That machinery had been sold by defendant to the value of $10,368.31, for which he held accounts and bills receivable, but upon which the money had not been collected. *Fifth.* That defendant then had in his possession a large amount of second-hand machinery, the property of plaintiff and defendant, inventory of which was made and a copy retained by each.' [Finding 26.] That at the commencement of this action the accounts between the plaintiff and defendant, as subsequently ascertained by this court, were as follows: '*First.* The plaintiff was not indebted to defendant in any sum or amount whatever, either upon their joint account or his personal account. *Second.* The defendant had in his possession the sum of $3,799.60, money collected by him from the sale of the property of plaintiff and defendant, over and above all expenditures made by him, and all advances, with interest thereon, and over and above all sums and amounts which the defendant was entitled to deduct therefrom under the aforesaid agreement between plaintiff and defendant.' That the plaintiff was then entitled to have and receive one-half of the sum of $3,799 60, and the defendant entitled to retain the residue for his own use and benefit. [Finding 42.]"

After the commencement of the action several years elapsed before a receiver was appointed to sell and divide what remained of the partnership (to so call it) stock, and meantime Hendy continued to sell and dispose of it from time to time, and collect the proceeds, all of which he has kept, mingled with his private funds, and used in his business. He furnished statements of account to Steen from time to time, but the court finds they were not true statements, and, although he had in his hands at all times after the commencement of the action considerable, even large, sums to which Steen was justly entitled, he never tendered or offered to pay him any amount whatever. A part of the time he was under process of garnishment in a suit by one of Steen's creditors, but it does not appear that he admitted any indebtedness, or offered to pay any sum into court, or that he would have paid anything to Steen if there had been no garnishment. Very likely, if he had paid Steen what was due him, there would have been no garnishment; and certain it is that he had the use of the money while Steen and his creditor were deprived of its use.

The court finds, and its finding was not attacked, that the net amount realized by Hendy out of the partnership property, (we use this term for convenience merely, not deciding or assuming that it was partnership property,) after deducting everything he was entitled to charge against it, was something over $20,000, of which one-half belonged to Steen. The difference between this sum and the amount of the judgment is about $25,000, which is made up of interest, computed at the rate of 1¼ per cent. per month, compounded monthly on all balances down to the date of the judgment, August, 1885. The contention between the parties here is over this item of interest. We are clearly of the opinion that the judgment as to interest is erroneous, and that it must at least be materially reduced. As bearing on this element of the judgment, counsel for the respective parties have very elaborately argued the question whether or not the agreement found by the court constituted them partners. In our view of the case it makes no difference whether there was a partnership or not. Even conceding there was, the judgment as to interest cannot be upheld.

Counsel for respondent seeks to sustain it on two grounds: *First.* He says interest to be compounded at this rate was stipulated by the parties. *Second.* He claims that the defendant was plaintiff's trustee as to his share of the partnership funds; that he used these funds in business ventures, out of which he made large profits, and that plaintiff is entitled to the avails, which, not being exactly ascertainable, the court allowed according to this measure of computation, viz., interest at 1¼ per cent. per month, compounded monthly.

Neither of these positions is maintainable. *First.* There was no such stipulation. The only evidence tending to sustain the finding of the court to that effect is this: In 1874, while the agreement was in force, Hendy proposed to change it so that out of the profits he should get one-third on account of his capital, and another third for his services, leaving one-third only to Steen. Steen declined to accede to this proposition, and Hendy then proposed that they should "settle up." Thereupon Steen said he was willing that interest at bank rates, which were then 1¼ per cent., should be charged on all balances. Apparently this was agreed to, and the business proceeded as before. This stipulation, however, was merely an element of the partnership agreement, and, as made and intended, only applied during its existence to the monthly balances found due Hendy on account of advances of capital for carrying on the business. It ended when the partnership ended, and that was at the time plaintiff gave notice of its termination, in May, 1875, nearly a year before this action was commenced. This is alleged in the complaint, not denied in the answer, and is clearly proved by the evidence. The finding or assumption of the court that the partnership continued down to the entry of the decree in August, 1885, is in conflict with the pleadings, and wholly unwarranted. There was, therefore, no agreement by virtue of which this extraordinary rate of interest could be allowed. Nor could it be allowed in lieu of profits made by Hendy in the business ventures in which he used plaintiff's share of the funds. To charge Hendy as a trustee in this manner, a case must have been made against him either in the original, or by an amended or supplemental, complaint. Nothing of the sort was done, and the findings, which are supposed to sustain the decree on this ground, are wholly outside of any issues in the case. But in fact there is no finding that Hendy made profits equal to the interest allowed. It is only assumed that he might have done so. But, we repeat, if there had been such findings, they would have been outside the issues. We do not deem it necessary to decide the question, so much debated by counsel, whether the parties were partners. Whether they were or not, the amount due the plaintiff, except as to the matter of interest, was correctly computed, and the relation between the parties was to that extent confidential that it might have been the foundation of a voluntary trust, and the retention of the money gained by its violation constituted the defendant an involuntary trustee for plaintiff of his share of the profits of the business. He is therefore, though not a partner, accountable as a trustee; and we have recently held (Adams v. Lambard, ante, 180, opinion filed September 3, 1889) that compound interest at legal rates may be charged against such a trustee upon moneys fraudulently or wrongfully or oppressively withheld.

The judgment and order appealed from are, for the reasons stated, reversed, and the cause remanded, with leave to the plaintiff, if he be so advised, to file a supplemental and amended complaint charging the defendant with profits actually realized from the use of the trust fund, upon which the cause may be tried anew. Or, if the plaintiff elect not to file an amended or supplemental complaint, the superior court is directed, without a new trial, to state the account between the parties anew in the following manner: The amount found to have been due at the commencement of the action will be taken as a basis upon which interest is to be computed, beginning at that date, compounding annually at the legal rates. On the sums found to have been collected by defendant from time to time interest at like rates is to be computed to the next annual rest; the amount of these various sums forming a new principal, upon which interest is to be computed for another year. Interest shall be computed at this rate, and according to this method, down to the date of the former decree, August 15, 1885, after which time only simple interest shall be allowed; all of which is so ordered.

We concur: WORKS, J.; PATERSON, J.

ON REHEARING.

(Oct. 30, 1889.)

In bank.

PER CURIAM. A rehearing in this case is denied, but the judgment is hereby modified so as to read as follows:

The judgment and order appealed from are, for the reasons stated in the opinion filed herein, reversed, and the cause remanded, with leave to the plaintiff, if he be so advised, to file a supplemental and amended complaint charging the defendant with profits actually realized from use of the trust fund, upon which the cause may be tried anew. Or, if the plaintiff elect not to file an amended or supplemental complaint, the superior court is directed, without a new trial, to state the account between the parties anew, in the following manner: Interest to be computed on the balance found due the defendant, June 2, 1875, at the legal rate, till the commencement of this action, March 11, 1876, and credited to defendant. Interest to be computed at the legal rate on the sums collected by defendant from time to time between June 2, 1875, till the commencement of this action, and charged against defendant. A balance then struck. The amount thus found to be due the plaintiff, at the commencement of this action, will be taken as a basis upon which interest is to be computed, beginning at that date, compounding annually at the legal rates. On the sums found to have been collected by defendant from time to time, interest at the like rate is to be computed to the next annual rest; the amount of these various sums forming a new principal, upon which interest is to be computed for another year. Interest shall be computed at this rate, and according to this method, down to the date of the former decree, August 15, 1885, after which time only simple interest shall be allowed.

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80 Cal. 631

ALBERTOLI v. BRANHAM. (No. 12,018.)

(*Supreme Court of California.* Oct. 1, 1889.)

FRAUDULENT CONVEYANCES—PLEADING.

An answer seeking to avoid a transfer to plaintiff, as in fraud of creditors, alleged that the purpose was to defraud, etc., but failed to state any facts showing fraud, except that the sale was not accompanied by immediate delivery, nor followed by actual or continued change of possession, and in this the finding was against the answer. It did not allege that no consideration passed, or that there was no other property of the debtor with which to satisfy his debts, and the only allegation tending to show knowledge on the part of plaintiff that the conveyance was to defraud creditors was that plaintiff knew that his grantor was insolvent. The finding was that the conveyance was made by both parties thereto to defraud creditors of the grantor, and that the sale involved all the property of the debtor. *Held*, that the answer and findings were insufficient to show a fraudulent conveyance.

Department 1. Appeal from superior court, Santa Clara county; E. SPENCER, Judge.

Action by Sebastian Albertoli against B. F. Branham, sheriff, to recover goods taken by defendant on attachment. Judgment for defendant, and plaintiff appeals.

John Reynolds and *Hiram D. Tuttle*, for appellant. *T. H. Laine*, for respondent.

WORKS, J. The only question presented by this appeal is whether the answer of the defendant and the findings of the court show that the conveyance of the property in controversy to the plaintiff was fraudulent as against the creditors of his grantor. The answer alleges: "Defendant further alleges, upon and according to his information and belief, that heretofore, to-wit, on the 4th day of July, 1885, Serefino Albertini, hereinbefore mentioned, was the owner and in possession of all the property sued for in this action, described in the complaint herein; and that he was then justly indebted to divers persons in large sums of money, and among them to Attilio Agustini, to whom he was indebted in the sum of $387.85, and to whom he is now justly indebted in a large amount, to-wit, in the sum of $955.94, the judgment hereinbefore mentioned and referred to; that the plaintiff herein, and the said Serefino Albertini, with a full knowledge of said indebtedness of said Albertini to said Attilio Agustini and others, thereafter, and on or about the 18th day of July, 1885, for the purpose of hindering, delaying, and defrauding the said Attilio Agustini and the other creditors of said Serefino Albertini, in the collection and recovery of their just debts and claims against the said Albertini, made a pretended sale and transfer of the whole of said personal property (seized as aforesaid) from said Albertini to the plaintiff herein; that at the time of said transfer said plaintiff knew that said Albertini was insolvent; and defendant avers that said transfer was made with the intent on the part of plaintiff and said Albertini to hinder, delay, and defraud the said creditors of said Albertini, including said Attilio Agustini; and he further avers that said Serefino Albertini, at the time of said pretended sale and transfer to the plaintiff herein, had the possession and control of all of said personal property seized by defendant as aforesaid; and he avers that said sale and transfer was not accompanied by an immediate delivery of said property, nor followed by an actual or continued change of possession thereof." The court found on this issue as follows: "That on said 18th day of July, 1885, said Serefino Albertini made a sale to the plaintiff of his said leasehold interest, and of his right and title to all said property sued for in this action, except said ninety-six cheeses herein, and then and there delivered said property so sold to the plaintiff herein, all of which was situated on said leased lands; that said sale was made with the intent to hinder, delay, and defraud the creditors of said Albertini, on the part of both of said parties thereto, and especially to hinder, delay, and defraud the said Attilio Agustini, and those who assigned their demands to him, as hereinbefore stated; that said sale involved and comprehended all the property of said Albertini, and left him without any visible property." It is contended by the appellant that the answer stated nothing more than the conclusion that the conveyance was made to hinder and defraud creditors, and not the facts constituting such fraud. It is well settled that in pleading fraud it is not sufficient to allege it in general terms, and that the facts constituting the fraud must be stated. Pehrson v. Hewitt, 21 Pac. Rep. 950; City of Oakland v. Carpentier, 21 Cal. 642; Castle v. Bader, 23 Cal. 76. The only fact alleged in the answer, sufficient to avoid the transfer, was that the sale "was not accompanied by an immediate delivery of said property, nor followed by an actual or continued change of possession thereof," and the findings do not support this allegation. Where a creditor attacks a transfer of property made by his debtor, on the ground that such transfer was made to defraud, hinder, or delay creditors, facts must be alleged showing that the conveyance was made in such manner, and under such circumstances, as to have that effect. Therefore it must appear that, at the time the conveyance was made, the debtor had not other property subject to execution out of which his debts could be satisfied. Evans v. Hamilton, 56 Ind. 34; Deutsch v. Korsmeier, 59 Ind. 373; Pfeifer v. Snyder, 72 Ind. 78. This allegation is necessary to show that the conveyance was in fact fraudulent as against the creditors. If the debtor has other property subject to execution, sufficient to satisfy his indebtedness, the conveyance cannot amount to a fraud on his creditors. And, where the attempt is made to set aside a conveyance on such grounds, it must appear from the complaint that, at the time the action is commenced, the debtor has not other property sufficient to satisfy his debts. Bruker v. Kelsey, 72 Ind. 51; Sherman v. Hogland, 73 Ind. 472. This is for the reason that the conveyance, although made for the purpose of defrauding creditors, is valid as between the parties, and cannot be set aside unless it appears to be necessary for the protection of the creditor, and no such necessity exists if, at the time he commences his action, there is other property of the debtor out of which his debt can be made. In this case it should have been alleged, for a like reason, that, at the time of the levy of the execution under which the defendant attempted to justify his possession of the property, there was not other property of the debtor subject to such execution sufficient to satisfy the debt for which the levy was made. In the answer before us no such allegations are to be found. The court found that the transfer left the debtor without visible property, but this was a finding outside of the issues. There is no direct allegation that at the time the conveyance was made, or at any time subsequent thereto, the debtor did not have other property sufficient to satisfy his debts, nor is it alleged that the conveyance was without consideration. If full consideration was paid for the property, the creditors were not defrauded, and, unless the grantee of the property had notice of the intended fraud of the debtor, he would be protected, having paid a valuable consideration. The only allegation of fact tending to show knowledge on the part of the plaintiff that the conveyance was for the purpose of defrauding creditors was that he knew, at the time, that his grantor was insolvent. This was not sufficient, as there is no reason why an insolvent debtor may not convey his property for full value, which may have been the case here. It was not sufficient to characterize the conveyance as pretended and fraudulent, (Pehrson v. Hewitt, 21 Pac. Rep. 950,) and this was all that was done, except for the allegation of non-delivery, which, as we have said, was found against the defendant. We have in this case, as in many others, found it difficult to separate the different counts of the pleadings, and desire to suggest to attorneys that, if the several counts of the pleadings were consecutively numbered in all cases, the practice would be much improved. The judgment and order are reversed, and cause remanded for a new trial, with instructions to the court below to allow the parties to amend their pleadings.

We concur: FOX, J.; PATERSON, J.

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3 Cal. Unrep. 140

GORDON HARDWARE CO. v. SAN FRANCISCO & S. R. R. CO. (No. 12,030.) [1]

(*Supreme Court of California.* Oct. 4, 1889.)

MECHANICS' LIENS.

1. A claim of lien, filed by a material-man, giving the names of several persons to whom different portions of the material were furnished at different times, without any designation as to what portion was furnished to each severally, does not sufficiently comply with Code Civil Proc. Cal. § 1187, requiring the claim to state "the name of the person by whom he was employed, or to whom he furnished the materials."

2. A description of the materials furnished as "nails, spikes, iron, steel, picks, shovels, and other like material," is too indefinite and uncertain to sustain the lien.

Department 1. Appeal from superior court, Marin county; E. B. MAHON, Judge.

Hepburn Wilkins, for appellant. *Lloyd & Wood* and *F. S. Lippitt*, (*O. P. Evans*, of counsel,) for respondent.

FOX, J. This is an action by material-men to enforce a lien for material furnished to certain original contractors to be used under their contract "to construct the excavations, embankments, tunnels, box culverts, rubble walls, and such bridges as might be designated by the chief engineer of said railroad company on all that portion of the located line of railroad, then projected, of the San Francisco and San Rafael Railroad lying between the town of San Rafael and Point Tiburon in Marin county," with certain exceptions not necessary here to repeat. The case turns entirely upon the question of whether or not the court erred in sustaining defendant's objection to plaintiff's offer in evidence of "The Claim of Lien," which was filed in the county recorder's office of Marin county, on the 18th day of June, 1884, a copy of which is set forth in the record. When this claim of lien was offered in evidence the defendant objected thereto on several grounds, one of which was: "It does not appear to have been filed within thirty days after the completion of the work." This ground of objection seems to be good. The plaintiff does not claim to be other than a material-man, or a subcontractor for the furnishing of material, under an original contractor. He was, therefore, required by the statute, if he claimed a lien, to file the same within 30 days after the completion of the work. The claim was filed June 18, 1884. The evidence shows, and upon that point there does not seem to be any material conflict, that the last work done under the contract, or by the contractors, was on the 2d of June, 1884, and that for two weeks prior to that time they had not been working on the contract work, but had been engaged in removing *debris* which the contractor, without right, and in violation of instructions, had dumped on the land of a stranger, and for which he was liable in damages. The men were instructed to do this work on the 17th day of May, and the contract work was presumably finished at that time. Even if it was not, it appears clear from the evidence that it was finished, or that no more was done on it after the men commenced to remove this *debris*, which was two weeks prior to the 2d of June, and in either event this was more than 30 days before the filing of this claim of lien. However, the margin was so close that we should be unwilling on this ground alone to disturb the finding of the court below, whichever way it had ruled. Other grounds of objection were that the claim of lien did not state the demand, or the terms of the contract, upon and for which the lien is claimed. The claim shows upon its face that the original contractor for the work was one McDonald. With him the plaintiff contracted for the delivery of the material, as required. McDonald entered upon the performance of his contract in October, 1882, and prosecuted the same until February 6, 1883, plaintiff furnishing material as required. On the last-named date McDonald assigned to one Hawley. Plaintiff then contracted with Hawley, as before. He died before the work was completed, and it was subsequently carried on and completed by the legal representative of the estate of Hawley, to whom, the claim shows, plaintiff continued to deliver material as required, until the completion of the work. The statute expressly provides that the claim filed shall contain a statement of the demand, after deducting all just credits and offsets, with the name of the owner, or reputed owner, and "also the name of the person by whom he was employed, or to whom he furnished the materials." Code Civil Proc. § 1187. The lien can be maintained only by a substantial observance of the provisions of the statute. Wood v. Wrede, 46 Cal. 637; Hooper v. Flood, 54 Cal. 218; Goss v. Strelitz, Id. 640. The object of the statute is to advise the owner at whose instance, the material was furnished. Where, as in this case, material was furnished at divers times, and at the request of, or under subcontract with, different persons, it is not a substantial compliance with the statute for a material-man to file a claim for the gross sum of the balance claimed for all material furnished for that work, without any designation of the amount claimed on account of material furnished at the request of either or any one of the several persons at whose request it was furnished. For all the purposes of the statute, he might as well omit giving the name of any person for whom, or at whose instance, he had furnished the material. Such an omission would be fatal. Phelps v. Mining Co., 49 Cal. 339. We think it equally fatal to give the names of several persons to whom different portions of the material have been furnished at different times, without any designation as to what portion was furnished to each severally. As to the objection that the claim as filed does not state the terms of the contract upon or for which the lien is claimed, it is not necessary for us here to pass upon it. The claim does intelligibly state the terms of plantiff's contracts with the several original contractors, but it gives no information as to the terms of their contracts, except in the single particular of what they undertook to do. The statute is not free from ambiguity as to which of the contracts is referred to in that part of it which requires a statement of the terms of the contract; but, looking to the purpose of the requirement, it would seem to be the subcontract, for of this the owner may not be otherwise advised, while he is presumed to know the terms of the contract between himself and the original contractor.

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[1] Reversed in banc. See 25 Pac. 125, 86 Cal. 620.

An objection was also taken on the ground that the description of the materials furnished was too indefinite and insufficient to sustain a lien. The only description of the materials was that they consisted of "nails, spikes, iron, steel, picks, shovels, and other like material." This is altogether too indefinite and uncertain to sustain a lien, and especially since it is conceded to be the law that a lien can only be maintained for the material which was actually used in the work contracted to be done. We understand that to mean, in a case like this, that which became by its use a part of the completed work. That, certainly, could not include tools of trade,—"picks, shovels, and other like material." And it would not necessarily include any one of the items mentioned in the claim. As well might a house be held under a lien for a chest of carpenter's tools sold to the man who had contracted to build it as a railroad for picks and shovels used by a contractor in grading it, or for nails, spikes, iron, steel, and other like material used by him for the purpose of erecting temporary habitations and sheds for the occupancy of his men and animals while engaged in the work. These objections being fatal to the claim of lien, as offered, we need not consider other objections which were urged. Our conclusion is that the court did not err in sustaining the objection to the introduction of this claim of lien. The foreclosure of the claim being the sole purpose of the action, there was no error in granting the nonsuit. Judgment and order affirmed.

We concur: Works, J.; Paterson, J.

(3 Cal. Unrep. 144)

Harmon v. San Francisco & S. R. R. Co.[1]
(No. 12,017.)

(*Supreme Court of California.* Oct. 4, 1889.)

Mechanics' Liens.

The fact that a claim of lien, filed by a material-man, included more than was due him, if the error was without fraud, will not defeat his right to recover.

Department 1. Appeal from superior court, Marin county; E. B. Mahon, Judge.

F. H. Boalt and *H. A. Powell*, for appellant. *Lloyd & Wood* and *Hepburn Wilkins*, for respondent.

Fox, J. This case is like that of Gordon Hardware Co. v. Same Defendant, ante, 406, (No. 12,030, just decided,) except that at the hearing, on the offer in evidence of the claim of lien, which was substantially like that in the other case, open to all the same objections, and objected to on the same grounds, the court overruled the objections, and admitted the claim in evidence; but afterwards, upon plaintiff's resting his case, the court, on motion of defendant, struck out the said claim from the evidence, to which plaintiff excepted, and thereupon the nonsuit followed, as before. This was only another way of reaching the same result, and for the same reasons. In his proofs in this case the plaintiff showed what part of the material furnished by him had not gone into and become a part of the actual structure, which would reduce his claim by some $6,000; and, if there had been no other ground of objection, the bare fact that he had filed his lien for too much, if it were shown that it was done without fraud, would not have defeated his right to recover. But this did not cure the defects in the claim of lien, to which attention is called in the opinion filed in said No. 12,030, and on the authority of that case the judgment and order appealed from in this case are affirmed.

We concur: Works, J.; Paterson, J.

(81 Cal. 60)

O'Hanlon v. Denvir. (No. 12,489.)

(*Supreme Court of California.* Oct. 8, 1889.)

Contracts—Pleading—Improvements on Public Land.

1. In an action on an agreement to pay plaintiff certain sums of money, an allegation in the complaint that defendant "has failed, neglected, and refused" to pay such sums, is a sufficient allegation of non-payment.

2. One who has made improvements on public lands may sell them, and they will constitute a good consideration for a promise to pay the price.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco. T. H. Rearden, Judge.

B. B. Newman and *Wm. Rix*, for appellant. *William H. Fifield*, for respondent.

Belcher, C. C. The only question presented by this case is whether the complaint stated a cause of action when tested by a general demurrer. The court below held that it did not, and gave judgment for defendant, from which the plaintiff has appealed. The facts stated in the complaint are in substance as follows: The plaintiff and defendant were "in the actual possession as joint owners and tenants in common of all the possessory rights and improvements upon" certain lands described by legal subdivisions according to the government surveys. The improvements consisted of "dwelling-houses, the clearing of a portion of the land of scrub-oaks and other wild shrubbery, constructing roads leading to and upon the land, planting grape-vines thereon, and other improvements, all of which were made by plaintiff and defendant as such joint owners and tenants in common." While the parties were such owners, and so in possession of the premises, they mutually agreed that plaintiff should, and he did, "relinquish, sell, and assign to defendant all his right, title, and interest in and to said possessory claims, possession, and improvements;" and, in consideration therefor, the defendant agreed to pay plaintiff, on demand, the several sums of money expended by him in making the improvements, etc.; and also the reasonable value of his work, labor, and services. It was agreed between the parties that the sums of money so expended amounted to $632, and the alleged value of the labor and services was $325; but "the defendant, although thereto often requested by plaintiff, has failed, neglected, and refused to pay" these sums of money, or any part thereof.

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[1] Reversed in banc. See 25 Pac. 124, 86 Cal. 618.

It is argued for respondent that the demurrer was properly sustained, because the complaint contained no sufficient averment of non-payment, and in support of this position Scroufe v. Clay, 71 Cal. 123, 11 Pac. Rep. 882, is cited. That was an action on a promissory note, and the averment was that the defendant "has refused, and still refuses, to pay," etc. The complaint was demurred to on the ground that there was no allegation of non-payment, and the demurrer was overruled. It was held in this court that the demurrer should have been sustained; the court saying: "The averments of the complaint are not equivalent to an averment of non-payment. The failure to pay constitutes the breach, and must be alleged." We do not think that case at all in point for respondent. Here it is not only alleged that defendant had refused to pay, but that he had failed and neglected to do so. This was a direct allegation of "the failure to pay," and was clearly sufficient.

It is also urged that the lands described must be presumed to be public lands of the United States, because the complaint speaks of possessory rights upon them. And this being so, it is said that "the clearing of a portion of the land of scrub-oaks" was illegal, and the defendant's promise to pay for either the timber or the labor and money expended in doing this illegal act was void; citing Ladda v. Hawley, 57 Cal. 51, and Swanger v. Mayberry, 59 Cal. 91. We do not see that any necessary presumption arises that the lands were public lands. One may have "possessory rights" to land the title of which has passed from the government. But, conceding that the respondent is right in his assumption, still the cases cited only hold that one is not permitted to cut or sell the timber growing upon public land, but he may "occupy, settle upon, and use the land for the purpose of settlement, which would, of course, include the right of clearing away the timber for the purpose of cultivation or occupation." Now, "scrub-oaks" can hardly be said to be the "timber" which the government forbids any one to cut and sell from its lands. Some of the meanings of the word "scrub," as defined by Webster, are: "Something small and mean;" "close, low growth of bushes; low underwood;" "mean; dirty; contemptible; scrubby." It would seem, therefore, that when the plaintiff and defendant cleared a portion of the land of scrub-oaks and other wild shrubbery, they were preparing the land for the purpose of planting grape-vines thereon, or other cultivation, and were doing nothing more than they were authorized to do.

It is further claimed that an agreement to sell a "possessory right" to public lands prior to entry and payment, is void, and that by removing from the land described plaintiff relinquished to the government all his rights to it, including his improvements; that there was therefore no consideration for defendant's promise to pay. Counsel cite, in support of this position, Damrell v. Meyer, 40 Cal. 166, and Huston v. Walker, 47 Cal. 484. These cases decide that an agreement by a pre-emptioner upon public land, prior to entry and payment, to sell the land to, or divide it with, another, after he shall have obtained title, is void. The decisions are undoubtedly correct, but no such question arises here. The single question presented here is, can one who has made improvements on land, admitting it to be public land, sell his improvements to another? and does the sale constitute a good consideration for a promise to pay the agreed price? We know of no law, federal or state, forbidding such a sale, and of no decision by any court, upholding respondent's theory. We conclude, therefore, that the demurrer was improperly sustained, and we advise that the judgment be reversed, and the cause remanded, with directions to the court below to overrule the demurrer.

We concur: Gibson, C.; Van Clief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is reversed, and cause remanded, with directions to the court below to overrule the demurrer.

(81 Cal. 103)

Evans v. De Lay *et al.* (No. 12,003.)

(*Supreme Court of California.* Oct. 11, 1889.)

Trial—Findings on Immaterial Issues—Impeachment of Witness.

1. In an action for money loaned, evidenced by due-bills, where the court finds that the bills were executed and delivered by defendants to plaintiff; that plaintiff is the person described therein as Mrs. A. B.; and that the money loaned was her separate property, acquired by gift from her husband, A. B.,—failure to find as to whether plaintiff was the wife of A. B. is not cause for reversal, though that fact is alleged in the complaint, and denied in the answer.

2. Where plaintiff testifies on cross-examination that she was married to A. B. at a certain time, evidence that she was at that time the wife of another man, and had testified in another case that she was married to that other before the time mentioned, is not inconsistent with her testimony, and is not admissible to impeach her.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

R. B. Mitchell and *Mitchell & Ricketts*, for appellants. *J. F. Wendell* and *F. W. Van Reynegom*, for respondent.

BELCHER, C. C. This action was brought to recover moneys alleged to have been loaned at different times by plaintiff to defendants, several of the loans being evidenced by due-bills made by defendants to Mrs. A. B. Evans. The complaint states that the plaintiff was at the time of the loans the wife of Allan B. Evans, and that the money was her separate property. The answer denies that plaintiff was the wife of Allan B. Evans, or that she loaned to defendants any of the money sued for, or that it was her separate property; and, by way of defense, alleges that defendants made a verbal agreement with Evans to sell him a half interest in their business, and that the moneys alleged to have been loaned were partial payments made by him on his purchase. Plaintiff had judgment, a motion for a new trial was denied, and defendants appeal.

It is urged on behalf of appellants that the court found only inferentially, and not directly, that plaintiff was the wife of Evans, and that therefore the judgment should be reversed. The complaint alleged that defendants executed and delivered to plaintiff each of the due-bills sued upon, "describing her therein by her married name of Mrs. A. B. Evans." The answer denied the delivery, but not the execution, of the papers. The court found that the due-bills were executed and delivered by defendants to plaintiff, and that she was the person described therein as "Mrs. A. B. Evans." The court further found that the moneys loaned were all the separate property of plaintiff, "acquired by her during coverture * * * by gift from her husband, Allan B. Evans." These findings were amply sustained by the evidence, and in view of them it was entirely immaterial whether plaintiff was in fact the wife of Evans or not. The moneys being plaintiff's separate property, she had a right to loan them to defendants, and to sue for and recover them; and it was a matter of no concern to them whether she was married or unmarried, or whether she was the lawful wife of Evans or some other man. The contention of appellants cannot, therefore, be sustained; the rule being that findings upon immaterial issues are unnecessary, and that judgments will never be reversed for the want of them.

It is next claimed that the court erred in sustaining objections to offered testimony. The plaintiff was called as a witness in her own behalf, and, on cross-examination, testified that she was married to Evans on the 27th of April, 1880. She was then asked, "Had you another husband at that time?" Counsel for plaintiff objected to the question as immaterial and not cross-examination, and the objection was sustained. Counsel for defendants then offered to prove that, at the time plaintiff claimed to have been married to Evans, she was the wife of one Frank Cunningham; that in a certain case she had testified that she was married to Cunningham in January, 1869; that Cunningham was alive, and that they had never been divorced. Counsel for plaintiff objected to the offered evidence on the same grounds as before, and the objection was sustained. Counsel for appellants say in their brief: "The object of the evidence sought to be elicited was to impeach the credibility of the witness. She had testified she was married to Evans in 1880, and we had the right to prove her statements at other times which would contradict those she made on the stand, or which were inconsistent therewith." But the offered evidence did not tend to contradict the statement of the witness that she was married to Evans in April, 1880. At most, it tended only to prove that she had another husband at the time, and was therefore guilty of bigamy. This, if true, was a wrongful act, but it was irrelevant, and not collateral to any material issue before the court. And it is a well-settled rule that a witness cannot be impeached by evidence of particular wrongful acts. Code Civil Proc. § 2051; Hinkle v. Railroad Co., 55 Cal. 627; People v. Hamblin, 68 Cal. 101, 8 Pac. Rep. 687; Sharon v. Sharon, ante, 26. Besides, the fact of the witness' marriage to Evans was called out on cross-examination, and as said in People v. Dye, 75 Cal. 112, 16 Pac. Rep. 539: "A party cannot cross-examine his adversary's witness upon irrelevant matters for the purpose of eliciting something to be contradicted; and, if such matters are drawn out, the court should stop the inquiry there."

Finally, it is contended that the evidence establishes the fact that the money was not loaned, but was advanced by plaintiff on account of a proposed purchase by her of an interest in defendants' business. And it is said "that when the defendants failed to carry out their agreement to admit the plaintiff as a partner her remedy was by a suit to recover damages for breach of contract and not for money loaned." The court found that the moneys sued for were loans, and we think the evidence abundantly sufficient to justify the finding. It is true that plaintiff occasionally speaks of some of them as advances, but she also speaks of them as loans. The two terms are not necessarily inconsistent. Mortgages are sometimes given to secure future advances. The evidence shows that there were some negotiations for a partnership between plaintiff and defendants, but that the minds of the parties never met, and the negotiations came to naught. No partnership agreement was ever arrived at, and there could, therefore, be no action for its breach.

We advise that the judgment and order be affirmed.

We concur: VAN CLIEF, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(81 Cal. 120)

SMITH *et al.* v. MATTHEWS. (No. 11,644.)

(*Supreme Court of California.* Oct. 11, 1889.)

QUIETING TITLE—PLEADING.

A complaint showing that plaintiffs' grantor attempted to convey certain lands to defendant's grantor, and by mistake included too much land in the deed; that the land thus included has never been taken possession of by defendant or his grantors, but has remained in possession of plaintiffs and their grantors,—states a cause of action to quiet title, and is not barred by the statute of limitations, on account of plaintiff's actual possession. Overruling ante, 170.

McFarland, J., dissenting.

In bank. On rehearing. For report on former hearing, see ante, 170.

Mich. Mullany, *Aylett R. Cotton*, and *W. H. H. Hart*, for appellants. *Wm. Matthews*, for respondent.

Works, J. This case was affirmed on a former hearing, and a rehearing granted. The only question in the case is as to the sufficiency of the complaint. The complaint seems to have been regarded and treated by the parties, by the court below, and by this court on the former hearing, as one to correct a mistake in a deed conveying real estate. Ante, 170. So treated, the complaint was clearly bad, on the grounds stated in the former opinion. But on further consideration, and by sorting out a few simple and proper allegations from a mass of irrelevant and surplus matter, that never should have been in it, and which has only tended to confuse the real questions involved, and which has, so far, resulted in the appellants' defeat, we have concluded that, while the complaint is bad as one to correct a mistake, it states facts sufficient to constitute a cause of action to quiet title. If attorneys could be induced to plead, as required by section 426 of the Code of Civil Procedure, by stating "the facts constituting the cause of action in ordinary and concise language," instead of loading their pleadings with a detailed history of their case and the evidence by which their cause of action is to be established, they would save themselves and the courts a great deal of unnecessary labor, materially simplify the practice, save much expense to their clients, and sometimes avoid a decision against them, because of the extreme difficulty of understanding what their cause of action is.

Looking at the evidence pleaded in this complaint, in addition to the allegations of fact, it proves, if properly detailed in the complaint, that the plaintiffs' grantor attempted to convey certain lands to the defendant's grantor; that, by a mistake in locating one of the monuments, too much land was included in the deed; that the land thus improperly included in the deed was never taken possession of by the defendant, or any of his grantors, but has for many years, and ever since the conveyance, remained in the actual possession of the plaintiffs and their grantors. The right of the plaintiffs to have their title to the land quieted, as against a claim asserted by the defendant under this deed, was not barred, and could not be while the plaintiffs and their grantors remained in the actual possession of the land, claiming to be the owners thereof, and the actual owners, as against the defendant, of all interest therein except the mere naked title. Day v. Cohn, 65 Cal. 508, 4 Pac. Rep. 511; Barroilhet v. Anspacher, 68 Cal. 121, 8 Pac. Rep. 804; Love v. Watkins, 40 Cal. 563. We think, therefore, that the complaint states a cause of action to quiet title. Instead of pleading the evidence, it would have been much better if counsel for appellants had set up the facts and allowed the defendant to plead the statute of limitations; but this violation of good pleading has not rendered their complaint wholly bad. There were other objections to the complaint in the demurrer, but none of them are well taken, and they have not been pressed in this court.

Judgment reversed with instructions to the court below to permit the plaintiffs to amend their complaint, if they so desire; but, if not amended, to overrule the demurrer thereto, and proceed in accordance with this opinion.

We concur: Sharpstein, J.; Fox, J.

concur in the judgment: Beatty, C. J.

McFarland, J. I dissent. I do not think that the complaint avers that plaintiffs have been in possession of the land in contest since the execution of the deed. On the contrary, I think there is a marked attempt to avoid making such an averment. And, that being so, it follows clearly that the alleged cause of action was barred long before the suit was commenced. I think that the judgment should be affirmed.

(80 Cal. 609)

LEMON v. RUCKER. (No. 12,593.)

(*Supreme Court of California.* Sept. 30, 1889.)

FRIVOLOUS APPEAL.

Under Code Civil Proc. Cal. § 957, providing that, when it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just, such damages will be assessed in a case where the court is satisfied that the appeal was merely for delay, though the attorney for appellant prosecuted the appeal in good faith, believing that there was sufficient ground for reversal.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

J. M. Wood, for appellant. *G. B. Merrill*, for respondent.

WORKS, J. The only point made on this appeal is that the findings do not cover the issues, or, as counsel for appellant expresses it, "that the case alleged is not found, and the case found is not alleged." We have compared the complaint and the findings, and are thoroughly convinced thereby that the point is not well taken, that the criticisms made upon the findings are frivolous and unworthy of consideration, and that the appeal is wholly without merit.

Judgment affirmed, with 20 per cent damages.

We concur: FOX, J.; PATERSON, J.

ON REHEARING.

(Oct. 29, 1889.)

In bank.

PER CURIAM. On rehearing. Counsel for appellant has filed an earnest and elaborate petition for a rehearing in this case, in which he urges upon us his good faith in prosecuting the appeal, and contends that damages should not have been assessed.

We cannot, after reading this petition, question the good faith of counsel in taking the appeal. He was undoubtedly of the belief that there was sufficient ground for reversing the case; but we are still of the opinion that this belief was wholly unfounded. Therefore the question is whether or not the right and duty of this court to assess damages depends upon the belief of the attorney for appellant that he has sufficient ground for a reversal. The Code provides: "When it appears to the appellate court that the appeal was made for delay, it may add to the costs such damages as may be just." Code Civil Proc. § 957. In many cases the appeal may be prosecuted with the full belief that the cause may be reversed, and not only the appeal be taken, but the reversal desired for delay only. This may, and generally does, occur where the appeal does not affect the merits of the case, but rests entirely on technical grounds. The case before us is one of this kind. The cause of action was that the appellants, as real-estate agents, had sold the respondent's land for one price, and reported the sale to her at a less sum, and pocketed the difference. The evidence was not brought up, nor was it questioned by the appeal that the decision against the appellants was right on its merits. As was said in the former opinion, the appeal rested entirely on objections to the findings, which, in our judgment, were not only purely technical, but in fact wholly without foundation. A reversal, if the technical objections had been sustained, would not have reached the merits of the case, but would only have resulted in delay. It is fair to presume that this was the sole object of the appeal, as this would have been the only result, in view of the fact that the merits of the case were not presented to this court. It seems to us, therefore, that if there ever was a case in which the assessment of damages was not only justifiable, but eminently proper, this was such a case. In the crowded condition of the business of this court it is due, not only to the respondent, whose right to the recovery of her money is delayed, but to the court and other litigants, whose appeals are waiting to be heard, that the respondent should be properly remunerated for the delay, and this kind of appeals be discouraged. For these reasons the petition for a rehearing, and for a modification of the judgment by striking out the assessment of damages, is denied.

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80 Cal. 647

Tunstead, Sheriff, v. Nixdorf *et al.* (No. 12,158.)

(*Supreme Court of California.* Oct. 1, 1889.)

Indemnity Bond—Sheriffs.

1. A bond of indemnity to a sheriff for a sale under execution provided that the obligors would indemnify and save him harmless "of and from all damages, expenses, costs, and charges, including all counsel fees, which he * * * may incur in consequence of the legal enforcement of payment of the penalty of this bond, and against all loss and liability which he * * * shall sustain or in any wise be put to by reason of the levy," etc. Relying on this bond, the sheriff refused to return the property, and sold it, and a judgment was obtained against him therefor. *Held*, that the fact that, before the original execution was executed, an *alias* was necessary and was issued after the bond was given, did not preclude the sheriff from recovering on the bond.

2. Under the terms of the bond, the sheriff could recover of the obligors a reasonable amount which he paid as attorney's fees in the action on the bond.

Department 1. Appeal from superior court, Marin county; E. B. Mahon, Judge.

Action by James Tunstead, sheriff, on an indemnity bond given to him by defendants, Gustav Nixdorf and others. Judgment for plaintiff, and defendants appeal. Plaintiff also appeals from refusal to give judgment for his attorney's fees.

Joseph Kirk, for James Tunstead. *E. W. Ashby* and *L. Quint*, for G. Nixdorf and others.

Works, J. There are two appeals in this case, both of which are presented and will be considered together. The facts are somewhat complicated, and are thus stated by counsel for the defendants in their brief in support of their appeal: The facts of this case are that in July, 1876, the appellants Nixdorf and Schroeder commenced an action in the third district court of San Francisco against one James McCue to recover $10,000 damages; that in December, 1877, judgment was rendered in favor of said Nixdorf and Schroeder, and against said McCue, for the sum of $500; that on January 12, 1878, an execution on said judgment was issued, directed to the sheriff of Marin county, and placed in the hands of James Tunstead, plaintiff in this case, as such sheriff, with written instructions to levy upon and sell a certain stallion called "Copperhead," the property of said McCue, in said Marin county; that said Tunstead, as such sheriff, did, on the 12th day of January, 1878, by virtue of said execution and instructions, levy upon and take into his possession said stallion, and advertise him for sale; that after such levy, and after advertising the said stallion for sale, said McCue demanded that said Tunstead, as such sheriff, should release from said levy said stallion, as property of said McCue, as exempt from execution; that notice of said demand of McCue was given by said Tunstead, as such sheriff, to said Nixdorf and Schroeder, who as principals, and the other defendants herein, Jacob G. Gundlach and Henry Tromer, as sureties, executed the bond of indemnity set out in the complaint in this action, that on March 1, 1878, and before the sale of said stallion, said McCue commenced an action in the twenty-second district court, of Marin county, against said Tunstead, as such sheriff, to recover from said Tunstead the possession of said stallion, or its value, viz., $1,000; that such proceedings were had in said twenty-second district court, in said case of McCue v. Tunstead, that on April 15, 1878, a judgment was rendered in favor of said sheriff, plaintiff herein, and against said McCue, for the possession of said stallion, and thereafter said stallion was returned to said sheriff; that on the 3d day of May, 1878, an *alias* execution was issued out of the twenty-third district court, San Francisco, in the said case of Nixdorf and Schroeder against the said McCue, directed to and placed in the hands of the sheriff of Marin county, plaintiff here, and thereafter said stallion was levied upon and sold under said *alias* execution; that such further proceedings were had in said case of McCue v. Tunstead, Sheriff, that judgment was entered in favor of McCue, and against said Tunstead, for the return of said stallion, or its value, viz., $1,000, and certain costs; that said stallion was never returned to said McCue. This suit was therefore brought by plaintiff, upon the bond of indemnity set out in the complaint, to recover from the obligors therein the amount of plaintiff's liability in the case of McCue v. Tunstead, and $200 counsel fees, paid in this suit. See, also, for further particulars of the litigation resulting in this suit, McCue v. Tunstead, 65 Cal. 506, 4 Pac. Rep. 510, 66 Cal. 486, 6 Pac. Rep. 316; McCue v. Superior Court, 71 Cal. 545, 12 Pac. Rep. 615. The court below rendered judgment in favor of the plaintiff for the amount recovered against him by McCue, with interest and costs, but declined to allow him the sum of $200, alleged to have been paid out by him in the prosecution of the present action. The defendants appeal from the judgment against them, and from the order denying them a new trial, and the plaintiff appeals from the judgment on the ground that the attorney's fees should have been included therein. The defendants contend that the indemnity bond sued on only indemnified the sheriff against loss or liability on account of his seizure of the property under the original execution; and that as no sale of the property was made under said execution, but under an *alias* execution issued subsequent to the giving of the bond, it was not applicable to any liability incurred by reason of such sale.

The bond recites that whereas, a judgment was recovered by the parties, naming them, against said McCue, and execution had issued to the plaintiff herein, as sheriff of Marin county, and said sheriff had levied upon a certain stallion known as "Copperhead," and then provides: "And whereas, upon the taking of said goods and chattels, by virtue of the said writ, the said James S. McCue claimed the said goods and chattels, viz., the said stallion, as exempt from execution under the laws of this state, and whereas, the said plaintiffs, hereby expressly waiving a trial by sheriff's jury of the right of property and the said claim of exemption, require of the said sheriff that he shall retain the said property under such levy and in his custody: Now, therefore, the condition of this obligation is such that if the said Charles Schroeder and Gustav Nixdorf, as principals, and the said Henry Tromer and Jacob G. Gundlach, as sureties, their said heirs, executors, and administrators, shall well and truly indemnify and save harmless him, the said sheriff, his heirs, executors, administrators, and assigns, of and from all damages, expenses, costs, and charges, including all counsel fees, which he, said sheriff, his heirs, executors, administrators, or assigns, may incur in consequence of the legal enforcement of payment of the penalty of this bond, and against all loss and liability which he, the said sheriff, his heirs, executors, administrators, and assigns, shall sustain, or in any wise be put to, for or by reason of the levy, taking, or retention by him, the said sheriff, in his custody, under said execution, of the property claimed as aforesaid, then the above obligation to be void; otherwise to remain in full force and virtue."

It clearly appears from the recitals and covenants in the bond that the sheriff had seized the property on execution before the bond was given, and that the execution defendant was demanding the release of the property as exempt from execution. In order to prevent such release, the bond in suit was given. By reason of this indemnity, and relying upon it, the sheriff refused to deliver up the property, by reason of which he was involved in litigation, which resulted in a judgment against him. It seems to us that the fact that, before the original could have been or was fully executed, an *alias* writ was necessary to be and was issued, in order to sell the property, was wholly immaterial, and could not affect the right of the sheriff to resort to the indemnity bond. His liability attached the moment he refused, on demand, to surrender the property to the execution debtor, and that liability was fixed and determined by the judgment of McCue against him. The same judgment fixed the liability of the defendants in this action to the plaintiff. McBeth v. McIntyre, 57 Cal. 49. It would have been different if the bond had only indemnified the sheriff against actual damages. In such case the sheriff could not recover until he had actually been compelled to pay the judgment recovered against him. Oaks v. Scheifferly, 74 Cal. 478, 16 Pac. Rep. 252. The bond in suit was security against liability on the part of the plaintiff, and not against actual damages only, and his liability attached under the original execution. Conceding, as contended by the defendants, that it was the duty of the sheriff to have sold the property under the first execution when the property was returned to him under the judgment of the court below, which was afterwards reversed, the fact that, instead of doing so, an *alias* execution was issued, and the sale made thereunder, could not have injured the defendants, or affected their liability. There is no merit in the appeal of the defendants.

The question raised by the appeal of the plaintiff as to his right to his attorney's fees, expended in this action, must turn upon the covenants in the bond. The bond provided that the principal and sureties thereof should "well and truly indemnify and save harmless him, the said sheriff, his heirs, administrators, executors, and assigns, of and from all damages, expenses, costs, and charges, including all counsel fees, which he, the sheriff, his heirs, administrators, executors, and assigns, may incur in consequence of the legal enforcement of the payment of the penalty of this bond." The court below found that the plaintiff had "expended and paid out in the prosecution of this action, as and for counsel fees, the sum of $200; the same being a reasonable amount therefor." These fees are clearly within the covenants of the bond and should have been allowed. Whether, but for this express agreement to pay them, they could have been recovered, is immaterial. It is enough that the defendants promised to pay them.

The judgment is affirmed as against the defendants, with 10 per cent. damages, and the court below is instructed to modify the judgment, by including therein the sum of $200, attorney's fees expended by the plaintiff. The plaintiff will also be entitled to a reasonable fee for his attorney's fees in this court, which the court below will ascertain and allow.

We concur: Fox, J.; Paterson, J.

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81 Cal. 70

People v. Reed *et al.* (No. 11,769.)

(*Supreme Court of California.* Oct. 9, 1889.)

Appeal—Review—Dedication—Evidence.

1. A finding by the trial court of an ultimate fact does not preclude the supreme court from reviewing on appeal the sufficiency of the facts found to show such ultimate fact, where the finding thereof recites that it appears "by the acts, facts, and matters above found."

2. The platting of land, and the sale of lots with reference thereto, by the owner, does not constitute a dedication of land as a street as to the public, where such land is never opened as a street, and the owner keeps it inclosed, and uses it for more than 20 years before an attempt to accept it by the public.

3. An ordinance by the city council declaring that the land "be, and the same is hereby, dedicated and set apart to public use as a public street," without referring to the owner or his alleged dedication, is not an acceptance thereof.

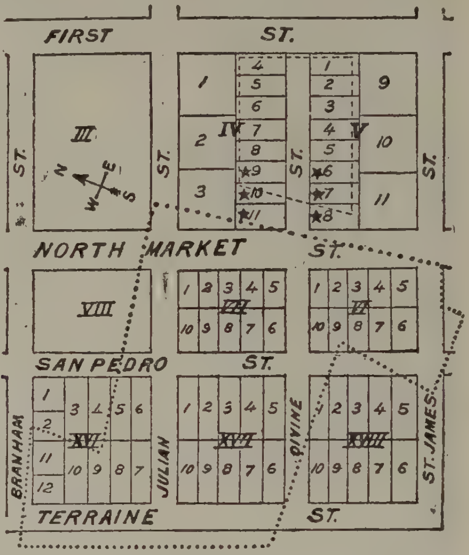
Thornton, J., dissenting.

In bank. On rehearing. For former report, see 20 Pac. Rep. 708.

William Matthews, for appellants. *Geo. A. Johnson*, Atty. Gen., and *D. W. Herrington*, for the People.

Works, J. This action was brought by the people, on the relation of the mayor of the city of San Jose against the appellants, to declare a certain strip of land to be a public street of said city, to compel the appellants to remove certain buildings therefrom, and to enjoin them from maintaining said obstructions, and from setting up any claim of right to maintain the same thereon. There was a judgment in favor of the plaintiff in the court below, and the defendants have appealed on the judgment roll.

The sole question in the case is whether this strip of land had or had not been dedicated by the defendants, or either of them, to the public as a highway, and this question we are called upon to determine from the facts as they appear in the findings. On this question the court finds: "(6) That in March, 1862, the defendant E. P. Reed was the owner in fee of the lands and the title thereto, designated by the red and blue lines shown on the map, marked 'Exhibit A,' city of San Jose, a copy of which is hereto attached, and made a part of these findings. (7) That in March of said year, 1862, said defendant E. P. Reed caused said lands within said red and blue lines to be surveyed by Charles T. Healey, who was then the city surveyor of said city of San Jose, and, with the other lands indicated upon said map, to be subdivided and plotted into streets, lots, and blocks, and a map thereof to be made upon a scale of 200 feet to the inch, and of which said exhibit thereto attached is a true copy. (8) That upon said survey and map the street designated 'Divine Street' thereon was laid down as a thoroughfare and street, marked thereon 'Divine Street,' extending from the west line of First street, as shown on said map, to the east line of Terraine street, extending in length from First street, westerly, a distance of about one thousand and fifty feet, and being sixty feet in breadth throughout." So much of the map as includes the lands referred to in said findings as being included within the red and blue lines is as follows:



Note. In the above diagram the red line is represented by dots and the blue line by short dashes.

The whole length of Divine street, as delineated on the map, appears on the part we have set out. The particular part of said street sought by this action to be opened lies between blocks VI. and VII. and extends from San Pedro to Market street, a distance of one block. The court further finds that said map was never recorded, but about 25 copies thereof were lithographed in said year 1862, and were by the appellant E. P. Reed exhibited to divers persons interested in the sale or purchase, or in some way connected with the transfers of lands and lots in said city, within the boundaries of the map, but gave instructions that the same should not be recorded. That the lands included in said map, outside of the red and blue lines, were the property of others than the said Reed, and their consent was not, and could not be, obtained to the subdivision and mapping of the same, and had not since been obtained, except that persons owning Divine street, east of Market and west of San Pedro street, threw the same open to public use according to said survey and map, and those interested in that portion of San Pedro street from Dams street southerly to San Augustine street, and that portion of Market street deeded to the city of San Jose, were thrown open to the public use as streets in conformity to the map, and have ever since been, and yet remain, public streets under the charge of said city. "That in the year 1863, with the consent of said E. P. Reed and others interested as owners in the lands, and by and with the consent of the mayor and common council of said city, the course and direction of said North Market street was changed from the direction indicated by the space lying between lands surrounded by the red lines and land surrounded by the blue lines on Exhibit A, to conform said Market street to said survey and map and plan of streets, lots, and blocks, as surveyed by said Healey, and the same has ever since continued to be the established route and direction of said Market street. "That First and Julian streets, as laid down on said map, were established, open public streets of said city for more than two years prior to said survey and mapping of said lands of defendant E. P. Reed. That all other streets shown upon said exhibit were for the first time designated as streets when said survey and map were made, as set forth in finding 11. That Market street was changed as to direction. That Julian street did not extend west of Market street." The court further finds that the appellant E. P. Reed, after the making of said map, made various conveyances and leases of property, describing the same by reference to said map, describing it. Some of these conveyances were by reference to lots and blocks, but most of them were by metes and bounds ignoring the lots, blocks, and streets. Some of them were by metes and bounds designating some of the streets as the boundary lines, and some of them conveyed parts of the streets as laid out in the map. Some, if not the most, of these conveyances seem to have been of property of which he had no title, but were included in the map. These conveyances included lots 9, 10, and 11 of block 4, and lot 8 of block 5, all of which fronted on the street in controversy in this action, but not on that part of the street sought to be opened. The court further finds that on the 24th day of December, 1867, the appellant E. P. Reed conveyed to his wife, Clarissa M. Reed, by metes and bounds, all of block 6 and 7, and that part of Divine street lying between said blocks, which is the portion of said street in controversy in this action. That thereafter certain other conveyances were made by Reed and wife by metes and bounds, mentioning certain of the streets on said map as boundary lines, one of which was for a part of said block 6, but not bordering on the street in controversy, the title to said portion of Divine street and the lands bordering thereon still remaining in Mrs. Reed until her death, and being by her will devised to her husband. The court further finds that on the 12th day of December, 1884, more than 20 years after said map was made, and after the portion of the alleged street in controversy had been conveyed to Mrs. Reed, and had been occupied by buildings and fences, the mayor and common council of said city of San Jose passed an ordinance declaring that the strip of land in controversy "be, and the same is hereby dedicated and set apart to public use as a public street forever," and instructing the street commissioner to demand possession thereof, and, if possession was given, to remove all obstructions therefrom and throw the same open to public use as a street of said city, and directing the city attorney, if possession were refused, to institute proceedings to recover the same for the city as a public street. It is also found that the owners of said strip of land claimed to be the owners thereof, free from any claim of the city or any of its inhabitants to use the same as a street. In conclusion the court below finds as follows: "(36) That by the acts, facts, and matters above found and recited, said premises above referred to and described were, by said several parties, dedicated as public streets of the city of San Jose, and were, by the proper authorities of the city of San Jose, accepted and received and used as public streets of the city of San Jose." From the findings of fact the court concluded that the property in controversy had been dedicated as, and was, a public street of said city, and entered judgment accordingly.

This action was heard by this court and decided in favor of the appellants, on the ground that the facts found by the court did not show a dedication. People v. Reed, 20 Pac. Rep. 708. A rehearing was granted. In their petition for a rehearing it was urged upon us that we had overlooked, or had not given sufficient weight to, the thirty-sixth finding, which they claimed was a finding of the ultimate fact of dedication, and concluded the case, on this appeal, against the appellants, the appeal being on the judgment roll, and they now attempt to forestall any inquiry into the question whether the specific facts found constituted a dedication of the property in controversy as a street by the same contention. But, conceding that the finding is one of fact, or, as counsel terms it, a "conclusion of fact," it is apparent that the court below did not intend to cut off the right of the appellants to test the sufficiency of the specific facts found to show such dedication, in the manner indicated. This finding is based upon the other facts found. It recites in terms that, "by the acts, facts, and matters above found, said premises were by said parties dedicated," etc. It may be that if this finding had stood alone, and had not been put in this argumentative form, it might have been upheld as a sufficient finding of an ultimate fact. But this cannot be so where the facts are fully found, and the general finding of a dedication is expressly drawn as a conclusion from such facts. Counsel say it does not appear that the court found all of the facts proved. But it does appear from the finding itself that it was based entirely upon the facts found, and not, in whole or in part, on facts proved but not found. Therefore, if the specific facts found do not support this one, which is a summing up of the others, the judgment should be reversed.

We pass, therefore, to a consideration of the question whether the facts found show a dedication. In doing so it must be borne in mind that the map made of the property was never recorded; that the part of the alleged street in controversy was never opened as a street, but for many years had been fenced and occupied by substantial and permanent buildings; that no sales of lots thereon were ever made; that there is no finding that any of the individuals who purchased property on other parts of the alleged street had ever seen the map of the property, or had any information, at the time they purchased, that a street was laid out at the place in controversy; and that no action was ever taken by the city for more than 20 years after the map was made and the property inclosed and permanently improved. In an early case this court said: "In dedication no particular formality is necessary. It is not affected by the statute of frauds. It may be made either with or without writing, by any act of the owner, such as throwing open his land to public travel, or platting it, and selling lots bounded by streets designated in the plat, thereby indicating a clear intention to dedicate; or an acquiescence in the use of his land for a highway, or his declared assent to such use, will be sufficient; the dedication being proved in most, if not all, of the cases, by matter *in pais*, and not by deed. The vital principle of the dedication is the intention to dedicate; and, whenever this is unequivocally manifested, the dedication, so far as the owner of the soil is concerned, has been made. Time, therefore, though often a very material ingredient in the evidence, is not an indispensable ingredient in the act of dedication. If accepted and used by the public in the manner intended, the dedication is complete, precluding the owner and all claiming in his right from asserting any ownership inconsistent with such use. Dedication, therefore, is a conclusion of fact, to be drawn by the jury from the circumstances of each particular case; the whole question, as against the owner of the soil, being, whether there is sufficient evidence of an intention on his part to dedicate the land to the public use as a highway." Harding v. Jasper, 14 Cal. 647.

It is well settled by the decisions of this court that the making and filing of a map, designating certain streets thereon, is only an offer to dedicate such streets to the public, and that the dedication does not become effectual and irrevocable until the same is accepted by the public. Hayward v. Manzer, 70 Cal. 476, 13 Pac. Rep. 141; Harding v. Jasper, 14 Cal. 647; San Francisco v. Calderwood, 31 Cal. 588; San Francisco v. Canavan, 42 Cal. 552; People v. Williams, 64 Cal. 502, 2 Pac. Rep. 393. But it is not the mere making of the map, or its delivery or exhibition to private individuals, that constitutes the offer of dedication to the public, but the filing; and, where the right to claim the street by the public rests upon the map alone, there is no offer to be accepted until the same is filed for record. It may be otherwise with private individuals who have purchased some of the property on the faith of the map, designating the streets, but this must be solely on the ground of estoppel, resting upon the representations made whereby parties have been induced to purchase on the faith of the implied statement that the designated streets were to be and remain open for public use. Such individual purchasers may, if it be shown that they acted on such representations, compel the opening of the streets, but if they do not the public has no ground of complaint. No dedication or offer of dedication has been made to the public, and it is not an interested party.

It is conceded by counsel for respondent that the portion of the street in controversy "has never been opened as a street," and that "on it the defendant had maintained a barn and shed, and kept it inclosed with substantial fences for more than twenty years before this suit." They take the position, however, that where the owner surveys and plats his property, and makes sales of lots with reference to such plat, the streets designated thereon are irrevocably dedicated to the public as streets. There are authorities sustaining this position. Bartlett v. Bangor, 67 Me. 464; Carter v. City of Portland, 4 Or. 339; Stone v. Brooks, 35 Cal. 494; Grogan v. Hayward, 6 Sawy. 498, 4 Fed. Rep. 161; Dill. Mun. Corp. (3d Ed.) § 640. But it is manifest that no such rule can prevail in this state, where it has been uniformly held that the owner may, at any time before his offer of dedication is accepted by the public, withdraw the same. As between him and the public, therefore, his act alone is not sufficient to constitute an irrevocable dedication. As we have said, it may be different as between him and private individuals to whom he has made sales of property with reference to the map. Much of the confusion in the decided cases has, in our judgment, grown out of the failure to distinguish between the right of the public authorities to claim a dedication, and the right of a purchaser to compel the opening of a street on the ground of estoppel. Holdane v. Trustees, etc., 21 N. Y. 474; Child v. Chappell, 9 N. Y. 257. In the case of Grogan v. Hayward, 6 Pac. Coast Law J. 351, relied upon by the respondent, which was an action by a private individual, this distinction is clearly made. If the purchaser of property asserts his rights the result may be the same, as to the mere keeping open of the street, as if a dedication is claimed by the public; but it does not follow that if he waives his right the public can assert it, nor can the purchaser, by asserting his right to an open way, impose on the public the duty of keeping a street in repair that has never been accepted. The case of San Leandro v. Le Breton, 72 Cal. 172, 13 Pac. Rep. 405, seems to overlook this plain distinction between the right of a purchaser and the public, but there it appeared that there was an acceptance by the public authorities, so that, so far as the opinion can be construed as militating against the rule above laid down, it is a mere *dictum*, and should have no weight. Therefore, conceding that a platting of property and sale of lots constitutes a dedication as between the owner and purchasers under him, of the streets delineated on the map, in order to constitute a dedication which can be taken advantage of by the public authorities of a city, the offer of dedication must have been accepted by such authorities, either by user or some formal act of acceptance. Harding v. Jasper, 14 Cal. 647; Hayward v. Manzer, 70 Cal. 476, 13 Pac. Rep. 141; San Francisco v. Calderwood, 31 Cal. 588; San Francisco v. Canavan, 42 Cal. 552; People v. Williams, 64 Cal. 502, 2 Pac. Rep. 393; City of Galveston v. Williams, 69 Tex. 449, 6 S. W. Rep. 860; State v. Trask, 27 Amer. Dec. 554, 563; Gilder v. City of Brenham, 67 Tex. 345, 3 S. W Rep. 309; Cook v. Harris, 61 N. Y. 448; Briel v. City of Natchez, 48 Miss. 423; Field v. Manchester, 32 Mich. 279; Hamilton v. Railroad Co., (Ill.) 15 N. E. Rep. 854, Fisk v. Town of Havana, 88 Ill. 208. Numerous other cases to the same effect might be cited. Such acceptance must be within a reasonable time after such offer of dedication, and if not accepted the owner may resume the possession of the property, and thereby revoke his offer. Hayward v. Manzer, 70 Cal. 476, 13 Pac. Rep. 141; State v. Trask, 27 Amer. Dec. 554, 566; Field v. Manchester, 32 Mich. 279; County of Wayne v. Miller, 31 Mich. 447.

In this case there was no user of the street, and no attempt to accept the dedication by formal act of the public authorities for more than 20 years. This was not within a reasonable time, as shown by the authorities cited above, and therefore came too late. But, if this were not so, we think the ordinance pased by the common council of the city was not in any sense an acceptance of the dedication It did not refer to the appellant or his alleged dedication of the street. As was well said in the former opinion, it appears more like an attempt to take private property for public use without compensation than an acceptance of the street. There was neither a dedication to, nor an acceptance by, the public in this case. Littler v. City of Lincoln, 106 Ill. 353; Kennedy v. Mayor, etc., 65 Md. 514, 9 Atl. Rep. 234.

Judgment reversed, with instruction to the court below to conform its conclusions of law to the views expressed in this opinion, and to render judgment on the findings in favor of the defendant.

We concur: **BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J.; FOX, J.; PATERSON, J.**

I dissent: **THORNTON, J.**

(81 Cal. 113)

PEOPLE v. BISHOP. (No. 20,515.)

(*Supreme Court of California.* Oct. 11, 1889.)

CRIMINAL LAW—EVIDENCE OF OTHER CRIMES—CROSS-EXAMINATION.

1. On the trial of one indicted for an assault with intent to commit murder, it is error to permit the prosecution to ask defendant, on cross-examination, whether he had not assaulted certain other persons with a deadly weapon, as to which he had not been examined in chief, and an objection that such evidence is immaterial is sufficient.

2. Such questions are not admissible for the purpose of impeaching defendant's character, either generally or for truth and veracity.

In bank. Appeal from superior court, Mendocino county; ROBERT MCGARVEY, Judge.

T. L. Carothers, for appellant. *George A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. Appellant was tried upon a charge of assault with intent to commit murder, and found guilty of an assault with a deadly weapon. He moved for a new trial, which was denied, and from the judgment and the order denying his motion for a new trial this appeal is taken. After the defendant had been examined in chief as a witness in his own behalf, he was cross-examined by the prosecution, and during such cross-examination the following questions were put to him, and the following proceedings: "Mr. Cooper (for the prosecution.) You were there that day, (the day of the alleged assault,) with a pistol on your person? A. Yes, sir. Q. What kind of a pistol? A Smith & Wesson, 38. Q. 38-caliber? How many times does it shoot? A. Five times. Q. Were you going to get sheep with that? A. No, sir. Q. What did you carry a pistol with you for, when you went up there to get your sheep? A. Well, there was a man about two or three weeks before that threatened to cut my heart out, so I packed this pistol. Q. A man threatened to cut your heart out? A. Yes, sir. Q. Who was that? A. It was William Clay, my brother-in-law. Q. Packed this pistol for your brother-in-law? A. No, I packed it to protect myself. Q. Is that the pistol you drew on Johnny Hall? Mr. Carothers. I object to that as not in cross-examination, and immaterial. The Court. Is it not competent for another reason? Mr. Carothers. I cannot imagine any reason it would be. The Court. It seems to me you ought to imagine. If a man is in the habit of assaulting men with a deadly weapon, it goes to the character of the witness. Mr. Carothers. They cannot attack his character. The Court. They can show that he is a man of bad reputation. Mr. Carothers. We except. The Court. Anything that would detract from the credibility, I suppose that it is competent for them to show. If he did assault Mr. Hall, it may be that he was perfectly justifiable. Go on. Mr. Carothers. We object as immaterial, incompetent, and not in cross-examination. The Court. It is not for the purpose of proving an assault on Hall. Mr. Cooper. For the purpose of showing the credibility of the witness; to show the character of the witness. The Court. I suppose it is competent. Go on. Mr. Carothers. We except. Mr. Cooper. Is that the pistol that you drew on Mr. Hall once? The Court. I do not think that question is exactly right. Mr. Cooper. Well, did you draw a pistol on J. W. Hall, the son of A. W. Hall, once? Mr. Carothers. I object as immaterial and not cross-examination. The Court. I overrule the objection. Mr. Carothers. We save an exception. Mr. Cooper. I will ask you if you did not, in the fall of 1886, draw a pistol on J. W. Hall. A. Well, Johnny and I had a little trouble. He pulled out a knife. Q. And you took out your six-shooter then? A. Yes, sir. Q. You did on that occasion draw a pistol? A. Yes, sir; to protect myself. Q. Do you know a man by the name of Benedict? A. Well, I have heard of him. Q. Did you ever draw a pistol on him? Mr. Carothers. I object as immaterial, and not cross-examination. The Court. I overrule the objection. Mr. Carothers. We except. Witness. That is another Johnny Hall case. Mr. Cooper. Benedict was working there? A. Yes, sir; I think he was. I had loaned Johnny Hall several hundred dollars. Q. I asked you if you drew a pistol on Benedict. A. Yes, sir; he came and took hold of my horses. Q. You drew a pistol on him? A. Yes, sir; to make him let go." The attorney general, in his brief, admits that the questions asked were incompetent for the purpose of affecting the credibility of the witness, but insists that "the grounds (of the objections) that the questions were immaterial were not sufficient, for, on cross-examination, it is not necessary that the questions be material to the issue."

We think the ground of the objection sufficient. Besides, the defendant's attorney stated as the grounds of one of his objections that the question was "immaterial, incompetent, and not in cross-examination." "A defendant in a criminal action or proceeding cannot be compelled to be a witness against himself; but if he offer himself as a witness he may be cross-examined by the counsel for the people as to all matters about which he was examined in chief." Pen. Code, § 1323. The defendant was not, nor is it claimed that he was, examined in chief as to the matters specified in the questions put to him on his cross-examination. He could not be impeached by the evidence sought to be elicited by those questions, nor would such evidence tend to prove that he committed the crime with which he was charged. Therefore the questions were immaterial. Being unauthorized and immaterial, the objections should have been sustained. The first rule governing in the production of evidence is that the evidence offered must correspond with the allegations, and be confined to the point in issue. Under this rule it is not competent for the prosecution to give evidence of facts tending to prove another distinct offense for the purpose of raising an inference that the person had committed the offense in question. The questions were asked, doubtless, with a view to create in the minds of the jury a prejudice against the defendant. They were not admissible for the purpose of impeaching the defendant's character, either generally or for truth and veracity. Code Civil Proc. § 2051. The rulings of the court upon the objections to the questions were clearly erroneous, and in our opinion affected the substantial rights of the defendant. That it was error for the court to say in its charge to the jury: "I have already remarked to you, gentlemen, that on a certain day this defendant was guilty of an assault with a deadly weapon, with intent to murder William Bonee,"—is too clear to admit of argument. If we were at liberty to go outside of the record we might easily be persuaded that it does not speak the truth. But the court has settled and certified to the correctness of a bill of exceptions, which shows that this clause was in the charge of the court, and we are compelled to pass upon it. The exceptions not noticed do not, in our opinion, require any consideration. For the errors which we have considered the judgment and order must be reversed. Judgment and order reversed.

We concur: BEATTY, C. J.; FOX, J.; MCFARLAND, J.; WORKS, J.; THORNTON, J.

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81 Cal. 106

ROBINSON v. NEVADA BANK. (No. 12,213.)

(*Supreme Court of California.* Oct. 11, 1889.)

PRINCIPAL AND AGENT — AGENT'S AUTHORITY — PLEDGE—EVIDENCE.

1. In an action for the alleged conversion of wheat pledged to defendant to secure payment of a note signed by a third person, as "agent," it appeared that defendant knew that the wheat was plaintiff's; that the note did not purport to be in plaintiff's name; and that the signer had no actual authority from plaintiff to pledge the wheat, though he was agent for plaintiff in some respects. Defendant showed no evidence that the third person had ever signed plaintiff's name to an obligation, or pledged plaintiff's property to secure his own, without written authority. It appeared that the third person paid part of the money raised by the pledge to plaintiff, but it also appeared that he owed the latter, who did not know from whence the money came. *Held*, that a finding for plaintiff would not be disturbed, as it was doubtful whether the third person was ostensibly authorized to pledge the wheat.

2. A circular from the agent soliciting consignments of wheat, when shown to have been received and acted on by plaintiff, is admissible to show the relations between plaintiff and the agent, though it had not been brought to defendant's notice.

3. Evidence is admissible to show that an addition made to a letter to defendant, signed by plaintiff, which addition would have constituted an estoppel if acted on by defendant, or a ratification if made by plaintiff, was made without plaintiff's knowledge or consent, where it is not shown that defendant acted on it, and the person making it was not plaintiff's partner, nor had any authority as to the wheat.

4. Error in the exclusion of evidence is not prejudicial where substantially the same evidence is afterwards admitted.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

T. I. Bergin, for appellant. *George A. Blanchard, Crittenden Thornton,* and *F. H. Merzbach*, for respondent.

HAYNE, C. This was an action for damages for the conversion of 3,748 sacks of wheat. The defense was that the wheat had been pledged to the bank by the respondent's intestate, J. H. Byers, acting through one W. A. Mathews, who is claimed to have been his agent, to secure the payment of money advanced by the bank, which money had not been repaid. The general facts are as follows: Byers was a farmer in Colusa county, who was in the habit of sending his wheat to Mathews to be warehoused. Mathews was in the habit of storing the wheat in the Mission Rock warehouse in the name of Byers; and this particular lot of wheat was so stored. In November, 1884, Mathews gave a promissory note to the bank, signed "W. A. MATHEWS, Agent," and pledged the wheat to secure its payment. The question at the trial was whether Mathews had authority to pledge the wheat. The trial court gave judgment for the plaintiff; and the bank appeals from the judgment and from an order denying a new trial.

1. The appellant asserts, in general terms, that the evidence is insufficient to support the decision. The learned counsel, however, does not point out any evidence to show that the findings are erroneous, and in view of his well-known ability and industry we consider this equivalent to an acknowledgment that the evidence is at least conflicting. But, as the case is a hard one for the bank, which undoubtedly parted with its money in good faith to a person who, in some respects, at least, was agent for the owner of the wheat, we have examined the evidence to see whether it justified the findings. In the first place, it is to be observed that the bank cannot claim that it did not know that Byers was the owner of the wheat. The original warehouse receipt showed that he was. The receipt taken in the name of the bank in place of the original receipt showed the same thing, and the note itself showed it, and the bank makes no such claim: for the answer avers

that the money was advanced to Byers, and that the wheat pledged was his wheat. In the next place, it is clear that this use of the wheat was without the knowledge or consent of Byers. He knew nothing of what had been done until an account was presented to him by Mathews, in March, 1885. Mathews, therefore, had no actual authority to pledge the wheat. The only possible question is whether he had ostensible authority. Upon this question it is to be observed that the note did not purport to be in the name of Byers. It was signed "W. A. MATHEWS, Agent." The officers of the bank seem to have accepted the statement of Mathews, and to have concluded that because he had been engaged in other transactions for Byers, therefore he had authority to act in this. But in what transactions? It was incumbent upon the bank to show that he had been authorized to act in similar transactions. It was incumbent upon it to show at least one specific instance in which Mathews had assumed to sign the name of Byers, or to pledge his property for obligations in Mathews' name, and in which such act had been authorized or recognized. Upon the defense made the defendant had the affirmative of the issue, and was therefore bound to produce a preponderance of evidence. And it is to be presumed that the bank kept proper records of its transactions, and could have proved such a specific instance if it had existed; but no such instance was shown. All the specific instances shown, except one, were of notes signed by Byers himself, although these were brought to the bank by Mathews. There was one note which was signed "W. A. MATHEWS," with the name "J. H. BYERS" written across its face; but this was not written by Byers, who knew nothing about it, and he is not shown to have authorized or recognized it. It was afterwards paid, presumably by Mathews himself. There were other notes signed by Mathews himself, and accompanied with notes signed by Byers. But we have not been able to find a single instance, authorized or recognized by Byers, where the latter's name was signed by Mathews to an obligation, or where his property was pledged to secure Mathews' own obligation, without a writing signed by Byers. This being the case, we cannot attach much importance to the general statements of some of the witnesses as to what was "always done." Mathews, in some parts of his testimony, seeks to convey the idea that the money went to Byers himself, and he did, undoubtedly, pay some of the money to Byers on several occasions; but he was always indebted to Byers. When he obtained the money by the pledge of this wheat he deposited it in the Grangers' Bank. At this time he was doing a large business with the Grangers' Bank, and his account was changing every day. His deposits there between September 3d and December 12th of the year in question amounted to $75,777.57, and he drew against this money for his own purposes, as occasion required, he being then, according to his own account, dealing in mining stocks, and engaged in the business of buying and selling wheat, insurance business, and making loans upon real estate, all on his own account, though with other people's money. Byers did not know that the sums he received had been raised on his wheat. He probably did not concern himself much about how Mathews got hold of the money, but accepted it because the man was indebted to him. We do not think that such payment operated to validate the otherwise invalid transaction. Mathews also states that with a part of the money raised by this pledge he paid some debts of Byers. But these were really Mathews' own debts, upon which Byers was accommodation indorser. Upon the whole case, although there is some testimony in favor of the appellant's position, the most that can possibly be said is that it is doubtful whether the decision was right upon the evidence, and under the well-settled rule the findings cannot be disturbed.

2. An objection was sustained to the question asked the witness Mathews, as to the party for whom he was acting in obtaining the loan. But the witness afterwards answered substantially the same question, and hence, if there was any error in sustaining the objection, it was without prejudice.

3. The plaintiff introduced in evidence a circular from Mathews to grain producers, soliciting the consignment of wheat to him, and offering to procure the same to be stored in warehouses, for the owners, and setting forth the desirability on various grounds of such a proceeding. The objection made to this was that there was no proof that the circular had been brought to the notice of the defendant. But, if the plaintiff received and acted upon this circular, we think that it was admissible upon the question as to the relations in fact existing between plaintiff and Mathews, and while, when the evidence was introduced, it had not been shown that the plaintiff had received and acted upon the circular, yet this was subsequently testified to. The error of receiving it without such testimony was therefore cured.

4. During the testimony of the witness Brander he stated that when Mathews came to the bank to get money he would "explain that Mr. Byers was interested with him in the matter." This was stricken out on motion of the plaintiff. The witness, however, almost immediately afterwards gave substantially the same testimony. He proceeded to say: "Mathews represented that he was a partner of J. H. Byers & Co., and he represented that he attended to the individual business of Byers that was not business of the firm." The question as to the representations of Mathews was afterwards directly put, and the court said: "I understand it has been answered that Mr. Mathews did make representations concerning his authorities. I will not allow that question, because the question has been asked and answered, and if there is anything to which it is preliminary, that thing may follow without asking the question again." Under these circumstances, if there was any error, it was cured.

5. Some time after the loan was made, Byers, when he found out what had been done, wrote a letter to the bank, in which he stated that "any future negotiations on the part of Mr. Mathews as affecting above lot of wheat will not be valid." This letter

was in the handwriting of one Mogk, who was the partner of Byers, but was signed by the latter in his individual name. After signing it he left it with Mogk to be mailed; and the latter wrote upon the margin of the paper the following: "Mr. Mogk, of J. H. Byers & Co., will be down to see you about Friday, May 1st, and give you full particulars in regard to the original loan of $4,900 on above lot of wheat; also for the purpose of substituting my own note, to effect a complete transfer. Please acknowledge receipt of this and contents inclosed." The plaintiff was allowed to prove that this addition was written by Mogk, without plaintiff's knowledge or consent, and it is urged that this was error. If any action had been taken by the bank upon the faith of this letter, we are inclined to think that it would have constituted an estoppel; but it is not shown that any such action was taken. The contrary is to be inferred from the testimony of the witness Brander. If Byers had written it himself, or had authorized it, it might perhaps have constituted a ratification, so far as the pledge was concerned. But the evidence above referred to showed that the addition was without his consent or knowledge, and we think that it was admissible to show such want of consent or knowledge. Finally, if it had appeared that Mogk was the partner of Byers with respect to the wheat in question, it might be argued that the effect was the same as if the addition had been written by Byers himself; but this does not appear. The wheat did not belong to the firm of J. H. Byers & Co. It is admitted by the pleadings to have been the property of Byers himself. Mogk may have been the partner of Byers as to other matters, but in view of the admission of the pleadings it cannot be inferred that he had any authority to do anything with respect to this wheat except to post the letter as Byers signed it. If he had any such authority it was for the defendant to show it. We therefore advise that the judgment and order appealed from be affirmed.

We concur: GIBSON, C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(81 Cal. 98)

CARRAHER v. SAN FRANCISCO BRIDGE CO.

(No. 12,115.)

(*Supreme Court of California.* Oct. 11, 1889.)

NEGLIGENCE—ACCIDENTS AT RAILROAD CROSSINGS—EVIDENCE—INSTRUCTIONS.

1. In an action for personal injuries, an allegation that the accident occurred at a place where defendant's railroad track crossed a certain street at its intersection with a sea-wall is sustained by evidence that it occurred where the track crossed the sea-wall at the foot of such street, if the street were extended so far, and a very short distance from that part of the street used as a public thoroughfare, and that the crossing was used by numerous teams hauling material for the sea-wall.

2. Evidence that defendant used a certain coal-house which obstructed plaintiff's view of the track, and shifted it when it shifted the track, supports a finding that such coal-house was erected and maintained by defendant.

3. An instruction that "it is also claimed that these erections" (the obstructions to plaintiff's view) "were placed there by the defendant" is not erroneous as assuming that such was the fact.

4. The injury was alleged to have been caused by plaintiff's team taking fright at defendant's engine near the crossing. *Held*, that an instruction that it was the duty of defendant's employes in charge of the engine, not only to give notice by bell or whistle, but to slow up and see that the crossing was clear, and that it was defendant's duty to station a flagman at the crossing, is erroneous, as invading the province of the jury to determine the proximate cause of the injury, and imposing too great a degree of care on defendant, and as being a direction to find for plaintiff if the injury would not have occurred had defendant stationed a flagman at the crossing.

Commissioner' decision. Department 1. Appeal from superior court, city and county of San Francisco; E. B. MAHON, Judge.

The allegation of the complaint, referred to in the opinion, was that the injury sued for occurred at a point where defendant's railroad crossed Vallejo street at its intersection with the sea-wall.

R. Percy Wright, for appellant. *Cary & Sullivan*, for respondent.

FOOTE, C. This action was to recover damages for injuries alleged to have been suffered by Carraher, the plaintiff, through the negligence and carelessness of the defendant, in running a train of cars engaged in hauling sand and rock to fill in a section of the sea-wall, being then in process of construction on a portion of the water-front of the city of San Francisco. The plaintiff had a verdict of the jury trying the cause, awarding him the sum of $1,000. From the judgment thereupon rendered, and an order denying a new trial, the defendant appeals.

The appellant contends that the verdict is not warranted by the evidence, and that certain of the instructions given by the court to the jury, at the instance of the plaintiff, are misleading, and erroneous. Counsel argue that the evidence shows without conflict that the plaintiff caused his own injury by his inattention to the horse which he was driving, his mismanagement of the animal, and his carelessness in approaching the crossing of the railroad near to which the injury was inflicted. There is a sharp conflict between that to which the plaintiff swore and some of the evidence given for the defendant, but the jury found for the plaintiff, and we see no reason to reverse their verdict on the evidence. The plaintiff declared that he had driven his horse and cart to the point where he dumped the load of sand and rock which he was hauling, and was on his return to the place from which another load was to be taken; that when he approached very near to the crossing of the railroad of the defendant over the sea-wall (which lay at foot of Vallejo street, and across it along the water-front of the city of San Francisco, if the street were prolonged to and beyond the crossing) the defendant's train of cars coming suddenly along, very close to the head of the plaintiff's horse, frightened the animal, which, in his struggles, upset the cart in which the plaintiff was riding, threw it and him down the bank of the sea-wall, and broke his wrist, etc. His further statement is that there was no flagman at that point, or any other means of warning him of the coming of the train;

that he heard no bell or whistle; and that he was prevented from seeing the approaching train by reason of the obstruction to his view caused by a coal-house, which stood near the track, and was used by the defendant for holding its supplies of coal for its engines. The defendant contends that there was no proof that the place where the plaintiff was injured was the same as that alleged in the complaint. It is very evident from an inspection of the whole record that the allegations of the complaint on the point are substantially sustained by the plaintiff's testimony. The sea-wall which the railroad crossed was extended over a space of ground, which necessarily lay at the foot of Vallejo street, if the same had been extended to the said sea-wall and water-front, was in a direct line with such extension if it had existed, and was only a very short distance from that part of the street used as a public thoroughfare. The crossing was used as a public way for numerous teams hauling material to construct the sea-wall, and we cannot see how the proof varied in any material degree from the allegations of the pleading.

It is further urged by the appellant that there was an entire want of evidence going to show that the defendant built or maintained the coal-house, claimed to have obstructed the plaintiff's viewing the approaching train, as he was proceeding to pass the crossing of the track. The appellant, in his brief, cites a small part of the answer of the plaintiff to a question propounded to him. The question was: "Do you know who built that coal-house?" The answer in full was: "I don't; but the San Francisco Bridge Company used it for their purposes. I couldn't tell who built it. When the track was moved the coal-house was moved." All that the defendant saw fit to quote to us of the answer are the words "I don't." The evidence is plain, without conflict, that the defendant did use that coal-house and shifted the track for its purposes, and there was no effort whatever proceeding from any source attempting to show that it did not erect and maintain the coal-house. From all the evidence and the circumstances attending the use of the house the jury correctly concluded that it was both erected and maintained by the defendant.

As to the matter of errors alleged to exist in the instructions granted for the plaintiff, it may be said that the words in the first instruction, "It is also claimed that these erections were placed there by the defendant," only informed the jury that the plaintiff claimed that the evidence showed that the obstructions to the view of the plaintiff had been placed there by the defendant, and does not assume that such was the fact; and the evidence tended to show the existence of what was thus claimed to exist. This instruction was therefore not misleading.

We do not perceive anything prejudicial to the defendant in any of the other instructions complained of, unless it be the seventh. In our opinion that portion of it is objectionable which reads as follows: "In such a case, when the view of the track and approaching trains is obstructed by the act of the defendant, it is no excuse for an action of damages to say that a bell was rung or a whistle sounded to warn persons about to cross the track. It was the duty of the employes in charge of the engine, not only to have given such notice by bell or whistle, but it was also their duty to have slowed up as it approached the crossing, and seen that all had acted on the notice, and that the track at the crossing was clear, and in order to have been so assured it was the duty of the defendant to have stationed a flagman or watchman at the crossing to warn persons about to cross the track at Vallejo street of an approaching train." This assumed the province of the jury to determine from all the facts and circumstances in evidence whether or not the defendant was guilty of negligence which was the proximate cause of the accident in not using reasonable care in operating its railroad and sand train, and was a virtual direction to find a verdict for the plaintiff, if they were satisfied that the injuries to the plaintiff would not have been sustained if a flagman or watchman had been stationed at the crossing, who would have caused the train to slow up, thus establishing the principle that in order to avoid responsibility for such accidents the defendant must in all cases provide against the consequences of all acts of carelessness on the part of persons in going into peril, and that to do this, and insure the person crossing the track against all possible injury, the company must provide every possible precaution, leaving none to be taken by the person in peril. This, we think, is not the law in such cases as this. We therefore advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed.

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81 Cal. 118

PEOPLE v. FORNEY. (No. 20,559.)

(*Supreme Court of California.* Oct. 11, 1889.)

ASSAULT—INFORMATION.

Pen. Code Cal. § 245, provides that "every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable," etc. An information charged that defendant, "with a deadly weapon, namely a knife, which he, the said F., in his hand then and there had and held, upon the person of one C., there being, did willfully, unlawfully, and feloniously commit an assault, contrary to the form, force, and effect of the statute." *Held*, that the information was not defective as failing to allege that defendant assaulted a human being, or as failing to allege intent or present ability to commit the assault.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

Carroll Cook, for appellant. *George A. Johnson*, Atty. Gen., for the People.

FOOTE, C. The defendant was convicted of an assault with a deadly weapon. From the judgment rendered in the premises he has appealed. His contention is that the information filed against him charges no offense known to the law. This he claims on the grounds—*First*, that it is not alleged against him that he assaulted any human being; *second*, that the pleading in controversy contains no averment that he had any intent to commit, or that he had the "present ability" to commit, the assault of which he was accused. The language of the information material to be considered is this: "Harry Forney is accused by the district attorney by this information of the crime of an assault with a deadly weapon, committed as follows: The said Harry Forney on the 11th day of September, A. D. 1888, at the said city and county of San Francisco, with a deadly weapon, namely, a knife, which he, the said Harry Forney, in his hand then and there had and held, upon the person of one John Coffey, there being, did willfully, unlawfully, and feloniously commit an assault, contrary to the form, force, and effect of the statute," etc. After reading that the assault was committed "upon the person of one John Coffey," it is manifest that a human being was declared to have been assaulted. The information charges that the defendant, with a deadly weapon, (describing the weapon,) willfully and maliciously committed an assault upon the person of one John Coffey. The statute bearing upon the matter is: "Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable," etc. Pen. Code, § 245. The intent to commit the assault, and the "present ability" to do so, must be proved; but the statute does not declare that the information shall state these probative facts; and the pleading is sufficient, having followed the language of the section of the Penal Code supra in charging the offense. People v. Turner, 65 Cal. 540–542, 4 Pac. Rep. 553. We therefore advise that the judgment be affirmed.

We concur: Belcher, C. C.; Van Clief, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

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81 Cal. 142

People v. Lanagan. (No. 20,554.)

(*Supreme Court of California.* Oct. 24, 1889.)

Murder—Instructions—Dying Declarations.

1. In a murder trial, an instruction that, "if the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated because death might and probably would have been the result of any disease with which the deceased was afflicted at the time of the violence," is erroneous, where there is evidence that the only blows given to deceased by defendant were given with the fists, and in self-defense, and that deceased died of injuries received otherwise than at the hands of defendant; as the violence of the prisoner may not have been unlawful.

2. The jury were instructed as follow: "When the killing is proved beyond a reasonable doubt, the defendant must make out his case in mitigation to excuse or justify it by some stronger proof in some appreciable degree than the proof of the prosecution. The burden of proof changes, and the proof on the part of the defendant must be in some degree stronger than the proof on the other side." *Held* erroneous. Following People v. Bushton, ante, 127.

3. The court instructed the jury that, if they believed that defendant did knock, kick, and stamp deceased, as charged, and if they believed that, at the time of such kicking and stamping, deceased was, and for some time prior thereto had been, suffering with peritonitis, occasioned by bruises received 32 hours prior to his death, still, if the jury further believed that the death was hastened by the knocking and stamping, the fact that deceased was suffering from peritonitis at the time would not extenuate defendant's guilt. *Held*, that the instruction was not objectionable, as assuming defendant's guilt, and was correct.

4. Expressions of opinion by deceased as to the character of the injuries of which he was dying are inadmissible as dying declarations.

Department 1. Appeal from superior court, Los Angeles county; William A. Cheney, Judge.

H. T. Gage and *John Robarts*, for appellant. *George A. Johnson*, Atty. Gen., for the People.

Fox, J. Information against the defendant, charging him with the crime of murder. Conviction of manslaughter. Motion for a new trial denied, and defendant appeals.

One of the charges of the court to the jury is copied from the charge in People v. Hong Ah Duck, 61 Cal. 394, and is the same charge which was repeated in People v. Bushton, ante, 127. There, after mature consideration, it was held to be erroneous. On the authority of that case the judgment and order appealed from in this case must be reversed. See, also, People v. Elliott, ante, 207.

As the case will go back for new trial, we are asked also to consider other points made on this appeal. The court, at the request of the prosecution, gave the following charge: "If the death of the deceased was accelerated by the violence of the prisoner, his guilt is not extenuated because death might, and probably would, have been the result of any disease with which the deceased was afflicted at the time of the violence." This charge is quoted from an approved text-writer, and in a proper case may be accepted as sound law. But in this case it was insisted, and there was evidence tending to show, that the only blows given to the deceased by the prisoner were given with the fists, and were given in self-defense; also that the deceased died of disease produced by injuries received otherwise than at the hands of defendant. It might therefore be that the "violence of the prisoner" was not unlawful. If it was not, then no guilt would flow from it, even if death had resulted from such violence. It follows, under these circumstances, that this charge may have been misleading to the jury, and from it they may have assumed the guilt of the defendant, when, with a proper modification, they would not have done so. Instructions should not, directly or indirectly, assume or hypothetically suggest the guilt of the defendant. People v. Williams, 17 Cal. 142; People v. Hurley, 57 Cal. 145.

The exception to the second charge given by the court to the jury at the request of the prosecution is not well taken. It is not open to the criticism of assuming the guilt of the defendant, as claimed by appellant, but simply holds that if the jury find certain facts, (of which they must be satisfied beyond a reasonable doubt,) from which the law presumes him to be guilty, then his guilt is not extenuated by reason of the existence of certain other designated facts; and it correctly states the law on that subject.

What is claimed to have been oral dying declarations of the deceased were given in evidence. Among the declarations of deceased so given in evidence were not only statements of fact as to what occurred between himself and the defendant, but also his opinion as to the character of the particular injuries of which he was dying. Objection was made to the evidence of this opinion of the deceased, and exception taken to the order overruling such objection. This exception is well taken. Matters of opinion in dying declarations are not admissible. People v. Taylor, 59 Cal. 650; People v. Wasson, 65 Cal. 538, 4 Pac. Rep. 555. A dying declaration can only be admitted after first showing that the person who makes it believes that he is about to die, and has no hope of recovery. It being shown that he entertains that belief, then, upon the assumption that he is likely to tell the truth under such circumstances, the statements which he makes in that connection, detailing the facts and circumstances under which he has received any injuries from which he may be suffering, and how, or at whose hands, they were received, are admissible in evidence, to be weighed by the jury like any other evidence in the case. But even then his opinion is not to be received as to whether he is dying of wounds or of disease; as to what particular injuries (if there be several of them) are causing his death. We perceive no other prejudicial error. Judgment and order reversed.

We concur: WORKS, J.; PATERSON, J.

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81 Cal. 143

GARDNER v. STROEVER. (No. 13,191.)

(*Supreme Court of California.* Oct. 29, 1889.)

OBSTRUCTION OF HIGHWAY—PRELIMINARY INJUNCTION.

Plaintiff alleged that he was engaged in the butchering business, and that defendant had constructed a building on the public road, wholly obstructing the road, which was plaintiff's only means of going to and from his slaughter-house, and that his business would be thus entirely destroyed, to his damage $5,000. He did not allege that defendant was not responsible for such sum, or that there would be any impediment to recovery of such sum by an action at law. *Held*, that he was not entitled to a preliminary injunction enjoining defendant from maintaining any obstruction on such road.

Commissioners' decision. In bank. Appeal from superior court, Butte county; P. O. HUNDLEY, Judge.

Action by Leo B. Gardner against Fred Stroever for damages. A preliminary injunction was granted, and from an order denying a motion to dissolve it defendant appeals.

Reardan & Freer, for appellant. *Gray & Sexton*, for respondent.

VAN CLIEF, C. The complaint describes a public road, "extending from the Oroville and Miner's ranch public road north-easterly past the slaughter-house of defendant and the slaughter-house of plaintiff, to the residence of Nancy Cooper," about 70 rods in length, situate in Butte county, and alleges that plaintiff is in possession of a slaughter-house on the south side of the road described; "and that the only means of entrance and exit to and from said slaughter-house to said public highway leading from Oroville to Miner's ranch, or any other public highway, is over and along said highway leading to the residence of Nancy Cooper aforesaid. That the defendant on the 20th day of February, 1889, wrongfully, unlawfully, and fraudulently, and for the purpose of vexing, annoying, and preventing this plaintiff from reaching his said slaughter-house, entered upon said public highway leading from the Oroville and Miner's ranch road to the residence of Nancy Cooper aforesaid, at a point between plaintiff's slaughter-house and said Oroville and Miner's ranch road, and caused to be erected across said public highway an obstruction, to-wit, a building which completely obstructed said road for all uses of a road, and wholly prevented this plaintiff from reaching his said slaughter-house. That plaintiff has no other way, convenient or otherwise, by which he can reach his said slaughter-house. That plaintiff is engaged in the butchering business in the town of Oroville, and is compelled, in order to supply the wants of his customers, to slaughter a number of animals each day. That he has no other place for slaughtering said animals than the place heretofore described. That if defendant is permitted to maintain his said obstruction across the public road, as aforesaid, plaintiff's business will be entirely destroyed and broken up, to his damage in the sum of $5,000. That, by reason of the acts heretofore complained of, plaintiff has been damaged in the sum of $300. Wherefore plaintiff prays judgment against the said defendant for the sum of $300 and costs of suit; that defendant be enjoined and restrained from maintaining any obstruction in and across said road during the pendency of this action; and that upon the trial of this case said injunction be made perpetual; and for such other and further relief as may be equitable and just." Upon this complaint alone the superior judge granted an injunction until further order, commanding the defendant and his agents "to desist and refrain from obstructing, or in any way, manner, or form interfering with, the road leading from the Oroville and Miner's ranch road to the residence of Nancy Cooper." The defendant moved, on the complaint alone, to dissolve the injunction upon "the ground that the complaint does not state facts sufficient to warrant the issuance or continuance of an injunction." This motion was denied, and the appeal is from the order denying it.

I think the motion to dissolve the injunction should have been granted. It appears by the complaint that the building complained of as being an obstruction to plaintiff's use of the road had been erected before the commencement of the action, and it is not alleged that defendant has threatened to do any other or further act tending to obstruct the road, or otherwise to injure the plaintiff. There was therefore no foundation in the complaint for a merely preventive injunction; and mandatory preliminary injunctions are seldom granted, and only in a peculiar class of extreme cases, of which this case is not one. High, Inj. §§ 2, 4; Murdock's Case, 20 Amer. Dec. 381, and notes citing the principal English and American cases.

To say the least, there is nothing in our Code of Civil Procedure more favorable to mandatory injunctions than is to be found in the general current of English and American authority. Indeed, our Code definition of an injunction (Code Civil Proc. § 525) entirely omits the mandatory ingredient found in nearly all the definitions of the text-writers. High, Inj. § 1, and note. But, without regard to statutory provisions, it seems to be well settled that a very strong and urgent case is required to justify a mandatory preliminary injunction. A clear case of prospective injury for which the plaintiff will have no adequate remedy at law is indispensable. In this case it is only alleged that plaintiff will be damaged in the sum of $5,000; and there is no allegation that the defendant is not responsible for that sum, nor that there will be any extraordinary impediment in the way of recovering that sum by an action at law. Tomlinson v. Rubio, 16 Cal. 204; Foundry v. Ryall, 62 Cal. 418. Besides, it has been decided by this court that a preliminary injunction "will not be retained where it appears [by the answer, uncontradicted by affidavit,] that the acts, the performance of which is sought to be restrained, had been performed before the order for the injunction was made or served." Delger v. Johnson, 44 Cal. 182. *A fortiori*, where the fact of performance appears in the complaint, as in this case. I think the order denying the motion to dissolve the injunction should be reversed, with direction to grant the motion.

We concur: Hayne, C.; Gibson, C.

Per Curiam. For the reasons given in the foregoing opinion the order denying the motion to dissolve the injunction is reversed, with direction to grant the motion.

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3 Cal. Unrep. 151

Bibb *et al.* v. Bancroft. (No. 12,253.)

(*Supreme Court of California.* Oct. 30, 1889.)

Instructions—Evidence.

1. In an action for breach of a contract by which plaintiff was to remove *debris* for defendant, the evidence showed that plaintiff, when seeking the contract, was referred by defendant to one C., and was told that anything he would do with him would be all right. On the question of agency, the court instructed as to the law of ostensible agency. *Held*, that the instruction was not irrelevant on the ground that an express agency only was shown by the evidence.

2. The complaint stated that "the parties hereto entered into a contract," etc., and that "defendant agreed with said plaintiffs to pay them the prices stated," etc. *Held*, that evidence of either an express or ostensible agency in the person who made the contract with plaintiffs was admissible.

Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by D. H. Bibb and others against H. H. Bancroft for breach of contract. It appeared in evidence that plaintiffs, when seeking the contract, were referred by defendant to one Cook, and were told that anything they would do with him would be all right. The jury were instructed on the question of agency as follows: "Another instance is that of an agency known as an 'ostensible agency.' That exists in law where one either intentionally, or from want of ordinary care, induces another to believe that a third person is his agent, although he never in fact employed him. In other words, one may actually create another his agent, and one may, on the other hand, induce a third person to believe another his agent, and to act with him as such; in which event the principal would be liable for the acts of the agent." Judgment for plaintiffs, and defendant appeals.

Estee, Wilson & McCutchen, for appellant. *C. H. Parker* and *Alex. G. Eells*, for respondents.

Paterson, J. Plaintiffs alleged in their complaint that on the 14th day of May, 1886, they entered into an agreement with the defendant, by the terms of which they were to remove certain *debris* from a lot owned by the defendant in the city and county of San Francisco, and that they were to be paid a certain price for each load of materials so removed by them. The defendant denied in his answer that any contract had been made between him and the plaintiffs. This denial raised the principal issue presented at the trial. The testimony fully sustains the allegations of the complaint. The most that can be claimed fairly by the defendant is that there is a conflict in the evidence. Under the well-established rule, therefore, this court will not interfere with the verdict or the judgment. We see no error in the rulings of the court in admitting testimony. The fact of agency, actual and ostensible, was so clearly established by the evidence, direct and indirect, that the verdict could not well have been other than it was without the testimony objected to. There was no error in the instructions of the court. Under the pleadings, it was proper for the plaintiffs to introduce any evidence tending to show an agency, either express or ostensible. That there was in Cook an express agency of some kind concerning the subject-matter there can be no doubt whatever. The only question was as to its extent. The plaintiffs were not obliged under their complaint to rely upon evidence of actual agency in Cook. Judgment and order affirmed.

We concur: Works, J.; Fox, J.

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81 Cal. 145

Orient Ins. Co. v. Reed *et al.* (No. 12,196.)

(*Supreme Court of California.* Oct. 30, 1889.)

Interpleader.

1. When, after the filing of a complaint in interpleader, one of the defendants alleges that a greater sum is due than plaintiff admits, whereupon plaintiff amends his complaint to make the allegation as to the amount agree with defendants' answer, there is no controversy as to the amount due, and plaintiff is entitled to relief.

2. Though plaintiff had previously denied the right of one of the defendants' to the fund in question in an action brought by said defendant as assignee of the money against him, he can nevertheless maintain an action of interpleader, as it is only when plaintiff denies one of the defendants' claims

in the action of interpleader itself that he can have no relief.

3. It is not essential that plaintiff should offer to pay the costs of the previous action.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Action by the Orient Insurance Company against John Reed and Sol. Lewis, to require them to interplead concerning their claims to money in plaintiff's hands. Judgment for plaintiff, and defendant Lewis appeals.

George Lezinsky, for appellant. *Van Ness & Roche* and *Pillsbury & Blanding*, for respondent.

MCFARLAND, J. The complaint avers that plaintiff insured Buffum & Co. against loss of, or damage to, certain property by fire; that the property was damaged by fire to the extent of $2,500, for which plaintiff is liable; that defendant Reed claims said money by virtue of an attachment served on plaintiff, and that defendant Lewis also claims said money by virtue of an assignment from said Buffum & Co., and that plaintiff has no claim on said money, and desires to pay it to the party defendant who is legally entitled to it, etc. The prayer is that defendants be required to interplead together concerning their claims to said money; that plaintiff be authorized to pay the same into court; and that thereupon it be discharged from liability therefor to either defendant. The defendants, after demurrers overruled, both answered, each setting up his respective claim, as stated in the complaint. Lewis averred that the amount due was not $2,500, but $2,587.88. Plaintiff then amended its complaint, acknowledging the latter amount as the correct sum due. The court found the facts substantially as stated in the complaint, and entered judgment decreeing that plaintiff forthwith pay said money, with interest, into court, (which was done;) that defendants interpleaded as prayed for; and that defendant be discharged from all liability, etc. From this judgment the defendant Lewis appeals.

The points made by appellant for a reversal are two: *First*, that there was a material dispute between plaintiff and defendants as to the amount due; and, *second*, that plaintiff denied the claim of defendant Lewis; and that either of those facts is sufficient to defeat the remedy of interpleader.

1. It is no doubt the general rule that an interpleader suit cannot be employed to determine disputed claims between the plaintiff and the defendants. The amount claimed by the defendants, or either of them, must be admitted, and the plaintiff must be a mere uninterested stakeholder. But, in the case at bar, while the answer of Lewis claimed a few dollars more than the amount stated in the original complaint, it was amended so as to acknowledge the amount claimed; thus obviating this objection of appellant.

2. It appears from the answer and findings that appellant Lewis had previously commenced an action against respondent to recover on the policy of insurance, and that respondent had filed an answer in that action in which it averred that it had no knowledge as to the alleged assignment from Buffum & Co. to appellant, and that, therefore, it denied such assignment; and upon this circumstance appellant invokes the rule that a bill for interpleader cannot be maintained which denies the claim of a defendant. But in the case at bar there is no denial in the complaint itself of appellant's claim; and the fact that it had made such denial on a previous occasion does not bring it within the rule.

Appellant also contends that respondent should have offered to pay the costs incurred in the said action brought against it by appellant. But, in the first place, there is no averment in the answer of any payment of such costs, or that any costs were incurred; and, in the second place, if there were any such costs, they are taxable in that action. The judgment is affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

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3 Cal. Unrep. 152

TAFFT v. PRESIDIO & FERRIES R. CO. (No. 11,988.)

(*Supreme Court of California.* Oct. 30, 1889.)

TRANSFER OF STOCK.

1. If the attorney in fact of a stockholder presents the certificate of stock, together with a power of attorney from the stockholder giving him full authority to deal with the stock, and the corporation's officers are ignorant of any intention on the part of the attorney to misappropriate the stock, the corporation will not be guilty of conversion simply by issuing another certificate in the name of the attorney, who appropriates the stock wrongfully.

2. The fact that the attorney was also a director of the corporation does not warrant the presumption that the corporation had notice of his intention to convert the stock to his own use, as he assumed to act, not for the corporation, but for his principal.

3. The lack of the owner's indorsement on the certificate was not inconsistent with the right of the attorney to cause the stock to be transferred to himself.

4. The neglect of the officers to require an indorsement of the certificate is only non-feasance, and is no evidence of conversion.

5. It is not the duty of the officers of a corporation to inquire into the motives of an attorney in fact, having full power to transfer stock, for desiring it to be transferred to himself.

Department 2. Commissioners' decision. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by Adelia A. Tafft against the Presidio & Ferries Railroad Company, a corporation, for the conversion of stock, the property of plaintiff. Judgment for plaintiff, and defendant appeals.

Jarboe, Harrison & Goodfellow and *Lloyd & Wood*, for appellant. *Wilson & Wilson*, for respondent.

VAN CLIEF, C. On the 23d day of October, 1874, the plaintiff executed to Arthur W. Bowman a power of attorney authorizing him to transact her business generally and particularly; "to invest all and singular such sums of money as may be in his hands belonging to me, in such securities and upon such terms as he may think fit and for my interest; to sell, dispose of, transfer, and deliver all or any of my interests in the capital stock of any association, bodies corporate or politic, and to represent me and vote for me at any and all meeting or meetings of stockholders of any and all corporations in which I now or may hereafter hold or own shares of capital stock; and to represent me and my shares of stock aforesaid in all matters and things touching the said shares, and the acts and doings of the said corporations; also to bargain and agree for, buy, sell, mortgage, hypothecate, and in any and every way and manner deal in and with, goods, wares, and merchandise, choses in action, and other property in possession or in action; and to make, do, and transact all and every kind of business, of whatever nature and kind soever; * * * giving and granting unto my said attorney full power and authority to do and perform all and every act and thing whatsoever requisite and necessary to be done in and about the premises, as fully, to all intents and purposes, as I might or could do if personally present." This power of attorney continued in force until October 18, 1884, when it was revoked. On and prior to the 23d day of May, 1882, the plaintiff was the owner of 200 shares of the capital stock of the defendant corporation, which stood in her name on the books of the corporation, and for which a certificate, numbered 31 had been issued to her. The defendant corporation was organized under the laws of this state for profit. Its by-laws, regulating transfers of stock, so far as relevant to this case, are as follows: "Sec. 2. Every transfer of stock, or of the certificates above provided to be issued, shall be entered in the transfer books, to be kept by the secretary, by an entry showing to and by whom transferred, the numbers and designations of the shares, and the date of the transfer, and duly attested by the secretary. No transfer shall be valid except as between the parties, unless made as in this section provided. Sec. 3. The stock shall be transferable as in the last preceding section specified, and upon the books of the corporation, upon proper assignment and delivery to the assignee of the certificates above provided for. * * * Sec. 4. The surrendered certificates shall in all cases be canceled by the secretary before issuing a new one in lieu thereof." On the 19th day of August, 1882, A. W. Bowman presented to the secretary of defendant the certificate of stock No. 31, issued to the plaintiff as aforesaid, but not indorsed by her, or by any other person for her; and at the same time presented to the secretary said power of attorney from the plaintiff, and demanded a transfer to himself, in his own name, of the 200 shares of stock represented by certificate No. 31, then standing in her name on the books of the company. The secretary then received from Bowman the certificate No. 31 without indorsement, canceled it, made the transfer on the books as requested, and, in lieu of certificate No. 31, issued to Bowman in his own name two certificates, for 100 shares each, numbered, respectively, 211 and 212. At the time of this transaction the plaintiff was absent from this state, and actually knew nothing of it, and had authorized it in no other way than by said power of attorney.

On said 19th day of August, 1882, Bowman was largely indebted to divers persons in this state, and was then, and ever since has been, insolvent. Thereafter, for a valuable consideration, Bowman assigned and transferred said certificates, numbered 211 and 212, to the California Safe-Deposit & Trust Company, a corporation, which took the assignment and transfer thereof in good faith, without notice of the rights of the plaintiff. Plaintiff had no notice of this transfer and assignment of certificates Nos. 211 and 212 until after they were made, and did not authorize the same, otherwise than by said power of attorney. Bowman was a director of the defendant corporation from January, 1882, until October, 1884. The defendant corporation never had any actual or presumptive notice that Bowman procured the transfer of said stock to himself for his own use, or that he intended to convert it to his own use, or to use it in any way prejudicial to the rights of the plaintiff, unless such notice may be presumed from the fact that he was one of the directors of the defendant corporation, as above stated. This action was brought by the plaintiff to recover from the defendant damages for an alleged conversion of said 200 shares of stock; and the court found: "*Eighth*, that said defendant did, prior to the commencement of this action, convert and appropriate the said 200 shares of stock of the defendant, so belonging to plaintiff, and has wholly refused to return the same, or any part thereof, to plaintiff; and that, at the time of such conversion, the same was of the value of $10,000." Judgment was accordingly rendered in favor of plaintiff for $10,000 and costs. Defendant moved for a new trial, on the ground, among others, of insufficiency of the evidence to justify the decision. From the order denying a new trial, and also from the judgment, the defendant appeals.

Whether or not the evidence justifies the finding that the defendant converted the stock, as expressed in the eighth finding above set out, is the principal question to be decided. If that finding is justified by the evidence, the judgment and order should be affirmed; otherwise a new trial should be granted. After a careful examination of the evidence I am of the opinion that it does not warrant the finding that defendant individually, or jointly with Bowman, converted the stock in question. There is no evidence bearing upon this issue except the facts and circumstances above stated, which, I think, neither constitute nor substantially tend to prove a conversion by the defendant.

1. The defendant never took or had possession of the stock, or of the certificate which represented the stock, in any other way or sense than it took and had possession of all stock which it transferred upon the corporation books at request of a party to the transfer.

2. The defendant neither exercised, nor assumed to exercise, any dominion or control over the stock or the certificate; but simply recorded the transfer, canceled the old certificate, (No. 31,) and issued new certificates, as requested by Bowman.

3. The defendant corporation had no notice that Bowman intended to convert the stock, or to use it otherwise than as authorized by the plaintiff. Under the cir-

cumstances of this case, the fact that Bowman was one of the directors of the defendant corporation at the time of the transfer of the stock to him does not warrant the presumption that the corporation had notice of his intention to convert the stock to his own use. A director of a corporation is not disqualified to deal in its stock on his private individual account, or as agent for others. And when, in the course of such dealing, he requests a transfer of stock on the corporation books, notice of his motives and intention in regard to such transfer is not to be imputed to the corporation, unless he also acts, or assumes to act, for the corporation in the same transaction. Mor. Priv. Corp. §§ 527, 540*b*, 540*c*; Bank v. Whitehead, 36 Amer. Dec. 186, and authorities there cited in note; Bank v. Gifford, 47 Iowa, 581; Blen v. Mining Co., 20 Cal. 614; Lothian v. Wood, 55 Cal. 161. Bowman did not act for, or assume to represent, the corporation in the matter of transferring plaintiff's stock, wherein it appears that the corporation was represented by its appropriate officers for that purpose,—its secretary and president,—to whom Bowman exhibited plenary authority to represent the plaintiff.

4. That the certificate (No. 31) was not indorsed by plaintiff was not inconsistent with the right of Bowman to have the stock transferred to himself. His possession of the certificate, with a power of attorney from plaintiff authorizing him to transfer the stock, was *prima facie* evidence that he was at least the equitable owner. Ang. & A. Corp. § 564; Low. Tr. Stocks, §§ 43, 44; Colt v. Ives, 31 Conn. 25; Trust Co. v. Able, 48 Mo. 136; Bank v. McElrath, 13 N. J. Eq. 26; Scripture v. Soapstone Co., 50 N. H. 571; Baldwin v. Canfield, 26 Minn., 43, 1 N. W. Rep. 261, 276; Bank v. Cox, 11 Rich. Eq. 347.

5. The neglect of the secretary and president to require an indorsement of the certificate before transferring the stock does not tend to prove that defendant converted the stock, or aided Bowman's conversion of it. Section 1 of the by-laws provides that "such certificates shall be transferable by indorsement and assignment," and that "no transfer shall be valid, except as between the parties, unless made as in this section provided." We have seen that delivery of the certificate, with written authority to transfer the stock, is evidence of an equitable assignment; no written assignment by indorsement or otherwise being necessary. Besides, it was enough to justify the transfer that the assignment appeared to be valid between the parties thereto. This satisfies the by-law requirement of an assignment, in the absence of notice to the corporation that an assignment was not intended. The by-law requirement that the certificate should be indorsed was for the benefit of the corporation, and was waived by the neglect of the corportaion to demand or request it. Black v. Zacharie, 3 How. 513; Bank v. Bank, 105 U. S. 217; Isham v. Buckingham, 49 N. Y. 222. If, however, the plaintiff had any right of protection by this by-law, I see no reason why her action, through Bowman, whom she had authorized to transfer the stock, did not amount to a waiver of the indorsement by her. Had she appeared in person, and procured the transfer without indorsing the certificate, it would seem clear that she thereby waived the indorsement. Was not Bowman authorized to do all that she could have done in that behalf if personally present? But, however this may be, the mere neglect of the defendant to demand or procure the indorsement of the certificate was only non-feasance, which of itself has never been admitted as evidence of conversion. 2 Greenl. Ev. § 642, and note. In this connection it should be observed that the *gravamen* of this action is conversion, and that negligence is neither alleged nor found. Doyle v. Callaghan, 67 Cal. 154, 7 Pac. Rep. 418.

6. It is true that defendant had notice of Bowman's relation to plaintiff as her agent, and also of his authority as such agent, so far as it appeared by the power of attorney. But such notice did not devolve upon the defendant the duty to seek, or inquire beyond what thus appeared, for the motives or intentions of Bowman, for the purpose of protecting the plaintiff from possible fraud or bad faith of her chosen and trusted agent, since it does not appear that defendant had any means of discovering Bowman's motives or intentions, other than to have inquired of him directly whether or not he intended, by the transfer, to defraud the plaintiff; which would have been, not only impertinent, but probably futile. The defendant was not a party to the transfer. Its function was simply ministerial, and its actions solely dependent upon the ostensible authority of Bowman to demand the transfer. Cook, Stocks, § 386; Helm v. Swiggett, 12 Ind. 195; Crocker v. Railroad Co., 137 Mass. 417; Brewster v. Sime, 42 Cal. 143. In Crocker v. Railroad Co., 137 Mass. 417, an executor had induced a corporation to transfer stock which belonged to the estate, and stood in the name of his testator, in fraud of the estate, by which the estate lost it; the corporation having notice of the representative character of the executor. The object of the action was to make the corporation responsible for negligence in transferring the stock under these circumstances. The court, by MORTON, C. J., said: "If it [the corporation] issues a new certificate upon a forged or an unauthorized transfer, the real owner retains his property in the stock, and the corporation may also be liable to a *bona fide* holder of the new certificate. But, when a transfer by one who has the full power to transfer is presented, the corporation has the right to act upon it, and it is not its duty to inquire into the purposes of the parties, or to investigate the question whether the transaction is in good faith or is fraudulent." In Field v. Schieffelin, 7 Johns. Ch. 150, the head-note correctly expressed the substance of the decision of the chancellor, as follows: "A guardian having the legal power to sell or dispose of the personal estate of his ward in any manner he may think most conducive to the purposes of his trust, a purchaser who deals fairly has a right to presume that he acts for the benefit of his ward, and is not bound to inquire into the state of the trust; nor is he responsible for the faithful application of the money, unless he knew, or

had sufficient information, at the time, that the guardian contemplated a breach of trust, and intended to misapply the money, or was in fact, by the very transaction, applying it to his own private purpose." See, also, Albert v. Bank, 2 Md. 169; Hutchins v. Bank, 12 Metc. 421; Ashton v. Bank, 3 Allen, 222. In Bank v. Cox, 11 Rich. Eq. 344, it appears that Madam S., being the owner of 50 shares of stock in South Carolina State Bank registered in her name, and of which she held the certificate, delivered the certificate, without indorsement, to B., and at the same time executed to B. a power of attorney, authorizing him to transfer the stock. B. assigned the stock to Cox, and used the proceeds for his own purposes. Cox applied to the bank to have the stock transferred to him on the books of the bank, which was opposed by S. on the grounds that she had not indorsed the certificate; that B. had committed a breach of trust in assigning it, and converting the proceeds to his own use; and that B. was totally insolvent. The bank interpleaded the parties. Upon these facts, substantially, the chancellor decreed that the bank transfer the stock to Cox, and in doing so said: "Whatever may have been the motive for the delivery of the certificate of stock and the power of attorney to B., she (S.) invested him (B.) thereby with all the *indicia* of property and ownership as to said shares of stock, and, if he abused her confidence, she must bear the consequences. [Page 349.] * * * The evidence is plenary that, according to commercial usage, this possession of the certificate and a power of attorney in this form imported ownership. [Page 350.]" The court of appeals, in affirming this decree, said. "B. had been put in possession of this scrip, with an indefinite power of disposition, by S., and, if he was not the owner, (of which ownership there is much evidence,) she exhibited him in a light which enabled him to lay claim to the stock. Under such circumstances, equity would not permit her to avail herself of the dry skeleton of title, which yet stands formally in her name, to defeat him whom she has contributed to deceive. The transfer should have been formally made; and this court will not take notice of that as undone which ought to have been done." Id. page 391.

If, according to the authorities above cited, the defendant may have looked upon Bowman as the equitable owner of the stock, by reason of his possession of the certificate, and his power to transfer the stock, it would only follow that defendant had notice that, while Bowman was the authorized agent of the plaintiff to sell and transfer her stock, he had purchased the stock in question from his principal, as he unquestionably had a right to do, provided that he dealt with her fairly and honestly, (Civil Code, § 2230; Rubidoex v. Parks, 48 Cal. 215; Blockley v. Fowler, 21 Cal. 329; Golson v. Dunlap, 73 Cal. 157, 14 Pac. Rep. 576;) and it was not the duty of defendant to inquire whether or not he had defrauded, or intended to defraud, his principal, that being a matter in which the principal and agent alone were interested. It did not concern third persons having no interest in the matter of the assignment or transfer of the stock; and such was the relation of the defendant to the transaction. On the presumption that the defendant knew the law applicable to the transaction, it can only be charged with notice that plaintiff could avoid the assignment as against Bowman, unless he could prove that it was perfectly fair and honest; but such notice did not impose upon the defendant a duty to intervene between the parties, and object to the transfer, which, for aught that appears, may have been perfectly fair and honest. If this view of the transaction is correct, it follows that the defendant had no notice that Bowman, as agent for the plaintiff, assigned her stock to himself without her consent; and it is therefore unnecessary to decide what effect such notice, if given, would have had. "It is, however, of no consequence," says an author, "that the title of the purchaser is voidable, if it has not been, in fact, avoided; because, by the definition of the term 'voidable,' the title of the purchaser, in such a case, is valid until it is avoided." Low. Tr. Stocks, § 138.

I do not understand that it is contended by the learned counsel for respondent that the defendant converted plaintiff's stock otherwise than by aiding or assisting Bowman to convert it to his use alone; for it is not pretended that the defendant had or sought any use, profit, or advantage by the conversion; nor, as before remarked, does the evidence tend to prove that defendant had actual or constructive notice of Bowman's conversion, or of his intention to convert; and the only act by which it can be claimed that defendant, even unconsciously, aided or assisted Bowman to convert the stock, was the act of transferring it on the books of the company at Bowman's request; which request was ostensibly authorized by the plaintiff. I have found no authority for a constructive conversion upon facts similar to the facts of this case. Perhaps Dodge v. Meyer, 61 Cal. 405, may be regarded as furnishing a pattern of a cause of action for constructive conversion, with little, if anything, to spare. In that case, however, the defendant, Meyer, had actual notice of the intention to convert, and intentionally aided and assisted in the conversion for his own benefit. I think the plaintiff was the victim of her own trusted agent alone, and that the judgment and order should be reversed, and a new trial granted.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial granted.

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81 Cal. 158

PEOPLE v. MCKENNA. (No. 20,537.)

(*Supreme Court of California.* Nov. 5, 1889.)

FALSE PRETENSES—INFORMATION.

An information charging that defendant "knowingly and designedly, by false and fraudulent representations and pretenses, defrauded" one T. of certain property, describing it, but which alleges none of the facts constituting the fraud, is insufficient, as Pen. Code. Cal. § 952, subd. 3, provides that an indictment must be direct and certain as to "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense."

2. Where the facts stated in an information do not constitute a public offense, objection to its sufficiency may be made at any time.

In bank. Appeal from superior court, San Luis Obispo county; V. A. GREGG, Judge.

Wm. Shipsey, for appellant. *George A. Johnson*, Atty. Gen., for the People.

PATERSON, J. The defendant was tried and convicted on an information which charged that "on or about the 15th day of July, 1888, at the county of San Luis Obispo, state of California, [the defendant,] did unlawfully, knowingly, and designedly, by false and fraudulent representations and pretenses, defraud one David Taylor of personal property to-wit, twenty hogs, of the value of two hundred and three and forty one-hundredths dollars in lawful money of the United States, the personal property of the said David Taylor, contrary to the form, force," etc.

The most important question in the case is whether the facts stated are sufficient to support a conviction. There was no demurrer to the complaint, but there was a motion in arrest of judgment, and a motion for a new trial. It is claimed on behalf of the respondent that the information is sufficient, in the absence of a demurrer; that, if the defendant had desired the information to be made more specific, he should have demurred on the ground that it did not substantially conform to the requirements of sections 950-952 of the Penal Code. If, however, the facts stated in the information do not constitute a public offense, the objection to its sufficiency may be made at any time. In civil cases the rule is, as stated by Mr. Justice TEMPLE, that the plaintiff is not required "to allege with minuteness all the particulars and circumstances which constitute the evidence of the alleged fraud, but he must make the charge with sufficient distinctness to enable his adversary to come prepared with his evidence upon the general questions of fraud, which will be raised." Capuro v. Insurance Co., 39 Cal. 125. It matters not that no objection is made by demurrer. Objection may be made at any time, because it goes to the substance of the complaint or indictment. The question whether a thing has been done fraudulently is a matter of law, and an allegation of fraud in general terms presents no issuable facts. Meeker v. Harris, 19 Cal. 289, 290; Triscony v. Orr, 49 Cal. 617; Bank v. Hynes, 50 Cal. 202. Where no facts are averred, no facts are admitted. Payne v. Elliot, 54 Cal. 343; Johnson v. Kirby, 65 Cal. 487, 4 Pac. Rep. 458. It is said by Mr. Bishop that "to charge simply in the statutory words that the thing was obtained by 'false pretenses' is not adequate. What the particular pretenses were must be stated, both as notice to the defendant of what he has to answer to, and as enabling the court to discern their indictable quality. A pretense, as set out, must be adequate in law. For example, it must be of an existing fact; not a promise. And it must be stated in a form direct; not argumentative. Therefore an allegation which did not distinguish clearly whether it was promise or fact was adjudged ill." 2 Bish. Crim. Proc. §§ 165, 166. Mr. Wharton says an information charging simply that the defendant obtained goods by false pretenses "would be scouted out of court." 1 Whart. Crim. Law, § 192. As said in U. S. v. Watkins, 3 Cranch, C. C. 441: "Fraud is an inference of law from certain facts, and the indictment must aver all the facts which constitute the fraud. * * * To aver that an act was fraudulently done is therefore * * * to aver a matter of law, and not a matter of fact."

It is a sound principle that an indictment charging fraud of any kind should aver with particularity the facts relied upon to show fraud. Many of the niceties and technicalities which existed under former methods of pleading are not allowed to prevail under the provisions of our Code; but the rule still exists that an indictment must be certain and clear as to "the particular circumstances of the offense charged, when they are necessary to constitute a complete offense." Pen. Code, § 952, subd. 3. It is true that, as a general rule, an indictment is sufficient if it describes the offense in the words of the statute; but, as said by Mr. Justice HARLAN in U. S. v. Simmons, 96 U. S. 360: "To this general rule there is the qualification, fundamental in the law of criminal procedure, that the accused must be apprised by the indictment with reasonable certainty of the nature of the accusation against him, to the end that he may prepare his defense, and plead the judgment as a bar to any subsequent prosecution for the same offense." The conviction under the information before us, and the judgment entered thereon, could not be safely or successfully pleaded in bar of a second prosecution for the same offense. It is alleged simply that the defendant unlawfully, knowingly, and designedly, by false and fraudulent representations and pretenses, defrauded Taylor of his personal property. The particular fraud is in no way identified. In our opinion, the allegations of the information are not sufficient to apprise the defendant with that certainty which the law requires of the nature of the accusation against him, to enable him to prepare a defense, or to plead the judgment as a bar to any subsequent prosecution for the same offense, and therefore that the motion in arrest of judgment should have been granted, and that the information ought to have been dismissed. U. S. v. Goggin, 9 Biss. 269, 1 Fed. Rep. 49.

A distinction is made between pleadings inartificially drawn, where there is an attempt to plead the facts, and those entirely wanting in facts. In People v. Donaldson, 70 Cal. 116, 11 Pac. Rep. 681, relied upon by respondent, the indictment charged that the defendant obtained the property under false pretenses, "in that he did willfully, unlawfully, knowingly, and designedly obtain from one J. P. Spence certain hogs belonging to him, and in his possession, by falsely pretending to Spence that he (the defendant) had in the Commercial & Savings Bank of San Jose the sum of $196.70, and did, with intent to cheat and defraud said Spence, make, execute, sign, and deliver to him a check upon that bank for such amount. The indictment further alleged that Spence was induced to part with his property by reason of such representation, and that the defendant knew at the time that he had no money or credit in the bank, and had no reason to believe that the check would be honored or paid." The difference between that case and the one before us is made plain by comparing the allegations of the indictment with those of the information herein.

The instructions, taken together, correctly state the law. The instruction given by the court of its own motion, however, would be better and clearer if the word "fraudulently" were inserted before the word "represented." The judgment is reversed, with directions to the court below to dismiss the information. All concur.

(81 Cal. 170)

KELLOGG *et al.* v. HOWES *et al.* (No. 13,324.)

(*Supreme Court of California.* Nov. 7, 1889.)

MECHANICS' LIENS—MATERIAL-MEN.

1. Code Civil Proc. Cal. § 1183, providing liens for contractors, laborers, and material-men, requires the construction contract to be in writing, and declares that where the amount exceeds $1,000, unless it is filed in the recorder's office of the county where the property is situated, it shall be void; "and in such case the labor done and materials furnished by all persons aforesaid shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." *Held* that, as the contract is void when not recorded, the material-men are not limited in their right to a lien to the amount due the contractor on the contract, though they had actual notice that there was such a contract.

2. As there was no valid contract, the statutory notice of the material-men's claim was not necessary to reach the money due the contractor, the statute itself being notice to the owner.

3. The legislature had the power to provide that if the contract was not executed and filed in a certain manner the owner should become liable to the material-men and laborers for the value of of their materials and labor.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Haynes & Mitchell, for appellants. *Davis & Taylor* and *W. H. Thomas*, for Levi M. Kellogg and Maitre & Hansen. *Adams & Rhodes* and *Johnston & Borden*, for California Door Co. *Johnston & Borden*, for Willamette Steam-Mills Lumbering & Manuf'g Co. *Reymert, Orfila & Reymert*, for B. A. Breakey. *Barclay, Wilson & Carpenter*, for E. L. Tower. *Scarborough & Waterman* and *Barclay, Wilson & Carpenter*, for A. H. Parsons.

WORKS, J. This action was brought by the respondents, as material-men, laborers, and subcontractors, against the appellants, to enforce a lien for material furnished and for labor done in the construction of a dwelling-house. The appellant Howes was the owner of the real estate, and contracted with his co-defendant to construct the building, and the latter contracted with the respondents for the labor and material done and furnished by them. The contract price for constructing the building was more than $1,000, and the contract was not filed for record as required by section 1183 of the Code of Civil Procedure. The respondents had actual notice that there was a contract between the owner and his contractor, and gave no notice to the owner to withhold payments to such contractor. The owner paid the contractor the greater part of the contract price. The amounts for which the respondents claimed liens exceeded the amount due the contractor, and unpaid, assuming the contract to have been valid, but were less than the full contract price. The court below held the contract to be void, for the reason that it was not filed for record, and that the respondents were entitled to recover the value of the material furnished and labor done by them, without any reference to the amount remaining unpaid to the original contractor by the owner. The only question presented and argued on this appeal is whether or not a material-man or subcontractor can recover, beyond the amount unpaid by the owner to the original contractor, on the contract, where the same has not been recorded, and where no personal notice has been given by such material-man or subcontractor to the owner to withhold the payments due such contractor, the material-man and subcontractor having actual notice that there was such a contract.

Counsel for appellants contend, with much earnestness and ingenuity, and with marked ability, that the right of the material-man and subcontractor to enforce his lien is limited, where he has given no personal notice to the owner to the amount remaining unpaid by the owner to the original contractor. They contend, in substance, that, although the contract is void as between the parties to it, it is not void as to the owner and the material-men and subcontractors; that there is a distinction between an original contractor and a material-man or subcontractor, in that the former has a direct lien upon the real estate of the owner to the full extent of the amount due him, based upon the personal liability of the owner to him, while the latter have but a lien in the nature of an attachment against the money in the hands of the owners, and due the contractor, and that the legislature had no power to make the owner or his property liable to any greater extent. There is, perhaps, not a single one of these propositions that is not, to some extent, supported by some decision or *dictum* of this court. The question is, therefore, whether these decisions or *dicta* are applicable to the present provisions of the mechanic's lien law, and, if so, whether they are such as should control us in the interpretation of such provisions. The present Code, so far as it affects this question, provides: "In case of a contract for the work between the owner and his contractor, the lien shall extend to the entire contract price, and such contract shall operate as a lien in favor of all persons, except the contractor, to the extent of the whole contract price; and, after all such liens are satisfied, then as a lien for any balance of the contract price in favor of the contractor. All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds one thousand dollars, and shall be subscribed by the parties thereto, and shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated, who shall receive one dollar for such filing; otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." Code Civil Proc. § 1183. Again: "No payment made prior to the time when the same is due, under the terms and conditions of the contract, shall be valid for the purpose of defeating, diminishing, or discharging any lien in favor of any person except the contractor; but, as to such liens, such payment shall be deemed as if not made, and shall be applicable to such liens, notwithstanding the contractor to whom it was paid may thereafter abandon his contract, or be or become indebted to the owner in any amount, for damages or otherwise, for nonperformance of his contract or otherwise. * * * All such contract and alterations thereof as do not conform substantially to the provisions of this section shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof. Any of the persons mentioned in section 1183, except the contractor, may, at any time, give to the owner a written notice that they have performed labor or furnished materials, or both, to the contractor, or other person acting by authority of the owner, or that they have agreed to do so, stating in general terms the kind of labor and materials, and the name of the person to or for whom the same was done or furnished, or both, and the amount in value, as near as may be, of that already done or furnished, or both, and of the whole agreed to be done or furnished, or both. * * * Upon such notice being given, it shall be the duty of the owner to, and he shall, withhold from his contractor, or from any other person acting under such owner, and to whom by said notice the said labor or materials, or both, have been furnished or agreed to be furnished, all money due or that may become due to such contractor, or other person, or sufficient of such money to answer such claim, and any lien that may be filed therefor for record, under this chapter, including costs and counsel fees provided for in this chapter, until such notice is by writing withdrawn; and all money paid thereafter by the owner to the contractor, or such other person, while such notice is in force, shall, for the purposes of all liens of all persons, except that of the contractor, be deemed a payment prior to the time the same was due, within the meaning of and subject to the provisions of this section." Id. § 1184.

It has been held in a number of cases under earlier statutes that a subcontractor or material-man could enforce his lien only to the extent of the contract price remaining unpaid, and that, too, under statutes providing that subcontractors should have a lien "regardless of the claim of the contractor against the owner," or that the lien should inure "to the extent of the contract price," and "whether done or furnished at the instance of the owner or his agent;" and "that the contractor should be deemed such agent, and that the lien should not be affected by the fact that no money was due the contractor." Counsel for appellant have industriously gathered up and cited these earlier statutes, and the cases decided under them. We cite them here more as showing the course of legislation and its judicial construction and interpretation on this subject than because of their bearing on the question now presented. St. 1850, p. 211; St. 1855, p. 156; St. 1856, p. 203; St. 1858, p. 225; St. 1862, p. 384; St. 1868, p. 589; Code Civil Proc. (1880) § 1183; Deering's Code Civil Proc. § 1183; St. 1887, p. 152; Cahoon v. Levy, 6 Cal. 295; Knowles v. Joost, 13 Cal. 620; McAlpin v. Duncan, 16 Cal. 126; Bowen v. Aubrey, 22 Cal. 566; Dore v. Sellers, 27 Cal. 588; Renton v. Conley, 49 Cal. 185; Latson v. Nelson, 11 Pac. C. Law J. 589; Whittier v. Hollister, 64 Cal. 283; O'Donnell v. Kramer, 65 Cal. 353, 4 Pac. Rep. 204; Wilson v. Barnard, 67 Cal. 422, 7 Pac. Rep. 845; Wiggins v. Bridge, 70 Cal. 437, 11 Pac. Rep. 754. It will be observed that all of these cases, so far as they hold that the lien of a subcontractor shall only extend to the money unpaid on the original contract, are cases in which the contract between the owner and subcontractor was valid, and each and all of them are based upon the theory, which we fully approve, that, where there is a valid contract between the owner and contractor, such contract is the measure of the owner's liability, and that, in the absence of notice from the subcontractor of his claim, a payment by the owner in conformity to the contract will relieve him to that extent from any claim or lien by the subcontractor. This is so under the present statute, and thus far the cases cited are applicable to the present statute, and no further.

Counsel insist that there is but one additional requirement under the present statute, viz., that the contract shall be filed in the recorder's office, and that such a requirement does not affect the principle laid down in the cases decided under former statutes, especially in this case, where it appears that the subcontractors had actual notice of the existence of the contract, which was in all respects in conformity to the statute. In this contention counsel overlook what we regard as the most material addition to the statute by the last amendment, viz., that if the contract is not executed as required by the statute, and filed in the recorder's office, it shall be void, and no recovery shall be had thereon by either party. In our judgment this provision of the statute takes away entirely the basis upon which it was held under earlier statutes that the subcontractor could not recover, viz., that the owner could not be compelled to pay more than he had contracted to pay, or, in other words, could not be compelled to pay twice for the same thing. This cannot be so under the present statute, where his contract is not recorded. The contract cannot be the measure of his liability, because there is no contract. He cannot pay the contractor, and thereby relieve himself from liability to the subcontractor, because, the contract being void as between him and the contractor, he is not liable to the latter, and has no right, as between him and the subcontractor, to pay such contractor. The statute is too plain on this point to need construction. It not only provides that the contract shall be wholly void, and that neither party shall recover thereon, which must have been provided wholly for the protection of subcontractors, laborers, etc., but in order to make this fact doubly plain it further provides that "the labor done and material furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." In other words, the subcontractors, laborers, and material-men shall have their lien precisely as if no contract had ever been made between the owner and contractor, and the material had been furnished and work done for the owner at his special instance and request.

But counsel say the legislature had no power to provide for any such liability on the part of the owner, and this court has so decided. We do not so understand it. It has been held, as we have said, and very properly, that where there is a valid contract the owner cannot be compelled to pay more than he has contracted to pay, unless he is notified of the claims of subcontractors before payment to the contractor. But that is not this case. Here there was no contract. If the legislature had the power to say to the owner, "If you pay the contractor, after notice from the subcontractor of his claim, you shall still be liable to the latter," it has the undoubted right to say to him, "If you do not execute your contract in a certain form, and file it in the recorder's office, you shall be liable to material-men and laborers for the value of their material and labor." There is no hardship or injustice in this provision. The owner is only compelled to pay once for what he receives and retains the benefit of. He is not bound, and has no right, as between him and subcontractors, to pay the contractor. If the contract is valid, then, under the present statute, notice must be given of his claim by a material-man or laborer, in order to reach the moneys due the contractor, and, if he fails to give such notice, the owner is protected by the statute, as held in the cases above cited, decided under former statutes. But, where there is no valid contract, this notice is unnecessary, because there are no payments to be stopped, and the statute itself is notice to the owner that he must not pay to the contractor.

It is urged upon us by counsel for appellant that the contract in this case was void only as between the parties to it, and not as between the owner and material-men and laborers, and that we have so decided in Powder Co. v. Flume Co., 20 Pac. Rep. 419. We did not so hold in the case referred to. It was held in that case that the contract between the subcontractor and contractor for material was valid, notwithstanding the original contract was void as between the parties to it. But the opinion in that case was so worded as to mislead in this respect, and it is broadly stated that the contract, though wholly void, was not void except as to the parties to it. This could not be so. A contract wholly void is void as to everybody whose rights would be affected by it if valid. And here it would be a strange construction of the statute to hold that the failure to file an instrument for record would render it void as to the parties to it, who necessarily have notice of its contents, and not affect the rights of the only persons sought to be protected by such filing, and who alone could be affected by such failure. The court meant nothing more in that case than to hold that the material-man was entitled to his lien notwithstanding the contract was not filed in the recorder's office. What was said as to the contract remaining to mark the extent of the recovery of the lienholders, etc., was outside of the real question presented in the case, and should be modified. The extent of the material-man's recovery is not measured by the terms of the contract. On the contrary, the statute provides in express terms that, where the contract is not recorded, the material-man shall have a lien for the value thereof. In case the contract is not recorded, the statute, and not the contract, measures the extent of his recovery; and so it was held in Lumber Co. v. Schmitt, 74 Cal. 625, 16 Pac. Rep. 516. The case of Latson v. Nelson, 11 Pac. C. Law J. 589, is greatly relied upon by the appellant. The reasoning of the opinion in that case was not concurred in by a majority of the court, and, so far as it may be construed as against the right and power of the legislature to enact the present statute, as we have construed it in this opinion, it does not meet with our approval. It is extremely difficult to determine what the views of the learned justice who wrote the opinion were, as announced in the opinion; but, as we construe his language, it amounted to nothing more than has been decided in earlier cases, that, where a valid contract existed between the owner and contractor, the former could not be made liable to subcontractors beyond the amount fixed therein, and that section 15, art. 20, of the present constitution had not changed that rule. So understood, the opinion is not in conflict with anything we have said in this opinion.

As to the contention that the fact that the respondents had actual notice of the existence of a contract was equivalent to the filing of the same in the recorder's office, this would be so if the question were one of notice. But it is not. The express provision of the statute is that, if the contract is not filed, it shall be void. This being so, there is in fact no contract of which the subcontractor is bound to take notice, and his knowledge that a contract was attempted to be made, but was not, cannot affect his rights.

The point made that there can be no recovery by a subcontractor as against the owner, independent of some contract between the owner and original contractor, is met by the express language of the statute that, for the purposes of his lien, he shall be deemed to have contracted directly with the owner, and shall have a lien for the value of his material. This brings him in direct contact with the owner as a contractor, and removes the distinction made under former statutes between those who contract directly with the owner and subcontractors. By the terms of the statute they become, for the purpose of their lien, original contractors with the owner, but cannot recover against him personally. Lumber Co. v. Schmitt, supra.

The judgment and order appealed from are affirmed.

I concur: Paterson, J.

Fox, J., (*concurring*.) I concur in the conclusion reached by Mr. Justice Works in the foregoing opinion, and generally in the line of reasoning by which that conclusion is reached. I have no doubt that the legislature has full power to provide that where, as was done in this case, an owner of real estate, without the intervention of a contract fixing the measure of his liability, proceeds personally, or through another acting with his knowledge, to make improvements thereon, he shall be liable to mechanics, laborers, and material-men for the value of their labor and material, and they shall have a lien therefor. In this case there was no contract, for the law itself declares that if not recorded the pretended contract is "wholly void." It is, therefore, as if it had never been made, and fixes no measure of liability for either party, or for any purpose. But after negotiating the terms of the contract with Lane, which was never completed, and never became a valid contract, Howes permitted him to procure material and erect the building· in other words, permitted Lane to act as his agent in the construction of the building upon which these liens were filed. The statute expressly declares that in such cases the subcontractor, the laborer, and material-man shall be deemed to have contracted directly with the owner, and shall have a lien for the value of his material or labor. There is no constitutional objection to such a provision. The obligation most frequently assumed by all men engaged in business, and most frequently enforced by the courts, is an implied one to do the same thing,—to pay the value of labor done or materials furnished at the request of the party receiving the benefit thereof; and it makes no difference whether the request was made by him in person, or through one whom he had held out to the world, or to the person furnishing the labor and material, as his agent in the premises. But it seems to me that the opinion of Mr. Justice Works is susceptible of a construction which would enable a stranger to go upon the land of an absent or non-resident owner, and, through laborers and material-men, improve him out of his real estate without his knowledge. The legislature has no power to authorize such a proceeding, and no precedent should be established which would sanction it. No person should be entitled to a lien or personal judgment against an owner in any case, unless he contracted the liability in person, or it be shown that he had actual notice in some form of the fact that his property was being improved in a manner which might create a liability or lien. A construction of the statute which would give it the effect of creating a lien, where the owner had no knowledge of the improvement, would render it unconstitutional. In this case there is no pretense of want of knowledge, and everything shows that the owner had actual knowledge of the improvement, and the law charges him with knowledge of the fact that there was no contract limiting his liability.

(81 Cal. 151)

BEAN v. LORYEA. (No. 12,335.)

(*Supreme Court of California.* Nov. 4, 1889.)

EVIDENCE—COPY OF FOREIGN RECORDS—INSOLVENCY.

1. The certificate attached to a copy of the record of a judgment rendered by the supreme court of New York, attached by the "presiding justice" of that court, is within Code Civil Proc. Cal. § 1905, providing that a judicial record of a sister state may be proved by the attestation of the clerk, and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form.

2. A discharge in insolvency, granted by a state court, will not bar an action on a judgment rendered in another state, where the judgment creditor is a resident of such other state, and was not a party to the insolvency proceedings.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action by Cotton W. Bean against Abraham M. Loryea on a judgment. Judgment for plaintiff. Defendant appeals.

C. Wittram, for appellant. *E. E. Haft*, for respondent.

FOOTE, C. This action was upon a judgment rendered in the supreme court of the state of New York in and for the city and county of New York. Judgment was rendered as prayed for, and from it, and an order denying a new trial, the defendant appeals. He makes the point, in favor of his demand, that the certificate of the clerk of the court, authenticating the copy of the record of the judgment obtained in New York, is not sufficient, because it does not show that the clerk was the legal keeper, nor where the legal custody of such records belonged; and the certificate of the judge, as "presiding justice," is insufficient. Section 1905 of the Code of Civil Procedure, under which a judicial record such as that now in hand can be proved, provides that "a judicial record of this state or of the United States may be proved by the production of the original, or of a copy thereof, certified by the clerk or other person having the legal custody thereof. That of a sister state may be proved by the attestation of the clerk, and the seal of the court annexed, if there be a clerk and seal, together with a certificate of the chief judge or presiding magistrate that the attestation is in due form." Here, the clerk attested the copy of the judicial record, and annexed the seal of the court. Attached to the certificate is that of the "presiding justice" of the court, which is the equivalent of "chief judge" or "presiding magistrate" thereof, that the attestation is in due form. This is a full compliance with the law.

The proof of the judgment being sufficient, it remains to be considered whether the certificate of discharge in insolvency, obtained from the proper court in the state of California, was a bar to the recovery of the plaintiff, who is a resident of the state of New York. The supreme court of the United States held, in Baldwin v. Hale, 1 Wall. 234, that "insolvent laws of one state cannot discharge the contracts of citizens of other states, because they have no extraterritorial operation; and, consequently, the tribunal sitting under them, unless in cases where a citizen of such other state voluntarily becomes a party to the proceeding, has no jurisdiction in the case. Legal notice cannot be given, and consequently there can be no obligation to appear, and of course there can be no legal default." In the present case the plaintiff did not become a voluntary party to the insolvency proceedings. The appellate court of Vermont, in Bedell v. Scruton, 54 Vt. 493, has followed the rule laid down by the supreme court of the United States; and the appellate court of California takes the same view of the matter in Rhodes v. Bordon, 67 Cal. 7, 6 Pac. Rep. 850. The appellant seeks to avoid the force of these decisions by claiming that an action upon a judgment is not a suit based upon a contract, and that therefore these cases are not in point. In this position he is not supported, as it has been declared by the court of last resort in this state that suits upon judgments are actions upon contracts. Stuart v. Lander, 16 Cal. 375; Reed v. Eldredge, 27 Cal. 348; Wallace v. Eldredge, Id. 499. We do not understand the case of Larrabee v. Baldwin, 35 Cal. 168, to be in conflict with the decisions just referred to. It is there said: "The claim of the respondent that the judgment is itself a contract, creating a new debt within the meaning of the statute, [that is, an act authorizing the formation of mining corporations,] for which all who were stockholders at the date of the rendition of the judgment are personally liable, is too absurd to require argument to refute it. That a judgment is a contract of record, in a certain legal sense, may be conceded; but it creates no such new liability as the statute in question contemplates." It has also been held by the same tribunal that a judgment is a debt. McBride v. Fallon, 65 Cal. 303, 4 Pac. Rep. 17. Being a debt, the rights accruing to the plaintiff under it could not be taken away by a court which did not have jurisdiction over him. We therefore advise that the judgment and order be affirmed.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(81 Cal. 162)

DOUGHERTY v. NEVADA BANK. (No. 12,354.)

(*Supreme Court of California.* Nov. 7, 1889.)

MUNICIPAL IMPROVEMENTS.

After the time for the completion of a contract for grading a street, under St. Cal. 1871-72, has expired, an attempt to extend the time is futile, and an assessment founded on such contract is void.

Department 2. Appeal from superior court, city and county of San Francisco; H. LEVY, Judge.

W. T. Baggett, for appellant. *W. H. L. Barnes*, for respondent.

MCFARLAND, J. This is an action to enforce a street assessment for grading a part of Mason street, between California and Sacramento streets, in San Francisco.

Judgment went for defendant, and plaintiff appeals. The court finds that the contract was made on January 15, 1873; that the work was to be performed within 150 days from the making of the contract; and that the work was not performed within that time, or within any time extended for its performance. There were attempts to extend the time years after its expiration; but, as before held by this court, such attempts were futile. The contract was made under the statute of 1871–72; and the case is on all fours with the case of Dougherty v. Coffin, 69 Cal. 454, 10 Pac. Rep. 672. There is nothing in the point that the court failed to find on some minor issues. Having found against appellant as above stated, the other matters were entirely immaterial. It would make no difference which way they were found. Judgment and order denying a new trial affirmed.

We concur: Sharpstein, J.; Thornton, J.

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81 Cal. 154

Holloway v. McNear. (No. 12,269.)

(*Supreme Court of California*. Nov. 5, 1889.)

Evidence—Parol to Vary Writing.

In an action against a charterer for breach of a charter party, which recites that "a commission of five per cent. on this charter shall be paid by the vessel, after completing the loading," to charterer, evidence of a custom of trade, by which the charterer was not entitled to the entire amount of the commissions specified in the charter-party, will not be admitted to vary the terms of the written contract as to the amount of commissions to which the charterer is entitled under it.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; John Hunt, Judge.

Action by William E. Holloway against G. W. McNear for damages for non-performance of a charter-party. Judgment for plaintiff. Defendant appeals.

T. I. Bergin, for appellant. *Jarboe, Harrison & Goodfellow*, for respondent.

Foote, C. This action was instituted by Holloway, who was the assignee of the rights and claims of Hughes & Co., a partnership; such rights and claims accruing under a certain charter-party executed for McNear by his agents, Iredale & Son, and by Hughes & Co. for themselves. Under that instrument the defendant chartered a certain ship, the Lord Cairns, to transport a cargo to Europe from San Francisco. When the ship was ready to receive her cargo, she was offered to the defendant, who refused to take her; and she was then chartered to other parties at a lower rate for freightage than the defendant contracted for. This action was brought to recover damages for the non-performance of the contract under the charter-party. The defendant, who is the appellant here, claimed, by way of defense, that his agents had no authority from him to make the contract as they did. He alleges that his telegram to them in cipher, conveying the terms upon which he was willing to enter into the agreement or charter-party, was not followed by his agents; that they stipulated for a less amount of commissions to him than he authorized. The language of the telegram was this, (received August 8, 1884:) "Lord Cairns you may charter if address, commissions 2½ per cent., and charter commissions here 5 per cent." The answer to that by his agents was: "Lord Cairns we have chartered for your account."

The clause in the charter-party relating to the matter of commissions is in this language: "Vessel to be consigned (inward only) at port of discharge to charterer's agent, to whom a commission of two and one-half (2½) per cent. on amount of freight is to be paid. * * * A commission of 5 per cent. on this charter-party shall be paid by the vessel after completing the loading, ship lost or not lost, at customary rate of exchange, in United States gold coin, to charterers." It is claimed that although this language on its face gives 2½ per cent. to the charterer's agents, and 5 per cent. to the charterer, that nevertheless, by custom and usage, the language of the last sentence of the contract above mentioned meant something else; that is, that although, by its terms, 5 per cent. as commissions was to go to the charterer, that in reality, interpreting the language in the light of custom and usage, it did not mean what it purported to mean. We are thus asked to construe the language of a written instrument contrary to its plain and manifest meaning, giving to the words their ordinary signification, and to read it according to a usage of trade solely. This the court below refused to do, and informed the jury that by the terms of the instrument the defendant and charterer was to receive the amount of commissions which his telegram called for, viz., 5 per cent. In this we think the court was correct. The instrument was not ambiguous or doubtful, and it was therefore for the court to construe it for the jury.

The evidence introduced upon the question of usage was not objected to, and the court afterwards instructed the jury to disregard it. We perceive no error in this. The evidence did not go to the question as to what the meaning of the language was in the light of usage. It was rather to the usage in respect to what the charterer was to do with the 5 per cent. commissions after he received it. What he should do with the money was not to be expressed in the contract. What he was to receive as charterer was to be placed therein; and this was done as he ordered it. Again, when it became evident to the court, after the evidence was introduced, that it was intended to vary a written instrument wherein there was no ambiguity whatever, it would not have been proper for the jury to consider it, as that would be to contradict the terms of a written instrument, which, being plain and intelligible, was for the court to construe, and not the jury. In his fourth point, the defendant expresses himself thus: "The exceptions to the charge of the court were well taken. The court erred in refusing to give instructions asked on the part of the defendant." To this extent only are we informed of the alleged errors of the trial court in the matter of the instructions referred to. We suggest, with all due respect to counsel, that while brevity is as has been heretofore stated, (Dale v. Purvis, 20 Pac. Rep. 296,) in such matters, much to be commended, it seems in the present instance to be so extreme as to indicate that the defendant has no real ground of objection, and we must therefore so treat it. Perceiving no prejudicial error, we advise that the judgment and order be affirmed.

We concur: GIBSON, C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

81 Cal. 1

NOUNNAN *et al.* v. SUTTER COUNTY LAND Co. (No. 12,227.)

(Supreme Court of California. Oct. 1, 1889.)

FRAUDULENT REPRESENTATIONS.

Plaintiffs claimed damages for fraudulent representations, in that defendant induced them to undertake the construction of a certain levee by representing that the amount of earth necessary to construct the same was 350,000 cubic yards, and that the earth to be moved was light, sandy loam. They alleged that, upon the faith of these representations, they entered into a written contract to build a levee on defendant's lands by a given date, for which they were to be paid 12 cents per cubic yard of excavation; that in the performance of the work they had moved 400,000 cubic yards of earth, more than half of which was much harder than represented by defendant; and that by reason of the character of such earth it was impossible to complete the levee as they contracted to do. *Held*, that such representations were expressions of opinion as to matters equally in the power of both parties to ascertain, and the omission of any reference to them in the contract showed that plaintiffs did not regard the same as material; and plaintiffs' continuance of the work after discovering that such representations were false was a waiver of their right to contest the contract upon that ground.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Craig & Meredith, for appellants. *James Wheeler*, (*W. W. Cope*, of counsel,) for respondent.

WORKS, J. This is an action for damages for fraudulent representations alleged to have been made by the respondent to induce the appellants to enter into a contract to construct a levee upon the lands of the former. A demurrer to the complaint was sustained, and, the plaintiffs refusing to amend, judgment was entered in favor of the defendant. From this judgment the plaintiffs have appealed. Several grounds were stated in the demurrer, but the only one discussed here is that the complaint did not state facts sufficient to constitute a cause of action. The representations relied upon as fraudulent are thus stated in the complaint: "That on the 13th day of August, 1884, at said city and county, the defendant represented to the plaintiffs that the defendant wished the plaintiffs to construct a certain levee upon the lands of the defendant in the county of Sutter. The defendant, in order to induce the plaintiffs to do the said work, represented to them that the amount of earth measured in excavation, necessary to be placed upon said levee in order to construct the same, was 350,000 cubic yards. The defendant further represented to the plaintiffs that the character of the earth along the line of said levee was light, sandy loam, and that it was good scraper material. The plaintiffs then stated to the defendant that if the quantity exceeded 350,000 cubic yards, or, if the adjacent earth varied from that stated, they would not do the said work, and proposed to go upon the ground and examine the same. Thereupon the defendant dissuaded and prevented them from doing so, and said that the plaintiffs could entirely rely on the accuracy of said statements. The defendant stated to the plaintiffs that the defendant had made a careful survey and measurement of said work, and had fully informed itself of the character of the said material. Both and all of said representations were made with the intent to induce the plaintiffs to enter into the contract hereinafter mentioned. The plaintiffs relied upon the said representations, and were induced by them to abstain from examining the premises. The premises are about one hundred and fifty miles from San Francisco, and it would have required many days of examination, surveys, and measurements to have ascertained the truth or falsity of said representations." It is alleged that the plaintiffs relied, and had a right to rely, upon these representations, and that they were thereby induced to enter into the contract without investigating for themselves the matters about which the representations were made. The contract is set out in the complaint, and bound the plaintiffs to construct a certain levee on the lands of the defendant, for which they were to be paid 12 cents per cubic yard of excavation. The contract was executed August 15, 1884. Estimates were to be made at the end of each month, and 75 per cent. of the amount of the estimates to be paid on the 7th day of each month, the balance of 25 per cent. to be paid 10 days after the satisfactory completion of the contract and the engineers' approval of the work, and acceptance by the board of directors of the defendant, but if the work should not be completed by the 1st of the following December, the 25 per cent. was to be forfeited unless the contractors were prevented in the due prosecution of their work by either providential acts or causes beyond their control, in which case a proportional time was to be allowed for such stoppage. After setting out the contract the complaint further alleges: "Both of the said representations were material, and neither of them was a matter of opinion merely. The materiality of the first-mentioned representation consisted in this: that the said work could not be prosecuted during the rainy season, and the then approaching rainy season did not afford more, or but very little more, than sufficient time to construct a levee of 350,000 cubic yards. And if the said levee should be in an incomplete condition when the rain should set in, then, by reason of overflow of the land, the partially constructed levee would be destroyed. And, in addition to this, the plaintiffs only had a capital of about $6,000, and the same would be exhausted in constructing a levee exceeding 350,000 cubic yards. *Second.* That said representations were material, in this: that the materials of the character mentioned can be moved with less expense and labor, and with greater rapidity than any other kind. That both of said representations were untrue. The fact was that the cubic contents of the said levee were such that it required 500,000 cubic yards, as aforesaid, to construct it. And the character of said adjacent earth was, except very near the surface, stiff *adobe*, and to a great extent hard-pan, both of which are more difficult to remove than light, sandy loam. The defendant at said time had reasonable ground to believe, and did believe, that both of said representations were not true, and to believe, and did believe, the facts to be as herein above set forth. Thereupon the plaintiffs entered upon the performance of said work, and in so doing they removed 400,000 cubic yards of earth, and placed the same on said levee. But they did not know that they had removed so great a quantity, because they had not measured or surveyed the same, and the surveyor mentioned in said contract had not done so. That as said work proceeded, it was at first of the character represented, but the same became harder as the plaintiffs progressed, but the plaintiffs did not discover the said fact until they had placed about 200,000 cubic yards on said levee. And afterwards, although the material became harder and more of the character of *adobe*, plaintiffs continued to believe that the quantity of such hard material would be but small, relying upon the statement of the defendant. On or about the 10th day of December, 1884, the plaintiffs discovered, and the fact was, that nearly all of the earth still necessary to be removed in order to complete said levee was very stiff *adobe* and hard-pan. They had aleady been delayed by the occasional appearance of said material. It became and was impossible thus to complete said levee. There still remain 100,000 cubic yards unfinished, although this latter fact the plaintiffs did not discover until on or about the 16th day of December, 1884. On the said 16th day of December the plaintiffs, by reason of the matters aforesaid, quit work under said contract, abandoned the same, and declared to the defendant that they did abandon and repudiate the same, and have ever since done so, and they demanded of defendant the reasonable value of the work done. The reasonable value of the said work was $57,120, and the plaintiffs admit that they received from defendant, in the premises, $36,350. But the same was paid before the plaintiffs discovered any of the facts regarding quantity and quality. The capital of the plaintiffs was wholly exhausted in the performance of said work. The plaintiffs have been damaged in the premises in the sum of $20,700. And therefore the plaintiffs pray judgment against the defendant in the sum of $20,700 and costs."

It will be seen that there are two representations relied upon, viz., that the amount of earth in excavation necessary to construct the levee was 350,000 cubic yards, and that the character of earth along the line of said levee was light, sandy loam and good scraper material.

It is contended by the respondent, in support of the ruling of the court below, that neither of these were representations as to a material fact, but were matters of opinion, and were immaterial. If this be so the complaint was insufficient, unless there are other allegations sufficient to take this case out of the general rule that the statement of mere matters of opinion, although false or erroneous, are not sufficient ground for an action of damages. Civil Code, § 1710; Rendell v. Scott, 70 Cal. 514, 11 Pac. Rep. 779; Lawrence v. Gayetty, 20 Pac. Rep. 384. It is quite clear, we think, that both of these statements were mere expressions of opinion with reference to matters equally within the power of both of the parties to the contract to ascertain and determine for themselves. Clapham v. Shillito, 7 Beav. 146; Development Co. v. Silva, 125 U. S. 247, 8 Sup. Ct. Rep. 881; Watts v. Cummins, 59 Pa. St. 88.

It is evident from the contract itself that the plaintiffs did not regard either of these representations as material, and that they did not rely upon them. They could have protected themselves against both of the contingencies covered by the representations by their contract. They were by the terms of the agreement to have a fixed sum per cubic yard for the work. Therefore the amount of earth necessary to be moved in order to complete the work was immaterial, except that they were required to have the same completed within a certain time or forfeit a part of their compensation. They could easily have guarded against this by providing that if the work overran the quantity named a longer time should be allowed them. As to the representation that the material was of a kind that would be easily worked, they could have protected themselves by providing that for that class of work they should have 12 cents per cubic yard, and for more difficult or expensive material to handle a greater sum. To have inserted such provisions in the contract would have been but an act of common prudence. If they had regarded these matters as material and contracted with reference to them, they would no doubt have been inserted.

Treating these as a part of the negotiations leading up to and forming the basis of the contract, we must presume that the entire negotiations of the parties were included in the written contract as executed, and so presuming, we must hold that they were bound to move the earth contracted to be handled, and to do it within the time named, without reference to its quantity or quality. Civil Code, § 1625; Pickering v. Dowson, 4 Taunt, 779. This was their contract. Treating them as mere representations made to induce the making of the contract, the contract itself furnishes sufficient evidence of the fact that they were not relied upon, and were not regarded by the plaintiffs as material. Besides, so far as both the quantity and quality of the material were concerned, the complaint shows a waiver on the part of the plaintiffs of the right to contest the contract on that ground. They did not stop work when they found the material to have been different from the kind represented, but kept on with the work long after such discovery. Nor did they stop work when they had handled 350,000 cubic yards of earth. This shows that they must have been willing to handle the kind of material they found, and in a greater quantity than the defendant had represented to be necessary, at the price named in their contract. Having continued on, after they must have known that the alleged representations were fraudulent, we must presume that they were willing to and did waive the fraud, with the hope, we suppose, of again finding a soft spot of earth. Having taken this risk, and made the defendant liable for the work done, after they discovered the alleged fraud, at the contract price, it was then too late to recover on the ground that such representations had been fraudulently made. Blen v. Mining Co., 20 Cal. 602, 614; Railroad Co. v. Row, 24 Wend. 74; Masson v. Bovet, 1 Denio, 69. For these reasons the complaint was bad, and the demurrer to it was properly sustained. Judgment affirmed.

I concur: Fox, J.

PATERSON, J. I concur. It is clear that the plaintiffs did not rely upon any statement as to the number of cubic yards which would be required in the construction of the levee. The contract itself shows that the dimensions of the levee were subject to the direction of the engineer. It provides: "The levee will be formed in layers of such uniform depth, and the materials disposed of and distributed in such manner, as the engineer may direct. * * * The levee is to be built six feet wide on top, unless otherwise directed, with slopes of four horizontal to one vertical on the inside." The other subject is well disposed of by Mr. Justice WORKS in holding that, so far as the quality of the material was concerned, it is clear that the plaintiff cannot complain. The complaint charges that the defendant represented to plaintiffs that it had made a careful investigation, and fully informed itself of the character of said material; that this representation was made with the intent to induce plaintiffs to enter into the contract, and that they were induced by the representations to abstain from examining the premises. Under these circumstances, I think, the plaintiffs would have had a cause of action against the defendants if they had stopped work and rescinded the contract promptly when they found the material was different in kind from that which was represented. This they did not do, and they must be held to have been willing to excavate the kind of material they found in a greater quantity than the defendant had represented to be necessary. Having continued on, it must be conclusively presumed that they did so at their own risk.

(81 Cal. 214)

TURNER v. REYNOLDS. (No. 12,151.)

(*Supreme Court of California.* Nov. 19, 1889.)

VENDOR AND VENDEE—ACTION FOR MONEY PAID—DEDICATION—INTEREST.

1. In an action to recover money paid on a contract for land, the complaint alleged that the land had been dedicated to the public as a street by deed. *Held*, that the ultimate fact to be determined was whether there had been a valid dedication, and it was unnecessary to find that it had been by deed.

2. Plaintiff is entitled to interest on the money from the time its return was demanded after failure of defendant to deliver a valid deed, without regard to subsequent demands for a deed.

3. Money expended by plaintiff for an abstract and report on the title to the land was properly allowed as damages, within Civil Code Cal. § 3306, which provides that the damages for breach of a contract to convey land shall include "the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon."

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Thos. F. Barry, for appellant. *J. M. Wood*, for respondent.

BELCHER, C. C. This is an appeal by the defendant from a judgment in favor of the plaintiff, and from an order denying a new trial. The judgment was rendered on the 14th day of June, 1886, the order denying a new trial was entered on the 2d day of December, 1886, and the notice of appeal was served and filed on the 10th day of February, 1887. On an appeal from a final judgment, an exception to the decision or verdict, on the ground that it is not supported by the evidence, cannot be reviewed, unless the appeal is taken within 60 days after the rendition of the judgment; and an appeal from an order denying a new trial can only be taken within 60 days after the order is entered. Code Civil Proc. § 939.

As the appeal in this case was taken more than 60 days after the rendition of the judgment, and after the order refusing a new trial was entered, the principal point urged by counsel for appellant, viz., that the findings of the court were not justified by the evidence, cannot be considered.

The other points, arising upon the judgment roll, are that the court failed to find upon two material issues, and that it erred in allowing the plaintiff $40 damages. The action was brought to recover the sum of $300, paid by plaintiff to defendant as a deposit to bind the purchase of a lot of land in the city of San Francisco, and also the further sum of $40, paid by plaintiff for an abstract and report on the title to the lot. The defendant gave plaintiff a written agreement for the sale of the lot, providing that 12 days should be allowed for an examination of the title, and that if the title should not prove to be valid the deposit should be returned. The complaint alleges that "defendant failed, within said twelve days, and for a great many days thereafter, to make or pass a valid title to said land to this plaintiff, and has so failed up to this day, though the same has been by plaintiff often demanded; that defendant could not make or pass a valid title to said land for the reason that the seller had not title to the westerly twenty feet thereof, which had been dedicated by deed, as disclosed by a search of the title thereto, as a public street, and the same, at the time of said contract to sell, was actually used as a public street, and is now so used;" and that "plaintiff expended $40 in and about said matter for an abstract and report on the title to said land." The answer to these allegations was a general denial.

The court, among other things, found: "(5) That on or about the twelfth day after the date of said contract plaintiff objected to said title for the reason that defendant had not title to the westerly twenty feet of said land, for that the same had been dedicated, and at the time of said contract to sell was actually used, as a public street, and thereupon demanded the return of said deposit. (6) That at said time said twenty feet of said land was used and dedicated as a public street. (7) That the defendant never tendered to plaintiff a good or a sufficient deed or deeds of conveyance, transferring or conveying to plaintiff a valid or perfect title to said land, and could not do so." "(9) That defendant has utterly failed hitherto to make, or pass, or render any valid title to said lands to said plaintiff, and could not have made or passed such title. (10) That plaintiff expended $40 in and about said matter * * * for an abstract and report on the title to said land."

It is claimed that there is no finding as to whether there was a dedication by deed of a public street through the land in controversy, and that this was a material issue. We think the finding sufficient.

The question to be determined was, had there been a valid dedication of a portion of the lot to the use of the public as a street? This was the ultimate fact, and, under our system, ultimate facts only need be alleged or found.

It is also claimed that there is no finding as to whether the plaintiff often demanded a conveyance after the 12 days provided in the contract had expired; and that this was a material issue, because it affected the time from which interest should be charged. We see nothing in this point. Under the facts found, plaintiff was evidently entitled to claim and receive interest on her deposit from the time she demanded, and defendant refused, its return.

It is objected that the findings do not support the judgment in so far as it awards the plaintiff $40 damages. This objection is met by section 3306 of the Civil Code, which fixes the rule of damages in cases like this, and, among other things, allows "the expenses properly incurred in examining the title and preparing the necessary papers, with interest thereon."

We advise that the appeal from the order denying a new trial be dismissed, and that the judgment be affirmed.

We concur: **HAYNE, C.; FOOTE, C.**

PER CURIAM. For the reasons given in the foregoing opinion the appeal from the order denying a new trial is dismissed, and the judgment is affirmed.

(81 Cal. 163)

In re ADAMS.

(*Supreme Court of California.* Nov. 8, 1889.)

STAY OF EXECUTION—CERTIFICATE OF PROBABLE CAUSE.

Where, for the purpose of staying execution of a judgment of conviction pending an appeal, application is made to the judge of a lower court, as provided by Pen. Code Cal. § 1243, for a certificate that there is probable cause for the appeal, such certificate should be granted if the judge thinks that the case presented is debatable,—if it is a case in which there may be an honest difference of opinion,—and not simply a case that is vexatious and frivolous.

In bank. Application for a writ of probable cause for appeal from superior court, San Bernardino county; J. L. CAMPBELL, Judge.

Hargrave & Bledsoe and *Harris & Gregg*, for petitioner. *H. Connor*, Dist. Atty., for the People.

BEATTY, C. J. When this application was originally presented the following opinion and order were filed: "In the matter of Horace Adams. The petitioner, having been convicted in the superior court of manslaughter, has appealed, or is about to appeal, to the supreme court. The judge of the superior court refuses to certify that in his opinion there is probable cause for the appeal, and the defendant, for the purpose of obtaining a stay of proceedings upon the judgment pending his appeal, has applied to me for a certificate of probable cause, pursuant to the provisions of section 1243 of the Penal Code. The application is made without any previous notice to the district attorney, and is based upon a certified transcript of the short-hand reporter's notes of the trial, and copies, certified by the county clerk, of certain instructions said to have been given and refused by the superior judge. There is no rule, and, so far as I can learn, there has been no uniform practice, with reference to proceedings in cases arising under this section of the Code. Sometimes the justice to whom the application has been presented has required the petitioner to give notice of the hearing, and to produce a settled bill of exceptions in support of his petition, and sometimes these requirements have been dispensed with. I think it is better that there should be a settled and uniform practice in these cases, and that the safer course is to require notice to the district attorney, and the production of a settled bill of exceptions, or a properly authenticated copy, in order that the people may have an opportunity to be heard in opposition to the petition, and that the justice acting in the matter may have before him an authentic record of the case as it will be presented to the supreme court. The only inconvenience that could arise from these requirements is that in case of delay in the settlement of the bill of exceptions a defendant might be deprived of the benefit of the statute by being sent to the state-prison before his petition could be heard; but it is to be presumed that in such cases the superior court would, if the defendant exercised proper diligence in the presentation of his bill of exceptions, grant a sufficient temporary stay of proceedings. If that court failed or refused unreasonably to grant such stay, it might be granted by a justice of this court. The power to do so is clearly incidental to the power to act upon the petition, for otherwise the statute could not, in many instances, have the operation it was evidently intended to have, viz., to preserve defendants in criminal cases from the disgrace and ignominy of imprisonment among convicts so long as the legality of their conviction remains open to serious question. Upon these considerations I have concluded to make the following order in the present case: Monday, the 21st day of October, at 10 o'clock A. M., at the supreme court chambers at Los Angeles, is fixed as the time and place of hearing this application. The petitioner will give at least five days' notice to the district attorney of said hearing, and will produce thereat a settled bill of exceptions, or a properly certified copy. In the mean time, and until otherwise ordered, all proceedings against the petitioner under said judgment are stayed. W. H. BEATTY, Chief Justice, Supreme Court."

The petitioner having, in compliance with said order, given the required notice to the district attorney, and produced a record of his conviction, including a settled statement of his exceptions, the question is now to be decided whether he is entitled to a certificate that there is "probable cause" for his appeal. It is not required that in matters of this kind any formal statement in writing of the grounds of our decision should be made; but the frequency with which these applications are denied by the judges of the superior court, when they ought to be granted, and the serious interruption to the business of this court caused by their renewal here, seem to demand an expression of our views as to the proper construction of section 1243 of the Penal Code, and the proper practice under it. Section 1243 reads as follows: "An appeal to the supreme court from a judgment of conviction stays the execution of the judgment in all capital cases, and in all other cases, upon filing with the clerk of the court in which the conviction was had a certificate of the judge of such court, or of a justice of the supreme court, that, in his opinion, there is probable cause for the appeal, but not otherwise."

It would seem that, notwithstanding what has been said by this court respecting this and cognate provisions of the statute, the opinion must obtain to some extent that the expression "probable cause for the appeal" is the equivalent of "probable ground for reversal of the judgment," and consequently that the superior judge, who has overruled the defendant's motion in arrest of judgment, or for a new trial, cannot, without stultifying himself, grant a certificate of probable cause. If it were true that there is no probable cause for an appeal except in a case where the judgment is probably erroneous, it would necessarily involve self-stultification for a judge, who, by denying a new trial and pronouncing sentence, has solemnly affirmed his belief in the validity of the judgment, to make a certificate implying that in his opinion the judgment ought to be reversed. The palpable absurdity of such a proceeding sufficiently demonstrates that the legislature could never have intended to require it,—demonstrates, in other words, that the certificate which the superior judges are required to grant in proper cases cannot have the meaning supposed. What, then, is meant by the expression, "probable cause for the appeal?" We answer, as we have answered heretofore, it means only that there is presented a case that is debatable; a case that is not clearly and palpably frivolous and vexatious; a case upon which there may be an honest difference of opinion. People v. Valencia, 45 Cal. 305; Ex parte Hoge, 48 Cal. 6. This is all that is required. It matters not that the judge before whom the prisoner has been tried may be satisfied that his conviction is in every respect regular and valid, (which, indeed, must always be the case before there can arise any necessity for an appeal;) he is, nevertheless, bound to grant a certificate of probable cause, and stay the execution pending the appeal, unless the case is so clear as to admit of no rational doubt or serious discussion.

The Case of ex parte Hoge, above cited, was an application for admission to bail pending appeal, the giving of bail being, as the law then stood, the only mode of staying execution, except in capital cases, and all that was said by Chief Justice WALLACE in deciding that case is, in the changed condition of the law, fully applicable here. We quote, as expressive of our views, the following portion of his opinion: "The right to appeal to the supreme court is guarantied by the constitution to the prisoner, and is as sacred as the right of trial by jury. It is one of the means the law has provided to determine the question of his guilt or innocence. Upon such an appeal, the ultimate question is nearly always as to the validity of the judgment under which the prisoner is to suffer; and it is certainly not consonant to our ideas of justice, if it can be prevented by legal means, that, even while the question of guilt or innocence is yet being agitated in the form of an appeal, the prisoner should be undergoing the very punishment, and suffering the very infamy, which it was the lawful purpose of the appeal to avert. It would be somewhat akin to a practice of punishing the accused for his alleged offense while the jury was yet deliberating upon the verdict." This language furnishes a guide to every judge to whom an application like this is presented. He should give the prisoner the benefit of every doubt, exercising his discretion liberally in certifying to the probable cause for the appeal, whenever a case is presented upon which candid minds might rationally differ. This view is sustained, not only by considerations of justice, but also by those of convenience and economy. The only result of a stay of execution is that the defendant, during the short time that his appeal is pending, remains a prisoner in the county jail, instead of being transported to the penitentiary. If the judgment is affirmed, the time he has spent in jail is so much added to the term of his imprisonment, and this fact will have a tendency to prevent applications for a stay in plain cases. A criminal of hardened character, to whom the mere ignominy of imprisonment among convicts has no terrors, will generally prefer to go to the state-prison pending his appeal, in order that the time of his sentence may be running, and that he may have the advantage of it in case the judgment against him is affirmed; and the plainer the case against him the stronger will be the operation of this motive. In every case, therefore, in which a stay of proceedings is demanded, it may safely be assumed that the stigma of imprisonment in the state-prison, and the forced association with the class of criminals there confined, is in his estimation the worst part of the punishment to which the petitioner has been condemned. To such a person the privilege of a stay of proceedings, pending the exercise of his constitutional right of appeal, is of inestimable value, and it ought never to be denied, except in a case in which it is certain no error can be found. If a stay is granted, and the judgment afterwards affirmed, no wrong has been done, and nothing has been lost to the public beyond the trifling expense of keeping the prisoner for a few months in the county jail, while he, as we have seen, has had so much added to the term of his imprisonment. If, on the other hand, a stay of execution is denied, and the judgment is reversed, (as may well happen in any debatable case,) not only has the public been subjected to the useless expense of transporting the prisoner to and from the state-prison, but upon him has been inflicted a wrong which the state has no power to redress.

For all these reasons we hope that hereafter the superior judges to whom these applications are made will, before denying them, seriously consider, not merely the question whether, upon mature consideration and after argument on the part of the people, all their rulings ought to be affirmed in the supreme court, but whether the case is so clear that no judge could fail, on a mere inspection of the record, and without argument, to pronounce the appeal frivolous.

It is proper to add that the foregoing remarks have no peculiar application to this particular case. They have been called forth by the pendency of a number of such petitions to the justices of this court, and their increasing frequency, resulting, as we believe, from a misconception of the meaning of the statute. It only remains to add that in this case the petitioner's bill of exceptions presents several questions which I am not prepared to say, in advance of argument, are wholly without merit, and therefore I shall grant the certificate prayed for.

We concur: MCFARLAND, J.; FOX, J.; PATERSON, J.; WORKS, J.; THORNTON, J.; SHARPSTEIN, J.

(80 Cal. 160)

PEOPLE v. BUSHTON. (No. 20,517.)

(*Supreme Court of California.* Aug. 28, 1889.)

On rehearing. No majority opinion filed. Dissenting opinion.

For statement and opinion on former hearing, see ante, 127.

THORNTON, J. I dissent from the judgment in this case and from the order denying a rehearing. I think there was no error in the instructions given in the case. They accord with the ruling in People v. Hong Ah Duck, 61 Cal. 387, and People v. Raten, 63 Cal. 421.

(80 Cal. 323)

SMITH v. SMITH. (No. 12,599.)

(*Supreme Court of California.* Sept. 26, 1889.)

In bank. On petition for rehearing. For opinion on appeal, see 21 Pac. Rep. 4. For opinion on rehearing, see ante, 186.

J. K. Law and *E. Jackman*, for appellant. *E. A. Rodgers, J. C. Campbell, Thos. Gardner*, and *C. H. Clement*, for respondent.

BEATTY, C. J. A rehearing herein is denied, but the former judgment of this court is modified so far as to reverse the judgment of the superior court as to the costs taxed therein, leaving said costs to abide the ultimate determination of the action.

Symons v. Bunnell *et al.* (No. 12,558.)

(*Supreme Court of California.* Sept. 28, 1889.)

For statement of case and former opinions, see 20 Pac. Rep. 859, and ante, 193.

J. M. Kalloch, (*M. G. Cobb* and *Theodore Bradley*, of counsel,) for appellants. *F. D. & G. W. Nicol*, (*P. W. Bennett*, of counsel,) for respondent.

Per Curiam. The motion of appellants to be restored to all property described in the complaint, and all rights lost by the judgment entered herein by the superior court of Tuolumne county, came on regularly to be heard. Warren Olney appeared for the motion, and F. D. Nicol in opposition thereto; and, the motion having been submitted upon the record herein, and affidavits filed by the respective parties, it is hereby ordered that the judgment of this court heretofore rendered be, and the same is hereby, modified so as to read as follows: The judgment and order are reversed, and the cause remanded for a new trial, and upon filing the *remittitur* herein the superior court of Tuolumne county is directed to restore to the appellants the possession of the property described in the complaint, and all rights lost by the said judgment.

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81 Cal. 199

In re Sylvester. (No. 20,566.)

(*Supreme Court of California.* Nov. 9, 1889.)

Criminal Law—Sentence.

Under an ordinance providing that any person carrying concealed weapons shall be fined or imprisoned in the city prison, or both fined and imprisoned, a judgment that an offender pay a fine, and, in case of its non-payment, be imprisoned in the county jail, is void as to the imprisonment, as the ordinance does not authorize imprisonment in the county jail.

In bank. Application for writ of *habeas corpus*.

H. W. Bradley and *Ford & Burnell*, for petitioner. *George A. Johnson*, Atty. Gen., and *J. N. Gillitt*, for the People.

McFarland, J. The petitioner, James Sylvester, was convicted in the police court of the city of Eureka of a violation of ordinance No. 55, ordained by the common council of that city, and sentenced to pay a fine of $50, and, in case the fine was not paid, to be imprisoned in the county jail of Humboldt county in the proportion of one day for each dollar of the fine; and he was, under the judgment, delivered to the custody of the sheriff. The said ordinance prohibits the carrying of concealed weapons within the city limits, and provides that any person violating it "shall be fined in a sum not to exceed $100, or imprisonment in the city prison not to exceed ten days, or by both such fine and imprisonment." Petitioner relies upon several grounds for his release, but it is necessary to notice only one. Whether or not, for a mere violation of a city ordinance, the common council could have legally provided for a judgment imprisoning petitioner in the county jail, an institution controlled by the supervisors, where additional penalties of hard labor, etc., were imposed, presents a question not necessary to be here determined. There was no attempt to exercise such power. The ordinance provided for imprisonment in the city prison, and it is clear that the judgment of imprisonment in the county jail was a nullity. The petitioner is discharged from custody.

We concur: Beatty, C. J.; Paterson, J.; Sharpstein, J.; Fox, J.; Works, J.; Thornton, J.

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81 Cal. 205

Manning v. Franklin. (No. 13,418.)

(*Supreme Court of California.* Nov. 15, 1889.)

Leases—Statute of Frauds.

Plaintiff, an old man, owned a lot of ground, and entered into a verbal agreement with defendant that if the latter would erect a house on the ground, pay half the taxes, etc., and take care of plaintiff, he might occupy said house during the natural life of plaintiff. Defendant complied with the terms of the agreement. *Held*, that part performance of the contract by defendant took the verbal agreement out of the statute of frauds, and defendant acquired a life-estate in the property.

Department 1. Appeal from superior court, Los Angeles county; Lucien Shaw, Judge.

Smith, Howard & Smith and *Thos. L. Winder*, for appellant. *Barclay, Wilson & Carpenter*, for respondent.

Works, J. This is an action of unlawful detainer. The court finds the facts tending to show under what claim of right the defendant was in possession as follows: "That in the month of February, A. D. 1886, the house and lot of the defendant having been washed away by the Los Angeles river, that plaintiff, then residing upon the south half of lot 1, block V, of the Alviso tract, in the city of Los Angeles, represented to the defendant that he (plaintiff) was solitary, old, and infirm, and was liable at any time to attacks of sickness, and proposed to defendant that he (defendant) should erect a dwelling-house on a part of said lot, and should reside with his family therein, and agreed with defendant that, in consideration of the erection of such building, and the payment of one-half the taxes (state, county, and municipal) that might thereafter, and during the continuance of said agreement, be levied and assessed upon said half of lot 1, and of one-half of the charge for water on said premises during said agreement, and in consideration that defendant should care for plaintiff in sickness, he (defendant) might occupy said house, erected by defendant on said premises, during the natural life of plaintiff; that said agreement was verbal, and never reduced to writing." The court also found that the defendant had complied with the terms of the contract on his part, and constructed a dwelling-house on the property, and was residing thereon. The plaintiff, in his complaint, treats the defendant as a tenant at will, and alleges that he had given him notice to quit, as required in such cases, and the court so finds. The defendant contends that by the contract, if in writing, he would have been entitled to a life-estate in the lands, and that by taking possession, and making the improvements, the verbal contract was taken out of the statute of frauds, and had the same effect. The court below found for the plaintiff, and gave judgment accordingly. The defendant appeals on the judgment roll.

There is no question as to the making of the contract and its performance. There is some ambiguity in one of the findings as to the care of the plaintiff by the defendant in times of the former's sickness, but we regard it as sufficient to show a compliance with the contract in that respect. The point made and relied upon is that the contract was void. As we understand the position of counsel for respondent, it is that the contract was a lease, and as such was void under sections 1091 and 1624 of the Civil Code, and sections 1971 and 1973 of the Code of Civil Procedure; that the part performance found could not take the case out of the statute of frauds; and that a specific performance could not be enforced because a part of the consideration on the part of the defendant was personal services to be rendered in the future. In our judgment neither of the last two questions arise in the case. This is in no sense a lease of the property, but a sale of a life-estate therein. There is no attempt to compel a specific performance of the contract, and therefore the question whether a contract, the consideration of which is personal services, could be specifically enforced, does not arise. It is sufficient to say that up to the present time the personal services have been fully rendered and performed. The contract, being in parol, was void, as counsel contend. But if this were an action to enforce the specific performance of an agreement to convey there could be no doubt that there was such a part performance as would entitle the plaintiff to such a remedy. Burlingame v. Rowland, 77 Cal. 315, 19 Pac. Rep. 526; McCarger v. Rood, 47 Cal. 138. And the fact that in this case there was no agreement for a future conveyance, but a present verbal contract, authorizing the defendant to take and hold possession, can make no difference, under the facts as found by the court. The same doctrine as to the effect of part performance which would entitle the defendant to a specific performance in a proper case, must, for the same reasons, and on like principles, protect him in his possession under the verbal contract so long as he complies with its terms. To hold otherwise would make the statute of frauds a means of perpetrating a plain and palpable wrong upon the defendant. The very object of the exception of the statute, that where the contract has been so far performed that the parties cannot be placed *in statu quo*,—for example, where the vendee has gone into possession under the contract, and if the contract is declared void would be a trespasser,—is to prevent such a result. In this case the defendant has done more than to take possession. He has made permanent improvements on the land which would fall to the plaintiff if he should recover. We think that the court erred in its conclusions of law from the facts found. The judgment is reversed, with instructions to the court below to conform its conclusions of law to this opinion, and render judgment on the findings in favor of the defendant.

We concur: FOX, J.; PATERSON, J.

(81 Cal. 217)

GLEASON *et al.* v. SPRAY *et al.* (No. 13,041.)

(*Supreme Court of California.* Nov. 19, 1889.)

HOMESTEAD—MORTGAGE—ABANDONMENT.

Civil Code Cal. § 1242, provides that the homestead of a married person cannot be conveyed or incumbered unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both the husband and wife. Section 1243 provides that such homestead can be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged by the husband and wife. Section 1244 provides that such declaration of abandonment is effectual only from the time it is filed in the office in which the homestead is recorded. *Held*, that a mortgage of a homestead executed by the husband alone is void from its inception, and it is of no avail that the homestead is afterwards abandoned.

Commissioners' decision. In bank. Appeal from superior court, Modoc county. G. F. HARRIS, Judge.

Spencer & Raker, for appellants. *Goodwin & Jenks, Ewing & Claflin*, and *J. J. May*, for respondents.

GIBSON, C. Ejectment to recover certain lots in the town of Alturas, Modoc county. Trial before the court, without a jury. Judgment for defendants; from which, and an order denying a new trial, plaintiffs appeal. The court found and adjudged that the principal instrument, in the form of a deed absolute, relied upon herein for a recovery, was intended and accepted as a mortgage; and that the same, having been executed by the husband alone while the property in controversy was a homestead, was void, and of no effect. The defendant J. D. Spray, while the owner of and residing with his wife upon the property, on October 20, 1884, made, acknowledged, and caused to be recorded a declaration of homestead embracing the same property. And on April 7, 1885, while the homestead thus created was still subsisting, he (Spray) executed and delivered to George M. Gleason, one of the plaintiffs, a general warranty deed, absolute in form, embracing the homestead, with other real property. This deed the court found was intended as a mortgage. Thereafter, on May 25, 1885, the defendants, Spray and wife, by a joint declaration to that effect, duly filed in the proper office, abandoned the homestead. On May 26, 1886, George M. Gleason, by a deed of gift, conveyed to Julia, his wife, the same property described in Spray's deed to him.

The first question arising on these facts is as to whether the deed of Spray to Gleason was absolutely void, or only inoperative against the homestead while it existed as such. It does not clearly appear whether the property in question was the separate property of Spray or the community property of himself and wife; but, whatever its character may have been, it was, by the declaration of homestead, converted into the joint property of both. Civil Code, § 1265; Burkett v. Burkett, 20 Pac. Rep. 715. "The homestead of a married person cannot be conveyed or incumbered, unless the instrument by which it is conveyed or incumbered is executed and acknowledged by both husband and wife." Civil Code, § 1242. In the homestead act of 1860, as amended in 1862 (St. 1862, § 2, p. 519) a similar provision is found; it reads as follows:

"No alienation, sale, conveyance, mortgage, or other lien of or upon the homestead property, shall be valid or effectual for any purpose whatever, unless the same be executed by the owner thereof, and be executed and acknowledged by the wife if the owner be married, and the wife be a resident of this state, in the same manner as provided by law in case of the conveyance by her of her separate and real property." Under this provision it was held in Barber v. Babel, 36 Cal. 11, that a mortgage of the homestead property executed by the husband alone, for the purpose of reviving a prior mortgage on the same property executed before the homestead was selected, was void and of no effect. Although the wording of the code provision is different from that of the homestead act, above set forth, we think both provisions are the same in effect, and designed to protect the wife in the security of a home by preventing the alienation of the homestead in any mode other than that prescribed by law. Barber v. Babel, supra; Burkett v. Burkett, supra. When a statute says an act cannot be done unless performed in a certain mode, the inhibition against performing it in any other way would seem, in view of the word "cannot," meaning an absence of power, to be just as strong and complete as when the statute says that an act, unless done in a certain mode, shall not be valid for any purpose. An examination of the other two sections of the Civil Code bearing upon the alienation and abandonment of homesteads convinces us that the construction given in Barber v. Babel to the provisions of the homestead act is correct, and should be applied to section 1242 of the Civil Code. Thus, by the provisions of section 1243, "a homestead can be abandoned only by a declaration of abandonment, or a grant thereof executed and acknowledged (1) by the husband and wife, if the claimant is married; (2) by the claimant, if unmarried,"—and, by section 1244, "a declaration of abandonment is effectual only from the time it is filed in the office in which the homestead is recorded." These three sections are *in pari materia*, and must be read together, and effect given to each. Sections 1242 and 1243 prescribe how homesteads may be alienated or incumbered, and the last-mentioned section, in addition thereto, how they may be abandoned, and section 1244 the time from which the abandonment becomes effectual. This last section, it is to be observed, fixes the time when the homestead character of the property is extinguished by abandonment, and does not give the abandonment any retroactive operation. The provision relating to abandonment in the homestead act of 1860, as amended in 1862, was that the homestead would be deemed abandoned upon the declaration to that effect being filed. But in section 1244 the words "from the time" must have been used for some purpose, and with the intention of preventing an instrument made by the husband alone, during the existence of the homestead and designed to affect it, from taking effect upon the abandonment of the homestead. By so construing those words, the three sections, taken together, erect a complete barrier around the homestead, for the protection of it in favor of the wife, against the individual assaults of the husband upon it. If, however, an abandonment under section 1244 would, as contended for by the appellants in this case, relate back to the time when the homestead was created, so as to render effectual any attempt of the husband alone to alienate or incumber it while it was a homestead, then the restrictions in sections 1242 and 1243 would be rendered nugatory; and the husband would be enabled, if so disposed, to fraudulently destroy the homestead by first conveying it to a stranger, without the knowledge of his wife, and then give vitality to his deed by obtaining her joinder in a declaration of abandonment upon some false pretext. When Gleason took the deed embracing the homestead from Spray, the declaration of homestead, unaffected by any abandonment, stood of record. He was therefore charged with notice of the existence of the homestead. And, as he took the deed, embracing the homestead property, without the signature and acknowledgment of Spray's wife, the deed, as to such homestead property, was void. It is therefore unnecessary to inquire whether the instrument was intended as a deed or mortgage. The judgment and order appealed from should, therefore, be affirmed.

I concur: BELCHER, C. C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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81 Cal. 202

DORLAND v. HANSON. (No. 12,399.)

(*Supreme Court of California.* Nov. 15, 1889.)

JUDGMENT—EXECUTION—ORDER OF SALE—VACATING ORDER.

1. A decree foreclosing a street assessment is a judgment, under the provisions of Code Civil Proc. Cal. § 681, authorizing the issuance of an execution thereon within five years after the decree is entered.

2. Where an order authorizing the issuance of an execution is made by one department of the court below, an order vacating the same may be made by another department of the same court.

3. Where the court below has, without authority, made an order authorizing the issuance of an execution, the same court may, on motion, vacate and set aside said execution or a sale made under it, though the order is appealable.

4. Code Civil Proc. Cal. § 681, requiring execution on a judgment to issue within five years after judgment is entered, applies also to an order of sale.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

J. M. Wood, (*J. C. Bates*, of counsel,) for appellant. *Sullivan & Sullivan*, for respondent.

WORKS, J. The only question in this case is whether or not an execution or order of sale can issue upon a decree foreclosing a street assessment, after five years. The court below held it could not, and set aside and vacated a former order authorizing such writ to issue, and vacating a sale made thereunder. From this order the appellant prosecutes this appeal. Section 681 of the Code of Civil Procedure provides: "The party in whose favor judgment is given may, at any time within five years after the entry thereof, have a writ of execution issued for its enforcement." And section 685 provides: "In all cases other than for the recovery of money the judgment may be enforced or carried into execution after the lapse of five years from the date of its entry, by leave of the court, upon motion, or by judgment for that purpose founded upon supplemental pleadings." The contention of the appellant is that the first of these sections applies solely to personal judgments for the recovery of money, and that a judgment for the foreclosure of a street assessment lien, where there can be no personal judgment, is not within that section, but is covered by section 685, and that, therefore, her execution or order of sale was properly issued by leave of court after five years. We do not so construe these sections. Section 681 must be held to apply to a judgment the object, purpose, and effect of which is to enforce the payment of money, whether the same be a personal judgment against the party indebted, or a decree foreclosing a lien for an amount due. Section 685 was evidently intended to and does apply to judgments requiring the party against whom it is rendered to do some specific act, as, for example, to deliver specific real or personal property. Taking this view of the two sections, we must hold that the order of the court below vacating the order authorizing the issuance of the writ after five years, and vacating the sale made under such writ, was right.

It was claimed in the opening brief of the appellant that the full five years had not run, because during a part of the time the powers of the administrator, whose power and duty it was to cause the writ to be issued, were suspended; but this contention is expressly abandoned in the closing brief, and it is admitted that the suspension of the powers of the administrator could not have the effect of suspending the running of the statute.

The order authorizing the issuance of the execution was made by one department of the court below, and the order vacating the same by another department of the same court, and it is contended that this was erroneous. We see no force in this position. It was the same court acting in each instance, and the fact that the orders were made in different departments is immaterial.

Again, it is said that the order authorizing the issuance of the writ was an appealable order, and could not be attacked in this way. Conceding the order to have been appealable, the execution issued was void, if the court had no authority to order its issuance, and might be attacked by a motion to vacate and set it aside, and the same may be said of the sale made under it. Therefore the only material question was whether the execution and sale should be set aside; and as to the power of the court below to set them aside, conceding the order authorizing the writ to issue to have been an appealable order, we have no doubt.

Counsel attempt to distinguish between an execution and an order of sale, and contend that section 681 is confined in terms to the former, and does not limit the time in which the latter may issue. We think, however, that the difference between the two writs is more in the name than anything else, so far as it affects the question before us, and that section 681 must be held to apply to both. The order appealed from is affirmed.

We concur: FOX, J.; PATERSON, J.

81 Cal. 195

MOORE v. MOORE *et al.* (No. 13,205.)

(*Supreme Court of California.* Nov. 9, 1889.)

ACTION TO RESCIND DEED.

In an action to cancel certain conveyances made by plaintiff to her four step-children, alleged to have been executed while mentally impaired and under undue influence, it was undisputed that the day after the funeral of plaintiff's husband, who had been shot and instantly killed, and while she was deeply shocked and agitated, T., a brother of deceased, who had professed great sympathy and solicitude for her, and several of his relatives, together with an attorney, who had been previously consulted and employed by him, visited her, and advised with her about these instruments; that at this time plaintiff was pregnant, which was known to T.; that she, not knowing that the attorney had been employed by him, had no adviser except these persons, who were all interested in securing all the property of deceased for the children; and that, without consideration, she then executed these instruments, conveying all her interest in her husband's property, worth $47,000. *Held*, that the conveyances should be set aside.

Department 2. Appeal from superior court, Santa Cruz county; PHIL. W. KEYSER, Judge.

Hall & Rodgers and *Olney, Chickering & Thomas*, for appellants. *Charles B. Younger*, for respondent.

MCFARLAND, J. This action was brought to cancel two deeds and a bill of sale made by plaintiff, on the ground of mental impairment, undue influence, etc., at the time of their execution. The findings and judgment were in favor of plaintiff, and defendants appeal from the judgment. Some exceptions were taken to rulings of the court about the admissibility of certain evidence; but these exceptions were afterwards withdrawn. The plea of the statute of limitations was practically disposed of when the case was here before on a demurrer to the complaint. Moore v. Moore, 56 Cal. 89. The complaint set up all the facts upon which the plea of the statute could be based, and this court held that the plea was not good; and, as the court found those facts, upon sufficient evidence, in favor of respondent, we must hold that the defense of the statute of limitations has not been maintained. There is, therefore, only one question—argued elaborately by appellants—to be disposed of, and that is, does the evidence justify the findings and judgment on the real merits of the case? The undisputed facts in the case are so strongly in favor of respondent that the evidence on the disputed facts would have to be very strong in favor of appellants, indeed, to warrant this court in overturning the judgment of the court below. These undisputed facts are as follows: Respondent was married to William H. Moore (now deceased) in the summer of 1871. They resided on a farm of deceased called the "Moore Ranch," situated a short distance from the town of Santa Cruz. At the time of their marriage the deceased was a widower, and had four minor children,—two boys, Frederick W. and Charles, and two girls, Alice and Stella,—who are defendants and appellants herein. Respondent and the deceased lived very happily together, and he was a kind and affectionate husband. She had been a school-teacher, and had no blood relations in that part of the country, and had only a slight acquaintance with any of the adult relatives of deceased. Down to the moment of his death deceased was a man of strong constitution and robust health. He almost daily visited the town of Santa Cruz, and respondent always looked for his return with pleasure. On the 30th day of October, 1871, he went to Santa Cruz, intending to return the same day, as usual. On the afternoon of that day he was shot and instantly killed; and his dead body was immediately brought home to respondent. There is no real attempt to dispute the fact that respondent was deeply shocked and agitated by this sudden and startling calamity although, as might well be expected, there is some conflicting testimony as to the extent of her mental prostration. On the day after the death of deceased, the appellant, Thomas W. Moore, a brother of deceased, visited respondent at her home, and professed great sympathy and solicitude for her in her distress. The body of the deceased was buried on November 1, 1871, and on the afternoon of that day the said Thomas W. Moore and his brother-in-law, J. N. Besse, visited an attorney, at his office in Santa Cruz, and the said Moore then and there advised with the said attorney as to how he could secure all the property of the deceased for his children by the former marriage. The next day after the funeral, or the second day,—that is, the 2d or 3d of November,—the said Thomas W. Moore, accompanied by a brother and two brothers-in-law, and the said attorney, visited respondent, and advised with her about the execution of the written instruments which are the subject of this action. At that time respondent was pregnant with a child begotten by said deceased,—which was afterwards born and is still living,—and this fact was known to all of said visiting parties. Respondent did not then know that said attorney had been employed by said Thomas W. for the purpose aforesaid. Respondent had no independent adviser, and no adviser at all, except said parties, who were all interested in securing all the property of deceased for his said children. Under these circumstances respondent executed the two deeds and the bill of sale set forth in the complaint, by which she conveyed and transferred to the said children, without consideration, all and every part of her right and interest—being one-third—in every dollar's worth of her deceased husband's estate, real and personal. The property was worth at that time $47,000. These facts are undisputed.

The disputed facts—all found by the court in favor of respondent—are mainly about the extent of respondent's prostration, and her ability to know what she was doing, and to act intelligently for herself. Her evidence was to the effect that she was shocked and terrified by the sudden death of her husband, and the manner of it,—the effect being deepened from her condition of pregnancy; that for two successive days and nights she watched and moaned by the side of the dead body, without sleep or nourishment; that for many days her mind was stupefied and disordered, so that she did not know what was right and proper to be done about her affairs; and that she did not read the said documents signed by her, and did not understand their purport or effect. Appellants, on the other hand, introduced testimony tending to show that her mental condition was not as bad as claimed by her, and that she was informed of and knew the character of the instruments signed by her, and that she signed them voluntarily. There was, also, some conflicting testimony about a certain will. The deceased had made a will, before his marriage with respondent, giving all his property to his said children, and respondent testified that she did not know that the subsequent marriage annulled the will, while appellants contend that she was informed and knew of that fact. There is also some conflict as to what was said about the effect which the proposed instruments would have on the interests of the expected child of respondent, although we do not see in the evidence any pretense of information to her that the instruments would convey away from the expected child all right to respondent's one-third of the estate. There was also a conflict of evidence about the purpose of a certain bond, given in relation to a certain life insurance policy. These were about all the material matters about which there are conflicts of evidence.

Considering all the undisputed facts, and particularly the unusual haste with which, and the extraordinary circumstances under which, the respondent was induced to forever give away such large and valuable property rights, we see no good reason to disturb the conclusions at which the lower court arrived.

The judgment is affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

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81 Cal. 190

MONAGHAN v. PACIFIC ROLLING-MILL CO.

(*Supreme Court of California.* Nov. 9, 1889.)

ACTION FOR PERSONAL INJURIES—PLEADING—INSTRUCTIONS—VERDICT—JURY.

1. In an action for personal injuries caused by the alleged careless maintenance of machinery, consisting of an iron rod, with a hook at each end by which it was attached to a chain, which at its lower end was connected with a lever, the whole hanging suspended from a beam, an averment in a complaint "that said machinery and apparatus were then and there unsafe, and the chain aforesaid was not securely fastened, and the hook aforesaid was defective and unfit for the purpose of holding and supporting said chain and lever, and by reason thereof the said chain fell from said hook and down upon the plaintiff," clearly includes a defect in the method by which the rod and chain were attached; the phrase "by reason thereof" not being referable solely to some defect in the texture or strength of the hook.

2. In such case, where the injury occurred while plaintiff, an employe of defendant, whose main work was in the yard outside the building, knowing nothing of the condition of the rod, chains, etc., was engaged, as directed, with one or two other employes, in moving a crane having an arm which projected about a foot and a half beyond the suspended rod and chain, and which it would strike unless the latter were moved out of the way, a verdict for plaintiff is not contrary to an instruction that, if the accident was caused by plaintiff or his co-employes "carelessly or negligently moving the arm of the crane against said suspended rod and chain, the plaintiff cannot re-

cover;" the instruction, when considered in connection with the other instructions, meaning simply that if the machinery and apparatus were safe, and the accident was caused by the careless moving of the crane, the plaintiff cannot recover, and there being no evidence requiring the jury to find that the crane was moved carelessly or negligently.

3. The finding of the jury that the machinery was defective and unsafe is supported by evidence showing that the rod and chain were unfastened, loose jointed, and liable every day to be dislocated by a blow from the crane.

4. It is not such misconduct as will warrant the granting of a new trial for a juror to state to several of the other jurors, during the course of the trial, that if certain precautions had been taken the accident could not have happened, illustrating his meaning with the model used at the trial, as it was the statement of a self-evident fact, which could not have improperly influenced the verdict, and the defendant, knowing of the circumstance at the time of its occurrence, making no objection until after verdict.

Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

T. Z. Blakeman, for appellant. *W. S. Goodfellow* and *Henry Perry*, for respondent.

MCFARLAND, J. This is an action to recover damages for a personal injury. The verdict and judgment were for plaintiff, and defendant appeals from the judgment, and from an order denying a new trial. The main facts of the case are these: The defendant was engaged in the business of rolling railroad iron, and used certain works, machinery, and apparatus for that purpose. Among other things so used was an iron rod, about an inch thick and 14 feet long, with a hook at each end, by which it was attached at each end to a chain, the whole hanging suspended from a beam in the building. The only means of securing the connection between the rod and the chains was the open hook at each end, placed in a ring in the chain. The hooks were not closed or fastened in any way. The lower end of the lower chain is connected with a lever, and the whole apparatus is used for handling heavy bars of railroad iron. Near this apparatus is a crane, consisting of a perpendicular shaft turning upon a pivot, with an arm or jib projecting from the shaft at right angles, and about 12 feet from the ground. The crane is used to change the rolls, dies, etc., and, as it swings around the arm, projects about a foot and a half beyond the said suspended rod and chain, and will strike the latter, unless it is swung out of the way. Plaintiff was an employe of defendant. His main work was in the yard outside of the building, and he knew nothing of the condition of the rod, chains, etc. On August 8, 1882, he was ordered to do some work inside of the building; and while he, with one or two other employes, were moving the crane, as directed to do, the outer end of the arm caught the suspended rod, and pushed it out of the upper ring, when it fell and injured plaintiff. The jury returned a verdict of $1,500. The gist of the action was the careless maintenance of the machinery, as above described.

1. Appellant contends that the proof does not sustain the cause of action alleged in the complaint, because, as he contends, the alleged cause of the injury was a defective hook, and the evidence does not show a defective hook. But we think that if the maintenance of the rod, hooks, and chains, as above described, was carelessness for which appellant was liable, then the complaint was sufficient to include that cause of action. The complaint, after describing the apparatus "consisting of a high frame, to which was fastened a hook, and from said hook a heavy chain," etc., avers "that said machinery and apparatus were then and there unsafe, and the chain aforesaid was not securely fastened, and the hook aforesaid was defective and unfit for the purpose of holding and supporting said chain and lever; and by reason thereof the said chain fell from said hook, and down upon the plaintiff." Appellant contends that the phrase "by reason thereof" should be referred solely to some defect in the texture or strength of the hook. We think, however, that the averment clearly includes a defect in the method by which the rod and chain were attached.

2. Appellant argues that the evidence was insufficient to prove that the machinery was defective or unsafe. But it would be going beyond the province of this court to hold that the jury erred in finding this unfastened, loose-jointed skeleton of rod and chain, liable every day to be dislocated by the blow of a long-armed crane, unsafe. It is argued that it had hung suspended there for some years without accident; but that circumstance is only a matter of wonderment, and is an instance of how good luck will sometimes protect carelessness for long periods.

3. The most grave point made by appellant is that the verdict was against the second instruction asked by appellant, and given by the court, to the effect that if the accident was caused by plaintiff, or his co-employes, "carelessly or negligently moving the arm of the crane against said suspended rod and chain, then plaintiff cannot recover in this action." But, in the first place, there was no evidence requiring the jury to find that the crane was moved "carelessly or negligently;" and, in the second place, the said instruction must be considered in connection with all the other instructions, and, considered thus together, they mean, simply, that if the machinery and apparatus were not unsafe, but the accident was caused by the careless moving of the crane, then plaintiff cannot recover.

4. There was no evidence calling upon the jury to find respondent guilty of contributory negligence.

5. There is a point made on the misconduct of the jury, the point being that during the course of the trial one of the jurors stated to several of the other jurors "that if the hook at the top of the suspended rod had been entirely closed or lashed the accident could not have happened," and "illustrated to them with the model used during the trial." It is, of course, improper for jurors to talk with each other about a case before it is finally submitted; but here all that was said is fully disclosed, and it is apparent that this statement of a self-evident fact could not have improperly influenced the verdict. Moreover, this circumstance was known to appellant at the time of its occurrence, and no objection was

made; and he could not thus remain quiet and take the chance of a favorable verdict, and keep this point in reserve. 1 Hayne, New Trial & App. § 27, and cases there cited.

There are no other points requiring notice. Judgment and order affirmed.

We concur: SHARPSTEIN, J.; THORNTON, J.

81 Cal. 200

PEOPLE v. BARTMAN. (No. 20,500.)

(*Supreme Court of California.* Nov. 9, 1889.)

PERJURY—EVIDENCE.

In a trial for perjury the evidence showed that defendant, in connection with a bail-bond, had sworn to an affidavit which read "that he is worth the sum of $300, exclusive of property exempt from execution, and over and above all debts and liabilities. Five lots in block 210, Alameda county" *Held* error to admit evidence that defendant was not the owner of these lots, as the words "five lots in block 210, Alameda county," by themselves, assert nothing, not constituting a complete sentence, and having no grammatical or logical connection with the rest of the affidavit.

In bank. Appeal from superior court, city and county of San Francisco; D. J. MURPHY, Judge.

Haggin & Dibble, for appellant. *George A. Johnson*, Atty. Gen., for the People.

BEATTY, C. J. The defendant appeals from a judgment convicting him of the crime of perjury. The indictment charged in substance that, one Maggie Farley having been arrested for a misdemeanor, and duly admitted to bail in the sum of $300, the defendant procured her discharge from custody by executing and delivering a bail-bond, to which was appended an affidavit, by which he made oath that he was a freeholder of the state of California, worth $300 over and above his debts and liabilities, exclusive of property exempt from execution, and that his property consisted of five lots in block 210, Alameda county; whereas he was not a freeholder, not worth $300, and not the owner of said lots.

The only evidence offered at the trial as to what the defendant did swear to in connection with said bail-bond was the affidavit itself, which reads as follows: "State of California, city and county of San Francisco—ss. J. A. Bartman, being duly sworn, deposes and says that he is a resident of the city and county of San Francisco, state of California, and a freeholder in said state of California, and that he is worth the sum of $300, exclusive of property exempt from execution, and over and above all debts and liabilities. Five lots in block 210, Alameda county. JOHN A. BARTMAN. Subscribed and sworn to," etc. No attempt was made to prove that the defendant was not a freeholder, or that he was not worth $300 at the date of said affidavit, but evidence was offered tending to show that he did not own any part of any block 210, in Alameda county. To the introduction of this evidence the defendant objected, upon the ground that it had not been shown that he ever swore that he owned any such property. His objection was overruled, and the evidence admitted. By this ruling, and by various other rulings in giving and refusing instructions, to all of which the defendant duly excepted, the court construed the affidavit above quoted as containing a sworn averment that the defendant was the owner of five lots in block 210, Alameda county. These rulings were, in our opinion, erroneous. The affidavit itself contains no such statement. The words, "five lots in block 210, Alameda county," by themselves assert nothing. They do not constitute a complete sentence, and they have no grammatical or logical connection with the rest of the affidavit. The mere surmise that the defendant, or the person who drew the affidavit, intended to have it understood that he owned said lots is not sufficient. The language used must sustain that construction, and this clearly does not. For the error indicated the judgment must be reversed. Other assignments of error, in this view, become immaterial. Judgment reversed, and cause remanded.

We concur: FOX, J.; THORNTON, J.; SHARPSTEIN, J.; WORKS, J.; MCFARLAND, J.

81 Cal. 209

PEOPLE v. ROGERS. (No. 20,592.)

(*Supreme Court of California.* Nov. 18, 1889.)

BURGLARY—INDICTMENT—RECORD ON APPEAL.

1. An information for burglary, omitting the word "feloniously," but charging the offense in the language of the statute, (Pen. Code Cal. § 459,) is sufficient.

2. Under Pen. Code Cal. § 459, providing that "every person who enters any house * * * with intent to commit * * * larceny * * * is guilty of burglary," a charge that defendant burglariously entered a store occupied by J. & H., with intent to commit larceny, is sufficient, without alleging that the occupants were partners, or that they owned the building and its contents.

3. Where there is no bill of exceptions, certain instructions asked by defendant, not shown by the transcript as either given or refused, and which are in no manner authenticated by the trial judge, do not form a part of the judgment roll, and will not be considered on appeal from the judgment.

Department 1. Appeal from superior court, Butte county; JOHN GALE, Judge.

The appellant, George Rogers, was convicted of the crime of burglary. Pen. Code Cal. § 459, provides: "Every person who enters any house * * * with intent to commit grand or petit larceny, or any felony, is guilty of burglary."

W. J. Herrin, for appellant. *Lewis Freer* and *George A. Johnson*, Atty. Gen., for the People.

FOX, J. Information and conviction of burglary. The appeal is from the judgment, and comes up on the judgment roll. The first point made by appellant is that the information failed to state facts constituting a public offense, and that the demurrer thereto should therefore have been sustained. The alleged defect consists in the omission of the word "feloniously." The information charges the offense in the language of the statute, and is sufficient. People v. Lewis, 61 Cal. 366.

The charge is that defendant burglariously entered the store occupied by Jones & Harding, with intent to commit larceny, etc. A point is made that it is not alleged that Jones & Harding were partners, or that they were the owners of the building or its contents. Under the Code definition of burglary, it was not necessary to allege the partnership, and the ownership of the building and its contents was sufficiently designated. People v. Henry, 77 Cal. 445, 19 Pac. Rep. 830.

It is claimed that the court erred in refusing to give certain instructions asked by defendant, which are set out in the transcript, numbered, respectively, 2, 3, and 5. The transcript does not show whether these instructions were given or refused. They are in no manner authenticated by the judge. There is no bill of exceptions, in or by which to make them a part of the record. They are, therefore, not a part of the judgment roll, (People v. January, 77 Cal. 179, 19 Pac. Rep. 258,) and cannot be considered by this court.

These are the only points made. Judgment affirmed.

We concur: PATERSON, J.; WORKS, J.

(81 Cal. 210)

PEOPLE v. KEELEY. (No. 20,597.)

(*Supreme Court of California.* Nov. 19, 1889.)

MALICIOUS MISCHIEF—INSTRUCTIONS—RECORD ON APPEAL.

1. Under Pen. Code Cal. § 596, providing that "every person who * * * maliciously exposes any poisonous substance, with intent that the same shall be taken or swallowed" by any animal, the property of another, shall be punished, an information need not state that the act was feloniously done, nor need it specify the poisonous substance, or state that it would kill.

2. An instruction that a malicious intent need not be proved by direct testimony, and that, if the jury found that the natural and probable results of an act would be to injure or destroy the property of another, no motive appearing from the evidence, malice may be implied, if the circumstances show a wicked, depraved, and wanton spirit, is not misleading, especially when followed by others, treating the subject fully and liberally.

3. Where an instruction found in the transcript is not brought up in a bill of exceptions, nor in any manner authenticated by the trial judge, nor indorsed as either given or refused, it forms no part of the record in the cause.

Department 1. Appeal from superior court, Yolo county; C. H. GAROUTTE, Judge.

Instructions 1 and 2, asked by the people, appear as follows in the transcript on appeal: "(1) The question as to the guilt of the defendant in this action involves two distinct propositions: *First*, was a poisonous substance, known as 'strychnine,' maliciously exposed in a watering trough belonging to the prosecuting witness, G. W. Oliver, with intent that it should be taken and swallowed by the horses of said Oliver? and, *second*, was such substance placed there by the defendant in this action? (2) In reference to the first proposition, if you find that such a substance was deposited in the watering trough of the witness Oliver, then it is not necessary that the intent shall be proved by the direct testimony of any witness. The jury have a right to infer the object and intent by all the circumstances of the case; and, if the jury find from the evidence that such an act was done by some one, and that the natural and probable results thereof would be to injure or destroy the property of another, and if no motive appears from the evidence, malice may be implied, if the circumstances of the commission of the act show a wicked, depraved, and wanton spirit. (Given as modified.) C. H. GAROUTTE, Judge."

Clark & Aram, for appellant. *E. E. Gaddis*, Dist. Atty., for the People.

FOX, J. The defendant was convicted of malicious mischief in putting a poisonous substance into a watering trough, with intent that the same should be taken and swallowed by the horses, etc. The appeal is from the judgment and the order denying a new trial. It is contended by the appellant that the information does not state that the crime was committed in Yolo county, the county in which the action was brought and tried. The making of such a point is trifling with the court, for the very first allegation of the information is that the offense charged was committed "on the twenty-fifth day of February, A. D. 1889, in the county of Yolo," etc.

The next point made is that the information does not charge a crime, in that it does not state that the act was feloniously done, and does not specifically name the poisonous subtance, or that it was a substance that would kill; and here we are treated to a long dissertation upon the fact that poison is found in a large number of substances used for food and for medicine, for both man and beast. But there can be no misunderstanding of what the statute (Pen. Code, § 596[1]) means when it uses the term "poisonous substance." The offense is charged in the language of the statute, and the charge is sufficient. People v. Lewis, 61 Cal. 366; People v. Henry, 77 Cal. 445, 19 Pac. Rep. 830; People v. Rogers, ante, 592, (filed November 18, 1889.) There is nothing in People v. Van Deleer, 53 Cal. 147, cited by appellant, in conflict with this conclusion. There the question was as to the sufficiency of the proof and the correctness of the charge.

Several exceptions are taken to instructions said to have been given at the request of the prosecution. A paper is found in the transcript headed "Instructions Asked by the People," containing paragraphs numbered from 1 to 11, inclusive. The first objection is to the paragraph marked 1, but that is not indorsed as either given or refused. It is in no manner authenticated by the judge, nor is it brought up in any bill of exceptions. Taken by itself, it cannot be considered by the court as part of the record in the cause. People v. January, 77 Cal. 179, 19 Pac. Rep. 258; People v. Rogers, supra. But paragraphs 1 and 2 must necessarily be read together, to make sense of them as an instruction. The latter is marked "given," and, reading them together, they make one complete instruction, not open to the objection made to either of them separately. Paragraph 2, even if taken by itself, as an independent instruction, is not open to the charge of being misleading, as claimed by appellant, especially when followed by the very full and liberal instructions given at the request of the defendant. Paragraph 3, to which exception is taken, is not authenticated as a part of the record, but even if given, was not erroneous. The same may be said of paragraph 6, to which exception is also taken.

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[1] Pen. Code Cal. § 596, provides: "Every person who * * * maliciously exposes any poisonous substance, with the intent that the same shall be taken or swallowed" by any animal, the property of another, "is punishable by imprisonment in the state-prison not exceeding three years," etc.

It is also claimed that the evidence was insufficient to justify the verdict. Much of the evidence was circumstantial; but this, taken in connection with the direct evidence, made out a very strong case against the defendant. Circumstantial evidence was introduced tending to show that it was possible that the offense might have been committed by some other person; but it was for the jury to determine from all the evidence, and to be satisfied beyond a reasonable doubt, whether or not the defendant was the guilty party. They heard and saw all the witnesses, and were the sole judges of the credibility and weight to be given to each part of the evidence. We cannot say, from the evidence, that they were not fully justified in the conclusion which they reached.

There was no error in the rulings of the court in the admission of testimony, or in refusing to strike out portions that had been given. The objection now taken to the testimony of the committing magistrate was not taken in the court below, and cannot be taken in this court for the first time.

A point is also made upon the fact that the charge and conviction is for malicious mischief, and the judgment is one of imprisonment in the state prison. The judgment is fully authorized by section 596 of the Penal Code, under which the information is filed. Judgment and order affirmed.

Works, J. I concur in the judgment.

Paterson, J. I concur in the judgment on the ground that in the present condition of the record the questions raised by the appellant (except as to the sufficiency of the indictment, and there is no merit in that,) cannot be considered. There is no statement or bill authenticated by the judge.

(81 Cal. 222)

Lee Chuck v. Quan Wo Chong Co. (No. 13,397.)

(*Supreme Court of California.* Nov. 19, 1889.)

Writ of Possession—Appeal—Supersedeas—Bond—Record.

1. A writ of possession, obtained by plaintiff after judgment, for the possession of land and for treble rents for its detention, is not fully executed at the time of the making of an order staying execution of the writ and the giving of a bond by defendant, where it appears from the sheriff's return that he had only taken out of the building on the premises in question so much of the personal property levied on by him as was necessary to satisfy plaintiff's money judgment, and that he had been unable to remove the balance, as, while so engaged, the order staying execution had been served upon him, and where other evidence shows that the property remained in the possession and under the control of an employe of the sheriff, though the employe states in his affidavit that he holds by license of the plaintiff.

2. Under Code Civil Proc. Cal. § 1176, providing that in actions of forcible entry and unlawful detainer "an appeal taken by defendant shall not stay proceedings upon the judgment, unless the judge * * * before whom the same was rendered so directs," after the trial judge has directed a stay, and a bond has been given in the amount fixed by him, he cannot withdraw his direction, and discharge the order.

3. Under Code Civil Proc. Cal. §§ 941-945, providing for undertakings on appeal in certain cases, and section 946, providing that, whenever an appeal is perfected as provided in the foregoing sections, proceedings shall be stayed, the giving of a bond at the proper time and in due form will have that effect, without reference to the sufficiency or insufficiency of the sureties.

4. An order not contained in the transcript, but which, with leave of the supreme court, has been entered *nunc pro tunc* and certified up, forms part of the record.

Thornton, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

Defendant, the Quan Wo Chong Company appeals from an order discharging a rule on the sheriff ordering him to show cause why further proceedings under a writ of possession, obtained by plaintiff in judgment in his favor, under the landlord and tenant act, should not be stayed, and the property taken thereunder returned to defendant. Code Civil Proc. Cal. pt. 3, tit. 3, c. 4, in "Summary proceedings for obtaining possession of real estate in certain cases," after defining "forcible entry," (§ 1159,) "forcible detainer," (§ 1160,) and "unlawful detainer," (§ 1161,) provides, in § 1176: "An appeal taken by the defendant shall not stay proceedings upon the judgment, unless the judge or justice before whom the same was taken so directs."

Smith & Murasky and *James F. Smith*, for appellant. *Chas. S. Wheeler*, for respondent.

Works, J. This was an action to recover the possession of certain real estate in the city of San Francisco, under the landlord and tenant act, and for the recovery of treble rents for its detention. Trial was had, and judgment rendered in favor of the plaintiff; and a writ of possession was duly issued, and placed in the hands of the sheriff. The writ was partially executed when application was made by the defendant, asking that the judge of the court direct that proceedings be stayed on his filing the necessary undertaking. The order was made, and a bond was given, but the sheriff declined to stay proceedings, or to return the property that had been taken into possession by him to the defendant. The defendant then made application to the court for a rule upon the sheriff to show cause, why further proceedings should not be stayed, and the property returned and restored to the defendant. The order to show cause was duly issued; and, after a hearing, the court below discharged the rule, and declined to restore the defendant to possession. This appeal is from the last-named order, discharging the rule to show cause, and refusing to order the sheriff to restore the property to the defendant. It is claimed on the part of the defendant that, after the order directing a stay of proceedings upon the giving of a stay-bond, and the due execution of such bond, the court below had no further power or jurisdiction in the matter, and that the defendant was entitled upon the execution of such bond to the immediate restoration of the property. On the other hand, the plaintiff and respondent contends that at the time the first order, staying proceedings, was made, and the bond executed, the writ of restitution had been fully executed, and the plaintiff put in possession of the property, and that for that reason the order upon the sheriff was inoperative, and that he could not restore the property to the defendant.

The main question, therefore, is whether or not the writ of restitution had been fully executed at the time the first order for a stay of proceedings was given. In the answer of the plaintiff to the order to show cause why the proceedings should not be stayed, and the property be restored to the defendant, it was averred "that at the hour of 11 o'clock, or thereabouts, on said 22d day of December, 1888, the sheriff of the city and county of San Francisco fully executed said writ, so far as the same required the delivery of the possession of said premises, by formally delivering over the possession thereof to plaintiff's agents; and that this plaintiff, by his agents, has held the continual and exclusive possession thereof ever since said time, and that he has refused, and still refuses, to allow the defendant to enter thereon; that, after the sheriff had taken away from said premises a portion of the personal property levied upon, the order of this honorable court, staying further proceedings, was served upon said sheriff, or his deputy; and that thereafter, for the protection of said sheriff, and for the protection of said defendant, and for the protection of this plaintiff, this plaintiff granted permission to said sheriff to place one or more persons on said premises, whose business it should be to look after the personal property belonging to defendant thereon; that, under the license of this plaintiff, granted as aforesaid, said sheriff has had one or more persons upon such premises, in charge of said personal property, but that said persons claim no right whatever to the possession of the premises, and that this plaintiff is now, and ever since the delivery of the possession to him, as aforesaid has been, in the exclusive possession thereof; that plaintiff's agent in charge of said property is not now, nor has he been at any time mentioned herein, in the employ of the sheriff's office; that the writ of possession issued upon plaintiff's judgment was fully executed upon the part of the sheriff prior to any stay of execution herein; that plaintiff has obtained possession of said premises by virtue of his judgment herein, and in strict accordance with law, and if the defendant, through failure to obtain a stay of proceedings prior to the execution of plaintiff's writ, has suffered, it is not in the power of this court to relieve it from the consequences of its laches at the expense of plaintiff's rights." It further appears, from the affidavit of one John O'Shea that during all of the times mentioned he was in the employ of the sheriff of the city and county of San Francisco, and that he was in possession of the property, and was "then and there instructed by the sheriff that the possession of said premises had been surrendered to Lee Chuck, the plaintiff above named, and that said sheriff had no further right to the possession thereof; and that ever since said time he has been in charge of the personal property belonging to the defendant which is upon said premises; that he still continues to remain upon said premises, but that ever since the delivery thereof to plaintiff as aforesaid he has remained thereon by the license of said plaintiff; and that at no time since has he, nor has any other agent or employe of said sheriff, been in possession of said premises, but that the said Lee Chuck ever since said time has continued in possession thereof." The return of the sheriff, which was introduced in evidence, is as follows: "I hereby certify that, in obedience to the writ of possession issued in the case of Lee Chuck vs. Quan Wo Chong & Company, I did, on the 22d day of December, 1888, at 11 o'clock A. M., cause the therein named plaintiff to have quiet and peaceable possession of the premises therein described; that on the 21st day of December, 1888, under and by virtue of the said writ of possession, I levied upon certain personal property situate in said premises, and removed a portion of the same for safe-keeping to the warehouse of Davis, Heber & Company, auctioneers, San Francisco, where the same will be sold at public auction, at sheriff's sale, to satisfy the judgment recovered by the plaintiff in the said action. The other portion of the personal property so levied upon I have not been able to remove, as, while engaged in the act of removing, an order of this court, commanding me to release the property so levied upon, was served upon me, and I at once stayed all proceedings under said writ. This is a partial return only to the said writ, and is made under an order of court this day made and entered." It appears from these proceedings that the premises involved in this litigation were occupied and used by the defendant as a mercantile establishment, and the personal property therein was a stock of merchandise. The return of the sheriff, and other evidence, clearly shows that at the time the first order staying execution of the writ was made, and the stay-bond executed, the sheriff had only taken out of the building so much of the personal property as was necessary to satisfy the money judgment recovered by the plaintiff, and that the balance of the property still remained in the building. There was the utmost expedition on the part of the attorney for the plaintiff to procure his writ and obtain possession of the property, and this was done before the defendant or its attorney had notice that the judgment had been rendered, and before an opportunity to procure an order directing a stay of proceeding and give the necessary bond was given. The sheriff defied the first order of the court, or, to say the least, disregarded it, and, either before or after the order was made, turned over to the plaintiff, nominally, not only the possession of the real estate but of the defendant's stock of merchandise also. It is perfectly apparent, however, that this giving of possession was merely nominal, and with the hope of thereby showing a full execution of the writ. The misfortune of the showing is that it appears that the sheriff never had in fact turned over the possession to the plaintiff. On the contrary, the property remained in the possession and under the control of the employe of the sheriff. The fact relied upon, and stated in the affidavit of such employe, that he was there by the license of the plaintiff, does not seem to us to be a matter of any consequence.

In this class of cases an appeal taken by the defendant does not stay proceedings, unless the judge before whom the case is tried so directs. Code, Civil Proc. § 1176. In this case the direction was given and the undertaking executed in pursuance of the direction of the judge, and in the amount fixed by him. When this was done the proceedings were stayed precisely as in other cases. The judge of the court below having directed a stay, and the bond having been given, the court below had no further control over the matter. To allow the judge to give the necessary direction, and then, after the defendant had complied with his order, and the appeal and stay had been perfected, to permit him, without any statutory authority, to change his mind, and withdraw his direction or discharge such order, would lead to great uncertainty, inconvenience, and, in some cases, perhaps, to wrong and injustice.

In this case it is claimed by the respondent that two bonds were given; that the first was insufficient, the sureties not being good; that these proceedings took place before the second bond was given; and that, as at the time the proceedings took place no sufficient bond had been given, there was no stay of proceedings, and that none existed until the second one was given. We do not so understand the law. Sections 941, 942, 943, 944, and 945, of the Code of Civil Procedure provide for undertakings on appeal in certain cases. Section 946 provides that whenever an appeal is perfected as provided in the preceding sections proceedings shall be stayed. This must be so, without reference to the sufficiency or insufficiency of the sureties. It is only necessary, under these sections, that a bond be given at the proper time, and in due form. If the sureties are insufficient, pecuniarily, the opposite party has his remedy under section 948. He may, as provided in that section, except to the sureties at any time within 30 days after the filing of the undertaking; and, unless they, or other sureties, justify, as therein provided, within 20 days after the appellant has been served with notice of such exceptions, "execution of the judgment, order, or decree appealed from is no longer stayed." That is, the proceedings are stayed until the necessary exceptions are made, and time given for the sureties to justify, and no longer. It necessarily follows that if the same or other sureties do justify within the time allowed the stay continues, and the liability of the new sureties relates back to the time of the first stay. So the fact that two bonds were given is immaterial. Hill v. Finnigan, 54 Cal. 494, is not against this construction of the statute. There the sureties failed to justify, and the appellant claimed the right to file a new undertaking in this court.

It only remains to consider whether the writ was fully executed at the time the stay took effect. We think it was not. In order to constitute a full execution of the writ, the defendant and its property must have been removed from the premises, and the possession of the real estate given to the plaintiff, unless the removal of the personal property was in some way waived by the defendant. Crocker, Sher. § 554; Freem. Ex'ns, § 474; Smith v. White, 5 Dana, 376; Witbeck v. Van Rensselaer, 64 N. Y. 27. The case of Scott v. Richardson, 2 B. Mon. 507, is apparently in conflict with this well-settled rule; but in that case the goods were all removed from the dwelling-house, except a part of the household goods in the kitchen, which the sheriff intended to remove, but was prevented by an injunction. It was held that, the sheriff having turned all the previous occupants out of the house, and put the plaintiff into it, and given him possession by words as well as acts, and having removed the goods of the previous occupants out of the dwelling-house, he had done all that was essential to the full execution of the writ, and his return to that effect was proper. This was, as we understand the decision, to hold, in effect, that all of the household goods being removed, except a small part in the kitchen, was a substantial execution of the writ. In this case the sheriff never turned the possession of the property over to the plaintiff. His return says he did; but the facts stated by him in his return, and the affidavit of the party he left in charge of the property, show clearly that he did not. The stock of goods remained on the premises, and the sheriff remained there, in charge of them. It is true, it is claimed that the sheriff was not in possession of the real estate, but of the personal property; but the personal property being on the premises, and the sheriff there in possession and in charge of them, he was still, in contemplation of law, himself in possession, with his writ unexecuted.

It is claimed by the respondent that the record does not contain any such order as the one appealed from. But the appellant has, with leave of this court, had an order entered *nunc pro tunc*, certified up, which appears to be the proper order, and the fact that such an order was actually made is not controverted. We think this is sufficient. The order appealed from is reversed, with instructions to the court below to enter an order commanding the sheriff to restore the possession of the property in controversy to the defendant.

We concur: BEATTY, C. J.; FOX, J.; SHARPSTEIN, J.; PATERSON, J.

I dissent: THORNTON, J.

(81 Cal. 261)

VON GLAHN v. BRENNAN *et ux*. (No. 12,152.)

(*Supreme Court of California*. Nov. 20, 1889.)

EJECTMENT—PARTIES—TERMINATION OF TENANCY—RECORD ON APPEAL.

1. In ejectment, where defendant relies on adverse possession, evidence that plaintiff's grantor claimed the property; that she had paid the taxes thereon; that defendant held an adjoining piece, as her tenant, with which the lot in controversy communicated; and that defendant had repeatedly admitted that he held the property in question as her tenant,—supports a verdict in plaintiff's favor.

2. Notice is not necessary to terminate a tenancy, where defendant in his answer denies plaintiff's title, and alleges ownership in himself.

3. Where land is purchased with the wife's earnings, the husband not making any claim thereto, and telling her that "everything you make is yours," it is the wife's separate property, and the

husband need not be joined as plaintiff in ejectment for such land.

4. Affidavits, read on a motion for a new trial on the ground of newly-discovered evidence, which are not incorporated in the bill of exceptions, but merely marked by the clerk as having been used on the hearing, form no part of the record.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Davis Louderback, for appellants. *Joseph Kirk*, for respondent.

HAYNE, C. Ejectment for a lot, 40x69½ feet, on the south-west corner of Filbert and Steiner streets, in the city of San Francisco. Verdict and judgment for plaintiff. Defendants appeal. The defendants, who were husband and wife, had no paper title, but relied on adverse possession. The defendant J. C. Brennan says that one Hagan gave him possession in 1872, and told him to hold the lot for one Godfrin, known as "French Charlie," until his (Godfrin's) return; that no one had any right to it except Godfrin; and that "he didn't think the Frenchman would come back to claim it." Defendant Brennan then says: "I claimed it as mine from holding possession." But we think that the evidence shows he held the property as tenant of one Mrs. Weygant, who was the grantor of the plaintiff. He admits that he was her tenant as to adjoining property, but says that the tenancy did not apply to the lot in controversy. It is clear that Mrs. Weygant claimed the whole piece. It is covered by the decree of distribution of her husband's estate. One of defendant's own witnesses says, "I knew Mrs. Weygant always claimed this lot," and it was in evidence that Brennan told one Rushmore that Mrs. Weygant claimed it, and he acknowledges that she paid the taxes on it from 1872, which was the time he went into possession, up to 1883. And it is not likely that she would have allowed Brennan to hold the adjoining piece as her tenant from month to month for so long a period, if he had manifested any disposition to claim this lot as his own, when she was all the while claiming it as hers, and paying taxes on it. Both pieces were used as a "milk ranch." The lot in controversy was used as a calf *corral*, and for this purpose was separately inclosed. But it communicated with the other piece by bars, and there was no difference in the general use. Even in the absence of other evidence, we should regard his story of a difference in the way he held the two pieces as an exceedingly lame one. But there is other testimony. It is in evidence that he declared in 1883 to one Tilton, a real-estate broker, that the property belonged to Mrs. Weygant. "He said he was, and had been, holding possession of this lot for Mrs. Weygant. He was going to keep it until Mrs. Weygant says to give it up." And this conversation had reference to the lot in controversy. He told one Waterman, a police officer, on an occasion when he was tearing down a barn, that "he was taking it down for Mrs. Weygant. She couldn't do it herself,"—and that "this lot was Mrs. Weygant's." After he was arrested for tearing down the barn he repeated to the officer "that this property was Mrs. Weygant's, and that he tore down the barn for her; that he was there as her tenant." And when Rushmore was asserting some claim to the property he wrote to Mrs. Weygant the following letter: "San Francisco, May 15, 1883. Mrs. H. Weygant—Madam: The Lady Jane Rushmore, who is recorded as owner of the lot on the corner of Filbert and Steiner streets, was sent on last week to Stockton insane asylum. Her brother is negotiating with a man in the neighborhood to erect a building on the lot. I would like to have some authority or some legal standing, to be able to prevent him from doing so. If possible, I would like to see you. I do not like to leave from around the place night or day, for I hear this man Rushmore is bound to put some one to live on it, if not prevented. Hoping you and all the family are well, I remain, yours truly, J. C. BRENNAN. P. S. If you cannot come, please send me word what to do. J. C. BRENNAN." The lot in controversy is the lot "on the corner of Filbert and Steiner streets." The adjoining piece, owned by Mrs. Weygant, was not on the corner. And Brennan admits that he did "not know of any property about which there was a dispute between Mrs. Weygant and Rushmore, except it was this lot in litigation here." In view of all this testimony, we quite agree with the jury in the view they seem to have taken of the case.

The learned counsel insists, however, that if there was a tenancy it was not terminated by notice. "There was no evidence," he says, "of the termination of this alleged tenancy of this lot. * * * Even a tenancy at will requires a month's notice to terminate the same." But, in view of the denials in the answer of the ownership of the plaintiff, and the claim he sets up to be himself the owner, we hardly think that this position will avail him. Simpson v. Applegate, 75 Cal. 345, 17 Pac. Rep. 237.

It is argued for the appellants, however, that the plaintiff was a married woman, and that the property was community property; and that, therefore, their plea of nonjoinder of the husband as a party plaintiff should have been sustained. But the plaintiff testifies that her husband told her that "everything you make is yours;" and that she went into business for herself, and thereby earned the money with which she purchased the property. It does not appear that the husband makes any claim to the property. For all that appears to the contrary, he yields to the claim of his wife; and, under the circumstances, we think that the property must be considered to be the separate property of the plaintiff.

One of the grounds of the motion for new trial was newly-discovered evidence. Concerning this, it is sufficient to say the affidavits are not incorporated in a bill of exceptions, but are merely marked by the clerk as having been used on the hearing. But, if they could be considered, they are cumulative merely, and are not such as to render a different result probable, if a new trial were had; and, moreover, there is no sufficient showing of diligence. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are affirmed.

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81 Cal. 236

TYLER *v.* STONE *et al.* (No. 12,356.)

(*Supreme Court of California.* Nov. 20, 1889.)

ASSUMPSIT—PROMISE TO PAY.

In an action to recover a sum of money alleged to have been loaned to defendants for 60 days, it appeared that a written contract had been entered into by the parties by which, in consideration of $1,200 advanced by plaintiff, he was to have 10,000 shares of stock, which were to be pooled for 60 days with 20,000 shares belonging to defendants, and sold by one of defendants for the mutual benefit of the parties, each receiving one-third of the proceeds. As the stock was sold, 50 cents per share was to be set aside as a fund, which, when it amounted to $1,200, was to be drawn by plaintiff, and charged to him as part of the money to be paid him; "he to be paid the $1,200 in any event." *Held* an unqualified promise to repay plaintiff the money advanced by him.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

W. B. Tyler, for appellant. *Craig & Meredith*, for respondents.

FOOTE, C. This action was brought to recover the sum of $1,200, which Tyler claimed Smith and Stone had borrowed from and promised to repay him in 60 days from the date of the loan. Judgment passed for the defendants, from which, and an order denying a new trial, the plaintiff appeals. The written contract, which is made an exhibit to the complaint and offered in evidence, under the terms of which Tyler makes his claim, is: "Messrs. Stone and Smith are the owners of 100,000 shares of the Curtis Consolidated Mining Company's stock at Virginia. George W. Tyler advances $1,200 to Messrs. Stone and Smith, in consideration of which he is to have 10,000 shares of said stock, or its proceeds; 70,000 of said stock to be locked up absolutely, and not used; 30,000 shares to be put in a box, and to be drawn out by Stone, and sold for the mutual benefit of the three. When drawn out, 50 cents per share is to be placed in the box. When the box contains $1,200, same to be drawn by Tyler, and charged to him as part of the money to be paid him; he to be paid the $1,200 in any event. The pool to continue sixty days. Each of the three to receive one-third of the money for which the 30,000 shares are sold. At the end of sixty days, Stone and Smith to receive the 70,000 shares, and each to receive one-third of the 30,000 shares not sold. Settlement to be made on each Saturday afternoon at 2 o'clock. Witness our hands and seals, this 30th day of April, 1881. J. W. SMITH. [Seal.] H. S. STONE. [Seal.] GEO. W. TYLER. [Seal.]" According to its terms, it is plain that Tyler was at the end of 60 days to be repaid the $1,200 he had loaned, in any event, whether the pooling arrangement was successful or not. The evidence of Tyler and Smith, one of the defendants, corroborated the unambiguous language of the contract. Stone's testimony was contradictory to that evidence in some respects, although it did not attempt to deny the acknowledgment of indebtedness and promise on his part to repay the $1,200. There is no reason made apparent why the written contract should not be controlling in the matter. It is not susceptible of any other construction than that which the plaintiff puts upon it. It explains itself fully and clearly, and by it Tyler is entitled to recover all of the $1,200 which was to be repaid him, in any event, except what he may have already received. The inadmissible oral testimony tending to contradict the contract, and which is opposed to the evidence of Tyler and Smith, himself a defendant, should not be allowed to render nugatory the words of the written instrument. We therefore advise that the judgment and order be reversed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed.

THORNTON, J., (*concurring*.) I concur in reversing the judgment and order herein, on the ground that the decision of the court below is not justified by the evidence. Conceding that the evidence would have been excluded on objection that it was incompetent, for the reason that it tended to change the terms of a written agreement, yet, as it went in without objection, the court below was bound to consider it, and give it its due weight. I know of no rule of law which justifies any court in disregarding evidence of the character introduced in this case because, if objected to, it would have been ruled out. It was before the court on the trial of this case, and demanded consideration as much as the written agreement or any other matter testified to on the trial. Further, I am of the opinion that plaintiff was entitled to recover the $1,200 at the end of the 60 days. The $1,200 to be paid Tyler, under the express terms of the contract, "in any event," referred to the $1,200 mentioned first in the contract, which sum was advanced by plaintiff and was to be paid him "in any event,"—that is to say, whether or not the 30,000 shares were sold within the 60 days, and whether the 50 cents per share got into the box or not within the aforesaid period. If there was no sale, and no money got into the box, Tyler was still to have back the sum advanced when the 60 days had passed. This we think the fair and just construction of the contract, deducible from the words employed by the parties to express their meaning, and patent on the face of the contract. For the foregoing reasons given, I am of opinion that the judgment and order should be reversed, and the cause remanded for a new trial.

(81 Cal. 182)

WADSWORTH v. WADSWORTH. (No. 12,445.)

(*Supreme Court of California.* Nov. 9, 1889.)

DIVORCE—PLEADING—CROSS-COMPLAINT.

1. In an action to annul a marriage, a judgment for defendant, on his cross-complaint for divorce, obtained in absence of plaintiff's attorney,

should be set aside on plaintiff's motion, made within six months, as a liberal rule should prevail in such cases.

2. Under Code Civil Proc. Cal. § 442, providing that "whenever the defendant seeks affirmative relief against any party relating to or depending upon the contract * * * upon which the action is brought, * * * he may, in addition to his answer, file at the same time * * * a cross-complaint," the defendant in an action to procure the annulment of a marriage may have a cross-complaint for divorce, as such proceedings arise out of contract, within the meaning of this provision.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

W. C. & I. G. Burnett, (*Dorn & Dorn*, of counsel,) for appellant. *W. B. Tyler*, for respondent.

HAYNE, C. This action was brought against William Wadsworth, Sr., for annulment of marriage, upon the ground that at the time of the marriage he had a wife living. William Wadsworth, Jr., was joined as a defendant, upon the alleged ground that the other defendant had transferred to him, without consideration, property purchased in part with funds of the plaintiff, and which would be community property if the marriage had been valid. William Wadsworth, Jr., made default. William Wadsworth, Sr., filed an answer, averring, in substance, the validity of the marriage. He filed with his answer a cross-complaint for a divorce from the plaintiff, on the ground of desertion. The plaintiff filed an answer to the cross-complaint, denying the desertion. By some inadvertence the attorney for the plaintiff did not appear at the trial, and she was not represented thereat. The court granted the defendant a divorce upon his cross-complaint. Within six months the plaintiff moved to have the judgment set aside, on the ground of excusable neglect. This motion was denied, and the plaintiff appeals from the order denying the motion. There is no bill of exceptions; but the stipulation made by the parties is, in our opinion, sufficient for the purposes of the appeal. Bonds v. Hickman, 29 Cal. 461; Solomon v. Reese, 34 Cal. 34.

1. So far as the divorce awarded to the defendant is concerned, the motion should have been granted, under the rule laid down in McBlain v. McBlain, 77 Cal. 509, 20 Pac. Rep. 61. In that case the court, per PATERSON, J., said: "The parties to the action are not the only people interested in the result thereof. The public has an interest in the result of every suit for divorce. The policy and the letter of the law concur in guarding against collusion and fraud; and it should be the aim of the court to afford the fullest possible hearing in such matters." In the present case there seems to have been an honest desire on the part of the plaintiff to present her side of the case; and while, in an ordinary action, the neglect shown might be sufficient to deprive her of a right to relief, yet in this kind of case a more liberal rule should prevail. And we think that the same reasons require the application of a liberal rule to proceedings for the annulment of marriage, and, therefore, that the judgment should have been set aside as to the whole case.

2. It is argued for the plaintiff that the defendant cannot have a cross-complaint in this kind of an action. And this question will necessarily arise when the case goes back to the trial court, and should be disposed of. It has long been the practice in this state for the trial courts to entertain cross-complaints in actions for divorce. Doubt was cast upon this practice by what was said in De Haley v. Haley, 74 Cal. 489, 16 Pac. Rep. 248. The point was not decided by that case, but MCKINSTRY, J. in the course of the opinion, said: "It may not be improper to remark that it is at least doubtful whether the Codes provide for a cross-complaint in actions for divorce,"—and he went on to explain why it was doubtful. The respect which we have for the opinion of that learned judge has induced us to make a careful examination of the subject. There can be no doubt that in the English ecclesiastical courts the defendant could have affirmative relief, not only upon a cross-demand, but even upon his answer, if the evidence showed that he was entitled to it. This was held in the case of Best v. Best, 1 Addams, Ecc. 411, 2 Eng. Ecc. R. 158. That was a suit for divorce *a mensa et thoro*, upon the ground of cruelty. The defendant set up the adultery of the plaintiff. No relief was granted to either party. But upon the authority of Sir George Saville's Case, (which began in 1740,) Dynely v. Dynely, decided in 1732, and Mathew v. Mathew, decided in 1769, the court laid down the rule above stated, and said: "That a cross-suit or separate citation is necessary, however, under such circumstances, has never been asserted that I am aware of, from that time to the present; and the practice of either, thus held to be optional, appears from that time to have been finally dispensed with." In Dysart v. Dysart, 1 Rob. Ecc. 106, in which the husband sued for a restitution of conjugal rights, and the wife sought a divorce on the ground of cruelty, Dr. LUSHINGTON said, with reference to the charge of cruelty: "If that charge be proved, it is clear that not only must the earl fail in obtaining the decree he prays for, but that the countess will be entitled to a decree of separation." But upon the evidence he held that the charge was not proved. In Clowes v. Jones, 3 Curt. Ecc. 185, it was held that in a suit by a husband for nullity of marriage it was competent for the wife, without taking out a cross-citation, to sue for a restitution of conjugal rights. In Anichini v. Anichini, 2 Curt. Ecc. 210, which was a suit for restitution of conjugal rights, (subsequently turned into a suit for a separation,) Dr. LUSHINGTON denied the plaintiff's prayer, and granted the defendant's application for a separation. In reference to this subject, Mr. Poynter, in his treatise on the Doctrine and Practice of Ecclesiastical Courts Relative to the Subject of Marriage and Divorce, (2d Ed. pp. 241, 242,) says: "To bar a suit for the restitution of conjugal rights, facts of cruelty or adultery may be counter-pleaded, as constituting lawful grounds for a separation; and, when so counter-pleaded, merely for the purpose of barring suit, evidence less circumstantial than what is required

to warrant a sentence of divorce in an original suit may possibly be held to be sufficient. But, if the counter-plea of cruelty or adultery happen to be sufficiently proved, the defendant in the suit for restitution is not only entitled to be dismissed from that complaint, but the suit may in effect change its character, at the prayer of the complainant, who becomes entitled to a sentence of divorce, as if in a suit promoted for that specific object." And the learned author appends to the above text the following note: "Anciently, in all matrimonial suits wherein adultery was intended to be offered on behalf of the defendant, a cross-suit, or, at least, a citation of the plaintiff to answer to that charge, returnable in the original suit, was held to be requisite; but it was solemnly determined by the delegates in Sir George Saville's Case that, in a suit for the restitution of conjugal rights, adultery may not only be pleaded in bar, but a divorce may be had in consequence of it. Best v. Best, 1 Addams, Ecc. 412." And Mr. Bishop says, with reference to the practice: "The flexibility of the practice in the ecclesiastical courts has already been mentioned. In it parties were in effect both plaintiff and defendant at the same time. So that, for example, one proceeded against for divorce *a mensa et thoro*, or for nullity of the marriage, or for restitution of conjugal rights, not only could bring forward a competent wrong, done by the other party, in defense of the suit, but, if he succeeded in his proofs, he could have the proper sentence rendered in his favor as though he were the original plaintiff." 2 Bish. Mar. & Div. (6th Ed.) § 316. The matter has been regulated in England by statutes, among which may be mentioned 29 and 30 Vict. c. 32, § 2. And the subsequent practice has been accordingly. See, generally, Blackborne v. Blackborne, L. R. 1 Prob. & Div. 563; Brown v. Brown, L. R. 3 Prob. & Div. 202; D. v. D., L. R. 10 Prob. Div. 75; Moore v. Moore, L. R. 12 Prob. Div. 193.

The practice in the English ecclesiastical courts has not been adopted in America to its full extent; that is to say, the defendant cannot have affirmative relief upon his answer alone, unless it be in the states of Georgia and Nebraska. See Owen v. Owen, 54 Ga. 526; Shafer v. Shafer, 10 Neb. 468, 6 N. W. Rep. 768. But the practice of giving affirmative relief in a cross-complaint, or, as it is sometimes called, a "counter-claim," prevails in many of the states. In some of the states there is express provision of statute to this effect. See Stoner v. Stoner, 9 Ind. 505; Glasscock v. Glasscock, 94 Ind. 163; Ficke v. Ficke, 62 Mo. 337. Compare Hoffman v. Hoffman, 43 Mo. 547. In other states where the practice prevails, we have not been able to ascertain whether there is an express provision of statute or not. See Hoff v. Hoff, 48 Mich. 281, 12 N. W. Rep. 160; Sterl v. Sterl, 2 Ill. App. 223; Lee v. Lee, 1 Duv. 196. But in New York, where there is only a general statute as to counter-claims, the practice prevails. See Campbell v. Campbell, 12 Hun, 636; Bleck v. Bleck, 27 Hun, 296; McNamara v. McNamara, 2 Hilt. 548; Waltermire v. Waltermire, 110 N. Y. 183, 17 N. E. Rep. 739. And so in Iowa. See Wilson v. Wilson, 40 Iowa, 233. And the point has been expressly ruled in Oregon. There the general provision is as follows: "The counter-claim of the defendant shall be one upon which a suit might be maintained by the defendant against the plaintiff in the suit; and, in addition to the cases specified in the subdivisions of section 72, (of the Code,) it is sufficient if it be connected with the subject of the suit." This provision was held sufficient to warrant a cross-demand for divorce, and the court, per LORD, C. J., said: "To compel the defendant to bring a new suit, and go over the same evidence, which could be as well given in the existing action, would be vexatious, and, in fact, unnecessary. On the other hand, to allow such an answer, the rights of the parties could be adjusted in one suit, and much inconvenience and delay avoided. It is always desirable that there be as speedy a determination of litigation as is consistent with a proper examination and consideration of the case." Dodd v. Dodd, 14 Or. 338, 13 Pac. Rep. 509. With reference to the American practice, Mr. Bishop says: "The practice of bringing a cross-suit by the defendant against the plaintiff, to aid the defense and obtain affirmative relief, may be resorted to in divorce cases the same as in any other. It is permissible equally whether the proceeding is by bill in equity, by libel corresponding to the ecclesiastical libel, or by a statutory complaint. The subject needs no particular illustration. Even, it has been held, a defendant may maintain his cross-bill for divorce, though he has not the statutory residence in the state necessary in an original complaint." 2 Bish. Mar. & Div. (6th Ed.) § 318. The prevalence of the practice in other jurisdictions is very persuasive of its convenience and efficiency. And that it is convenient and safe would seem to result from general principles. Why should not all the marital difficulties of a couple be adjusted in a single suit? A suit for divorce, under our system, has been held to be a suit in equity. Lyons v. Lyons, 18 Cal. 448; Sharon v. Sharon, 67 Cal. 185, 7 Pac. Rep. 456, 635, 8 Pac. Rep. 709. Is there any principle of equity which favors litigation by piecemeal? In the majority of cases, if affirmative relief can be granted to the defendant at all, it can be granted upon the evidence introduced upon the issues raised upon the complaint; or, at all events, such evidence is pertinent and material upon the cross-demand. In such cases, what useful purpose would be subserved by compelling the defendant to face the expense and delay of another suit, in which substantially the same evidence is to be introduced? It has long been usual in this state to have such relief on cross-complaint; and in at least two cases the practice has been impliedly sanctioned by the supreme court. See Coulthurst v. Coulthurst, 58 Cal. 239; Bovo v. Bovo, 63 Cal. 77. And it is safe to say that the remarks in De Haley v. Haley took the profession by surprise.

Is the language of the statute broad enough to warrant this widely extended and useful practice? The provision is as follows: Sec. 442. "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time —or, by permission of the court, subsequently—a cross-complaint. The cross-complaint must be served upon the parties affected thereby, and such parties may demur or answer thereto as to the original complaint." It is said in De Haley v. Haley that "an action for divorce is not brought on the 'contract' of marriage, but upon certain violations of duties or obligations annexed to the *status* of matrimony." It is submitted, however, that to construe the phrase "contract * * * upon which the action is brought," either in the strict common-law sense in which an action is brought "upon" a contract, or so as to confine its operation to suits affirming the validity of the contract and seeking to enforce it, would be to take an extremely narrow view of the provision, and to materially restrict its operation. A suit to rescind a contract, for example, would not be "upon" the contract, in the above senses, and yet it cannot be doubted that the defendant in a suit to rescind a contract could maintain a cross-complaint for specific performance of the contract, if the facts of the case entitle him to specific performance. But a suit to rescind a contract is no more "upon" the contract, in the above senses, than is a suit for divorce. It may be conceded that the married state is a *status*. But it is a *status* which results from a contract. Civil Code, § 55. And when the *status* is dissolved the contract is certainly not left in force. If not left in force, it must be dissolved by the decree. And, if so, the suit is, at least in part, for the dissolution of a contract. This being so, may not the cross-demand be said to be one "relating to * * * the contract * * * upon which the action is brought," in the sense of the statute? In an Iowa case the court held that the relief was within the meaning of the statute of that state in relation to counter-claims, saying: "The plaintiff seeks to annul the marriage contract on account of an alleged violation of it by defendant. The defendant, upon the other hand, seeks to annul the same contract on account of violations of the same by the plaintiff. The matters alleged arise out of the contract set forth in the petition, and are connected with the subject of the action." Wilson v. Wilson, 40 Iowa, 233. We think, therefore, that upon principle as well as upon authority there may be a cross-complaint in an action for divorce. And the rule seems to us to apply in actions for annulment of marriage. The demurrer was to the effect that William Wadsworth, Jr., should not have been joined as a party defendant. Compare Way v. Way, 67 Wis. 662, 31 N. W. Rep. 15. But this question does not arise upon appeal by plaintiff on order refusing to set aside a judgment in favor of the defendant. We advise that the order appealed from be reversed, and the cause remanded for a new trial upon all the issues.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed, and cause remanded for a new trial upon all the issues.

(81 Cal. 252)

SPERRY & Co. v. PERCIVAL MILLING Co.

(No. 12,064.)

(*Supreme Court of California.* Nov. 22, 1889.)

TRADE-MARKS—INFRINGEMENT—EVIDENCE.

In an action to enjoin defendant from counterfeiting certain trade-marks and labels of plaintiff, it appeared that the packages used by plaintiff and defendant were of the same size, shape, and material, with labels of the same size, shape, and position, which were printed in the same colors, with the same alternations; that wherever on plaintiff's label there was a progressive increase of the size of letters, there was the same on defendant's label; that the sentences and pictures on the latter were very similar to those on the former, and in some instances were the same; that the word "germ," used by defendant, was similar in sound and appearance to the word "germea," coined by the plaintiff; that the words "Trade-Mark Registered," in similar colors, type, and position, were on both packages, though defendant had not registered any trade-mark at the time the action was brought, while plaintiff's labels were registered several years before the infringement complained of began. It further appeared that the person who prepared defendant's package and labels had those of plaintiff before him; and one witness testified that he dealt in both articles, keeping the packages side by side, and when asked for the plaintiff's article he had sold that of defendant. *Held*, that plaintiff was entitled to judgment.

Department 2. Appeal from superior court, Sonoma county; JOHN G. PRESSLEY, Judge.

Newlands, Allen & Herrin, for appellant. *Wm. B. Haskell* and *T. J. Geary*, for respondent.

MCFARLAND, J. Plaintiff and defendant are both corporations; and the action is to enjoin defendant from counterfeiting, etc., certain trade-marks, labels, etc., of plaintiff, and for damages. The court found certain facts, upon which it rendered judgment for defendant; and plaintiff appeals from the judgment, and from an order denying a new trial. The main contention of appellant is that the conclusions of law reached by the court below were erroneous, and that, upon the findings of fact, the judgment should have been for plaintiff.

From March, 1883, to the commencement of this action—February 4, 1886—plaintiff and its assignors were engaged in manufacturing, by the roller process, and selling, a certain meal, made from wheat and used for mush, etc., to which they gave the coined name "Germea." Down to within one month of the commencement of this action this commodity was exclusively put up by plaintiff in certain packages, with certain labels, etc., thereon, which were registered with the secretary of state as a trade-mark, in May, 1883. About a month before the commencement of the action, defendant began the manufacturing and selling of a meal made by the roller process from wheat, and put it up in packages, with labels thereon, which plaintiff avers to be an infringement of its said trade-mark. Defendant had not registered any trade-mark at the date of the commencement of the action, but did so four days afterwards. The findings consist, in addition to the above facts, mainly, of *fac similes* of the packages and labels of the two parties; or, rather, the actual labels are pasted into the findings, so that, by looking at the transcript, an observer can see the two packages just as they appeared to purchasers. As their significance depends greatly upon the various colors used, it would be difficult to reproduce them here, and we see no necessity of attempting it. And we will confine ourselves to a very brief statement of the similarity of, and difference between, the two packages.

1. The two packages were of exactly the same size, shape, weight, and color. They were each of cylindrical shape, eight inches long, and four inches in diameter, and were composed of paper bags of the same kind and color.

2. On the top of plaintiff's packages there was a small, square label, with the words "Sperry & Co.," and underneath the word "Germea." There were also a few other words on the label. On the top of defendant's package there was also a small, square, label, very similar to that of plaintiff, but having printed on it the words "Golden Eagle," and underneath the word, "Germ."

3. On one side of plaintiff's package is a label, on light-brown paper, about six inches long and three inches wide, with a small red border. On the upper side are the words, printed in blue, "Germea for Breakfast." Next below are the words, in blue, "Ask your grocer for." Immediately below this are the words, in blue also, and in a large type, "Sperry's New Process," and below that, in still larger type, and in blue, the words "Patent Flour." On the end of the label, and outside of the red border, are the words, in blue, "Trade-Mark Registered." On a similar side of defendant's package there is a label of a similar size and paper to that of plaintiff; having, also, a small, red border, and with all the words, also, printed in blue. On the upper side are the words "Golden Eagle Germ," and immediately below, "Breakfast Dish." Immediately below that are the words "Ask Your Grocer for;" then, next below, in large type, "Percival's New Process;" and last below, in still larger type, "Patent Flour." At the end, also, outside the red border, are the words, "Trade-Mark Registered."

4. On plaintiff's package, next to the above label, was another label, of similar size and paper. On the top of the label there is the word "Germea" printed in red letters; and immediately below this word is a picture of plaintiff's mill, in blue color. It represents a main building, five stories high, with a flag-staff and flag on top, and lower wings on either side. Below this are several sentences, commending the commodity as nutritious and agreeable food. All these sentences are printed in blue, except the word "Germea," which, whenever it is used, is printed in red. The name of plaintiff is then given in red, and the words "Trade-Mark Registered" at the bottom, in blue. At the same place on its package the defendant had a label of the same size and kind of paper. On the top were the words "Golden Eagle," in red; and immediately below these words there is also a picture, in blue, of a building almost exactly like the one of plaintiff's label. It represents a main building, five stories high, with a flag-staff and flag on top, and lower wings on either side. It is almost impossible to detect any material difference in the two pictures. It is not a picture of defendant's mill. Below the picture are the words, in red, "Germ. Breakfast Dish." Next come several sentences, in blue, in commendation of the article. Below that is the name of the proprietors, in red; and last, the words "Trade-Mark Registered," in blue.

5. On plaintiff's package there appears next a label, similar in size to the others, on the top of which is the word, in red, "Sperry's." Immediately below, in large, heavy, blue letters, is the word "Germea," and next below, in red, "For Breakfast." Then follows four sentences, in blue, containing directions for the use of the article. At the bottom, "Trade-Mark Registered," in blue. A similar label on defendant's package has at the top, in red, the word "Directions." Then, after the words "For using the," in small type, come the words "Golden Eagle Germ," in large, heavy, blue letters, and next below, in red, "Breakfast Dish." Then follow four sentences of directions for use,—all in blue, except three words,—and "Trade-Mark Registered," in blue.

6. Another, and the last, label of the plaintiff has at the top the word, in red, "Germea;" and immediately below it is a picture of a child eating mush out of a bowl, all in blue. Below the picture are the words, in red, "For Breakfast;" and next the words, in blue, "No soaking required." Below that are the words, in red, "Cooks thoroughly in a few minutes;" and then the figure and word, in blue, "4 Pounds." And then, after the names and place of business of the proprietor, come the words, in red, "For sale by all the grocers," with the final "Trade-Mark Registered," in blue. On a corresponding label of defendant there is at the top, in red, "Golden Eagle;" next, below, in red, "Germ;" and then, below, in red, "Breakfast Dish." Immediately below that is a picture, in blue, of two children eating mush out of a bowl. Next below are the words, in red, "Cooks thoroughly in a few minutes;" and below that, in blue, "4 Pounds." Then follows the name and place of business of the defendant; and next below, in red, "For sale by all the grocers;" followed by the inevitable "Trade-Mark Registered," in blue. And during all this time the defendant had no "Trade-Mark Registered."

The above descriptions do not create in the mind an entirely accurate notion of the similarity of appearance presented by the two packages. It sufficiently appears from them, however, that the two packages were of the same size and shape, and of the same kind of paper; that the labels were of the same size and shape, and placed on the packages in the same manner; that on the labels the same colors were used, and that the alternations of the colors were the same; that wherever there is a progressive increase of the size of letters and words in plaintiff's labels, there is a similar progressive increase in the labels of defendant; that the word "germ," used by defendant is very similar in appearance and sound to the word "germea," coined by plaintiff; that the sentences printed on defendant's labels are very similar to those on plaintiff's labels, and in many instances (see subdivision 6 of this opinion) exactly the same; that the words "Trade-Mark Registered" are on each package, in the same type and color, and at the same place,—outside the red border; that the two pictures of plaintiff (of the mill and the child) are copied by defendant, the one literally, and the other nearly so; and that the two packages, as above described, would produce on the eye of a purchaser a similar impression. And, when we view the two packages, shown as entireties in the transcript, their close similarity is unquestionable. In our opinion, upon the facts found, the judgment should have been for plaintiff.

The rule governing such cases is that if the imitation of a trade-mark is intentionally so close as to deceive an ordinary purchaser, the defendant is liable; and the fact that an attentive inspection will disclose differences in even many respects between the two articles will not shield him. In Lockwood v. Bostwick, 2 Daly, 521, the suit was for an injunction to restrain the defendants from using a label bearing the name "Bovina," on the ground that it was an imitation of a label used by plaintiffs, bearing the name "Boviline;" the labels having also, otherwise, a close resemblance to each other. Judgment for plaintiff was sustained, and the court, in its opinion, uses language which clearly expresses the correct rule, and is also directly applicable to the case at bar. The court, speaking of the two labels, says: "The design, evidently, was to depart from the other sufficiently to constitute a difference when the two were compared, and yet to do it so skillfully that the difference would not be detected by an ordinary purchaser, unless his attention was particularly called to it, and he had a very perfect recollection of the other label. The design was to deceive, and to obtain, in the manufacture and sale of the article, any benefit or advantage that might be gained by its being purchased for another article of the same description, which was known and distinguished by a particular trade-mark. There could be no other motive, and it was done with the shallow expectation that the law would not see through the motive, but pronounce that the two labels were not the same, by simply distinguishing the points of difference between them." In McLean v. Fleming, 96 U. S. 245, the supreme court of the United States says: "What degree of resemblance is necessary to constitute an infringement is incapable of exact definition, as applicable to all cases. All that courts of justice can do in that regard is to say that no trader can adopt a trade-mark so resembling that of another trader as that ordinary purchasers, buying with ordinary caution, are likely to be misled. * * * Much must depend, in every case, upon the appearance and special characteristics of the entire device; but it is safe to declare, as a general rule, that exact similitude is not required to constitute an infringement or to entitle the complaining party to protection. If the form, marks, contents, words, or the special arrangement of the same, or the general appearance of the alleged infringer's device, is such as to be likely to mislead one in the ordinary course of purchasing goods, and induce him to suppose that he was purchasing the genuine article, then the similitude is such as entitles the injured party to equitable protection." We have quoted from these two cases because the language employed in the opinions aptly expresses the true rule. There are numerous authorities to the same point. And it clearly appears that in the case at bar the defendant did the precise thing which the authorities declare an infringement. The testimony shows that the person who prepared the bags and labels of defendant had the bag and label of plaintiff before him; and the witness Siegelken,—the only witness who testified directly on the point,—after stating that he was a grocer, said: "I have sold, right along, 'Germea' and 'Germ,' and am familiar with both packages. I have had both brands, and sold them. When customers have asked for 'Germea,' I have handed them out 'Germ.' I have them side by side." But this testimony was not necessary to show either the intent or its fulfillment. Both clearly appear upon the face of the packages, as they are presented in the findings.

These views make it unnecessary to notice other points raised by appellant. It is proper to say, however, that there are no grounds for granting respondent's request to strike out the transcript or dismiss the appeal; and, as the appellant waives all claims for damages, and all relief asked for under paragraphs 2, 3, and 4 of the prayer of the complaint, there is no necessity of a new trial. The judgment and order are reversed, with directions to the court below to render a judgment for plaintiff, decreeing an injunction as prayed for in the first paragraph in the complaint, with costs, but without damages, or other relief prayed for.

We concur: THORNTON, J.; SHARPSTEIN, J.

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3 Cal. Unrep. 162

In re MOORE'S ESTATE. (No. 13,139.)

(*Supreme Court of California.* Nov. 20, 1889.)

EXECUTORS AND ADMINISTRATORS — NEGLECT OF DUTY.

The fact that an administration has not been completed, though 14 years have elapsed since the appointment of the administrator, is *prima facie* evidence of neglect of duty on his part, and, in the absence of satisfactory explanation of the delay, supports a finding that the administrator has wrongfully and willfully neglected the estate, and has unnecessarily, willfully, and wrongfully prolonged its administration, to its great detriment, and justifies his removal, and the revocation of his letters of administration.

Department 2. Appeal from superior court, Santa Clara County; PHIL W. KEYSER, Judge.

This proceeding to obtain the removal of Thomas W. Moore as administrator of the estate of William H. Moore, deceased, was instituted in the superior court of Santa Cruz county by W. H. Moore, a son and heir at law of the decedent, but was subsequently removed to the superior court of Santa Clara county.

Hall & Rodgers, (*Warren Olney,* of counsel,) for appellant. *Charles B. Younger*, for respondent.

PER CURIAM. This appeal is from an order removing appellant, and revoking his letters of administration, as administrator of said estate. Said order is based upon a finding that "the said Thomas W. Moore has wrongfully and willfully neglected said estate, and has unnecessarily, willfully, and wrongfully prolonged the administration of said estate, and to the great detriment thereof." The question whether the finding is justified by the evidence is the only one which we shall now consider.

It clearly appears that appellant was appointed and entered upon the discharge of his duties as administrator of said estate in the early part of the year 1873, and the petition for his removal was filed July 14, 1887. Between the appointment and the filing of the petition more than 14 years had elapsed. This was *prima facie* evidence of neglect, and we fail to find any satisfactory explanation of this long delay consistent with the duty of the administrator to wind up the administration within a reasonable period. The power of removal for the cause specified is vested in the superior court; and "with the exercise of this power, so necessary to the protection and security of estates, an appellate court should not interfere, unless it be clearly shown that there had been a gross abuse of discretion by the probate court. The facts of this case, as disclosed by the record, establish no such abuse of discretion." Deck's Estate v. Gherke, 6 Cal. 666. Order affirmed.

(81 Cal. 231)

SCHENCK v. BANDMANN *et al.* (No. 12,386.)

(*Supreme Court of California.* Nov. 20, 1889.)

CORPORATIONS—DIRECTORS—DUTY TO POST STATEMENTS.

1. Under St. Cal. 1880, p. 134, providing that on failure to make and post, on the first Monday of each month, an itemized account of all disbursements and receipts during the preceding month, the directors of a mining corporation shall be liable to any stockholder complaining thereof in the sum of $1,000 liquidated damages, negligence on the part of the directors appears on showing their failure to make and post the account on the first Monday in the month, though it is admitted that they did not have the necessary information to make it, and the burden is on the directors to show exculpatory circumstances.

2. The statute being mandatory as to the time when the account is to be made and posted, the penalty attaches on the failure to do so on the first Monday in the month; and a complaining stockholder may recover for the failure, though the account is made and posted before the beginning of the action.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

J. F. Cowdery, for appellants. *E. F. Swortfiguer*, for respondent.

BELCHER, C. C. The plaintiff commenced this action to recover judgment against the defendants for $1,000 liquidated damages, with costs of suit, under the provisions of an act of the legislature of this state, approved April 23, 1880, (St. 1880, p. 134.) The case was submitted in the court below upon an agreed statement of facts, and judgment was given for plaintiff as prayed for in his complaint. The appeal is from the judgment, and rests on the judgment roll. The facts of the case, as they were agreed to and found by the court, are as follows: In September, 1880, the Pittsburg Gold Mining Company was a corporation, organized under the laws of this state, for the purpose of mining, and having its office and principal place of business at the city and county of San Francisco. The capital stock was $10,000,000, divided into 100,000 shares; and of this stock during the said month of September, and until long after the commencement of this action, the plaintiff was the owner and holder of 230 shares. On the 18th day of September, 1880, the defendants were duly elected directors of the said corporation, and from thence until the time of the commencement of this action, and for a long time thereafter, were and remained the duly elected, qualified, and acting directors thereof. The corporation also had a president and secretary, who were duly elected, qualified, and acting as such. During the month of October, 1880, work was being prosecuted in the mine held and owned by the corporation, and ore was being extracted and taken from the mine, and sent to mill for reduction, and bullion was obtained therefrom. The corporation also received and disbursed during the month considerable sums of money, and incurred indebtedness and liabilities which were existing on the first Monday of November following. The defendants, as such directors, did not make or post, or cause to be made or posted, on the first Monday of November, 1880, or at any time prior to the 19th day of that month, the itemized account or balance-sheet, or any account or balance-sheet whatever, for the previous month of October, as required by the act of the legislature above referred to. The defendants, as such directors of the corporation, and the president and secretary thereof, did not, nor did either or any of them, obtain the information necessary to the making of the itemized account or balance-sheet for the month of October, 1880, required by the said act, prior to the 15th day of November, 1880; but on the 19th day of that month, and the day before the commencement of this action, an itemized account or balance-sheet for the previous month of October, in substance and form as required by the statute, was made, verified, and posted in a conspicuous place in the office of the corporation by the president and secretary thereof.

It is contended for appellants that the conclusion of law drawn by the court from the foregoing facts, that plaintiff was entitled to judgment, was not warranted, and that the judgment should therefore be reversed. The argument is that, while it does not appear why the defendants failed on the first Monday in November to have the information necessary to enable them to comply with the law, still all presumptions must be indulged in their favor. The presumptions invoked are declared in subdivisions 1, 15, 20, 28, 33, § 1963, Code Civil Proc., and are that a person is innocent of crime or wrong; that official duty has been regularly performed; that the ordinary course of business has been followed; that things have happened according to the ordinary course of nature, and the ordinary habits of life; that the law has been obeyed. It is said the law never exacts impossibilities; and, it being admitted that defendants did not have the necessary information before the 15th of November, the burden was cast upon the plaintiff to show negligence on their part. On the other hand, it is contended for respondent that the statute is arbitrary in its requirements; that if defendants had any cause or excuse for their failure to obtain the necessary information, other than their own negligence, the burden was upon them to show it; and that, in the absence of such showing, they were rightly held to have incurred the penalty imposed by the statute, and must bear the consequences.

The act of the legislature under which the respondent asserts his right to recover applies only to corporations formed under the laws of this state for the purpose of mining; and the portions of it necessary to be considered are found in sections 1 and 3, and are as follows: "Sec. 1. It shall be the duty of the directors, on the first Monday of each and every month, to cause to be made an itemized account or balance-sheet for the previous month, embracing a full and complete statement of all disbursements and receipts, showing from what sources such receipts were derived, and for what and to whom such disbursements or payments were made, and for what object or purpose the same were made; also all indebtedness or liabilities incurred or existing at the time, and for what the same were incurred, and the balance of money, if any, on hand. Such account or balance-sheet shall be verified under oath by the president and secretary, and posted in some conspicuous place in the office of the company." "Sec. 3. In case of the failure of the directors to have the reports and accounts current made and posted as in the first section of this act provided, they shall be liable, either severally or jointly, to an action by any stockholder in any court of competent jurisdiction complaining thereof, and, on proof of such refusal or failure, such complaining stockholder shall recover judgment for $1,000 liquidated damages, with costs of suit." The requirement of the statute is clear that the account or balance-sheet must be made and posted on the first Monday of the month. No exceptions are provided for. The appellants failed to comply with this requirement. This is alleged and admitted. The corporate powers, business, and property of the corporation were exercised, conducted, and controlled by the appellants. Section 305, Civil Code. They knew, or ought to have known, at all times, the condition of the business and property under their control; and what they ought to have known they must be presumed to have known, unless they were negligent in the discharge of their duties. Nothing was required to be set out in the account except what, as directors, they were expected to know. The admission, therefore, unexplained, that they lacked the information necessary to enable them to make and post the account in time, seems to present simply a case of neglect or disregard of duty. It may be that, under possible circumstances, the directors of a corporation, when they have failed to comply strictly with the law, should be held excused. For example, the president or secretary, or both of them, might be taken sick or die, rendering it impossible for the account to bc made, verified, and posted in time. But, i so, the facts must be within the knowledg of the directors, who are sued, and shoul be set forth and proved. Under the circumstances shown in this case, we fail to se how the presumptions invoked by appellants can be held applicable to the case They were not charged with a crimina wrong, but with neglect to perform a dut enjoined by statute; and it is evident that their official duty in this respect was not regularly performed, and that the law was not obeyed.

It is further claimed for appellants that they ought not to be made to pay the penalty imposed upon them, because the account required was in fact made and posted the day before the action was commenced. But we find nothing in the statute, or in the supposed reason for its passage, to warrant such a defense. The statute seems to be as mandatory in regard to time as it is in other respects; and the first Monday of the month, and not the commencement of the action, is the time after which the penalty attaches. If the theory of appellants is right, then, though the directors of a corporation should delay making out and posting the account for six months or a year, they could still escape the consequences of their negligence if they should succeed in getting in ahead of the complaining stockholder by a day, or even an hour. We do not think this theory can be maintained. In Loveland v. Garner, 71 Cal. 544, 12 Pac. Rep. 616, the court, speaking of the same statute, said: "The plaintiff is entitled to recover, if he has alleged and can prove the defendants to have been guilty of failure on the first Monday of any one month 'to have the reports and accounts current made and posted, as in the first section of this act provided.'" The cases cited for appellants do not meet the case. We find nothing in the record to justify a reversal of the judgment, and therefore advise that it be affirmed.

We concur: HAYNE, C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(81 Cal. 240)

In re GILMORE'S ESTATE. (No. 13,163.)

(*Supreme Court of California.* Nov. 21, 1889.)

WILLS—CONSTRUCTION—DECLARATIONS OF TESTATOR—HOMESTEAD.

1. A testator devised to his wife one-half "of all my property of which I may die possessed," and to his children the remaining half. *Held*, that as to community property the devise to the wife was of one-half of his moiety.

2. Evidence of what the testator said, just before his death, to his executor, as to what was intended by the will, and who wrote it, the declarations having been made five years after the mak-

ing of the will, is inadmissible in a proceeding to construe the will.

3. After the homestead has been set apart to the widow, the court has no jurisdiction over it for the purpose of distribution.

Commissioners' decision. Department 2. Appeal from superior court, Alameda county; JOHN ELLSWORTH, Judge.

Appeal by certain legatees (children of Robert Gilmore, the deceased) from a decree of distribution giving to the widow of decedent three-fourths of an estate, under a will directing that she take one-half of all the property of which the testator should die possessed.

F. B. Ogden, for appellants. *Nye & Richardson*, for respondent.

VAN CLIEF, C. Appeal from decree of distribution under the following provisions of the will: "*Thirdly.* I give and bequeath to my wife, Elizabeth Gilmore, one-half of all my property, both real and personal, of which I shall be possessed at the time of my death, the same to be equitably divided by my executors, giving to her the privilege of taking her half of said real and personal property, if the same can be satisfactorily divided; if not, then the said executors shall sell the same, or such portion as cannot be so divided, and give to my said wife one-half the net proceeds of the same. *Fourthly.* I give and bequeath the remaining half of all my property, both real and personal, of which I may die possessed, to the following persons, to be divided by my executors equitably between them, and each of them, share and share alike." The persons named, who are to take under this fourth paragraph, are his daughter by a former marriage, and her children, and the children of a deceased daughter by the former marriage. All the property affected by the will was community property of the testator and his wife, Elizabeth; and the court below construed the will as giving to the widow, in addition to one-half of the community property to which she was entitled by law, an undivided one-half of the residue that was subject to the testamentary disposition of the husband. Was this in accordance with the expressed intention of the testator? is the principal question to be decided.

It will be observed that the will does not specifically describe any property, but simply gives to the wife "one-half of all my property, both real and personal, of which I shall be possessed at the time of my death." Conceding that the will is susceptible of two possible constructions,—one, that the testator intended to devise all property of which he should be possessed at the last moment of life, including the whole of the community property over which he had the power of disposition during life; and the other, that he intended to devise only his property then in his possession, over which alone he had the power of testamentary disposition, — still, well-settled rules of construction and presumptions of law require the adoption of the latter construction, which accords with the decree of the lower court. (1) The testator must be presumed to have known the law applicable to the disposition of property by will, and, therefore, to have known that he had no power to dispose by will, of his wife's interest in the community property, but only of his own interest therein. Civil Code, §§ 172, 1331, and 1402; Morrison v. Bowman, 29 Cal. 347; Estate of Frey, 52 Cal. 660. (2) He must also be presumed not to have intended to devise any property over which he had no power of testamentary disposition, and therefore the will should be read as applying only to his property within such power. King v. Lagrange, 50 Cal. 332; Estate of Silvey, 42 Cal. 213. In the latter case it was said: "The devise must be read as applying only to that moiety which was within his testamentary power. A purpose to attempt the disposition, by will, of property which, by statute, would pass to the wife, as survivor of the matrimonial community, immediately upon his death, is not to be readily inferred, especially where, as here, the words employed by the testator may have their fair and natural import by applying them only to that moiety of which he had, by law, the testamentary disposition." The devise in this case is "of all my property of which I may die possessed," and not of any specific property. The devise to the wife is not inconsistent with the other devises to the daughter and grandchildren. All the "words employed by the testator may have their fair and natural import by applying them only to that moiety of which he had, by law, the testamentary disposition;" and there is nothing in the circumstances under which the will was made, substantially tending to rebut the presumptions above stated. It is only where there is such a clear manifestation of intent to devise the whole community property as to overcome those presumptions that the wife can be put to her election either to take under the will, or to take what she is entitled to by law. Morrison v. Bowman, 29 Cal. 347; Noe v. Splivalo, 54 Cal. 207; Estate of Stewart, 74 Cal. 98, 15 Pac. Rep. 445. But, where there is no such manifest intent, the wife may claim and take both what the law gives her in the community property, and also what is given her by the will of her husband in that portion thereof subject to his testamentary disposition. Beard v. Knox, 5 Cal. 252; Payne v. Payne, 18 Cal. 301; Estate of Silvey, 42 Cal. 210; King v. Lagrange, 50 Cal. 331; Estate of Frey, 52 Cal. 658.

Under the circumstances of this case, the court did not err in excluding evidence of what the testator said, just before his death, to his executor, as to what was intended by his will, and who wrote it. Civil Code, § 1318. The declarations sought to be proved were made five years after the date of the will, and therefore constituted no part of the *res gestæ*. Nelson v. Mc Clanahan, 55 Cal. 308; Estate of Garraud 35 Cal. 336.

The order setting apart the homestead to the widow relieved it from administration, and excluded it from distribution, (Estate of Hardwick, 59 Cal. 292,) but it did not affect the title to the homestead, (Herrold v. Reen, 58 Cal. 443; Watson v. His Creditors, Id. 556; Estate of Burton, 63 Cal. 36.) Under the provisions of the Codes, it is only a homestead selected from the community property, during the existence of the community, to which the law of title by survivorship applies, (Civil Code, § 1265, and Code Civil Proc. § 1474;) and therefore, upon the death of the husband, in this case, the community property vested according to section 1402 of the Civil Code, regulating the succession to such community property, subject, however, to its temporary use as a homestead by the family of the widow, under an order of the probate court setting it apart for that purpose, (Code Civil Proc. § 1465.) But, after having been thus set apart, the court had no jurisdiction over it for any purpose of distribution; and therefore there is no apparent error in the decree in respect to the homestead. I think the decree should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the decree is affirmed.

(81 Cal. 244)

SCHURTZ *v.* ROMER *et al.* (No. 13,311.)

(*Supreme Court of California.* Nov. 22, 1889.)

APPEAL-BOND—RENDITION OF JUDGMENT.

1. Code Civil Proc. Cal. § 954, provides that, if an appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of a supreme court, be filed in the supreme court before the hearing on motion to dismiss. On an appeal from a judgment and order denying a new trial, the appeal-bond specified the judgment alone. After the time allowed by statute for giving the bond in the court *a quo*, he filed in the supreme court a bond on appeal from the order, approved by the chief justice. *Held*, that the statute only authorizes a new bond when the one filed is insufficient, and that the appeal from the order should be dismissed. Following Associates v. Wilkins, 12 Pac. Rep. 799.

2. The rendition of a judgment is its announcement by the court, and not its entry in the judgment book, within Code Civil Proc. § 939, providing that "an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment."

Department 1. Appeal from superior court, Los Angeles county, WILLIAM P. WADE, Judge.

Action by Joseph Schurtz against Max Romer and F. Kerkow. Judgment was for plaintiff; and from the judgment, and an order denying a new trial, defendant Kerkow appeals.

Gottschalk & Luckell, for appellant. *Wells, Guthrie & Lee*, for respondent.

WORKS, J. The appellant, Kerkow, gave notice of an appeal from the judgment, and from the order denying him a new trial. He gave an undertaking on appeal from the judgment alone. No reference was made in the undertaking to the order denying the new trial, or the appeal therefrom. After the time provided by law for giving the undertaking on appeal in the court below, the said appellant applied to the chief justice to approve an undertaking to be filed in this court. The undertaking was approved by the chief justice, and subsequently filed with the clerk of this court.

The respondent moves to dismiss the appeal on the ground that no bond was filed in time in the court below; and, no attempt having been made to file such bond, the one approved by the chief justice, and filed in this court, could not be effective. An appeal is taken by serving and filing a notice of appeal within the time prescribed by law. But the appeal is ineffectual for any purpose, unless within five days after service of the notice of appeal an undertaking be filed, or a deposit of money be made, or the undertaking be waived by the adverse party in writing. Code Civil Proc. § 940. The giving of the undertaking is necessary to confer jurisdiction on this court, and must be given within the time prescribed by the Code. But section 954 of the Code provides: "If the appellant fails to furnish the requisite papers, the appeal may be dismissed; but no appeal can be dismissed for insufficiency of the undertaking thereon, if a good and sufficient undertaking, approved by a justice of the supreme court, be filed in the supreme court before the hearing upon motion to dismiss the appeal." This section does not authorize the giving of an undertaking in this court in the first instance; but, when an insufficient one has been given in the court below, the defect may be remedied by filing a new undertaking here. The giving of the new bond is in the nature of an amendment to a defective proceeding. In this case no bond was given on the appeal from the order denying a new trial, nor was there any attempt to do so. For these reasons the bond approved and filed in this court was ineffectual for any purpose, and the appeal must be dismissed. No amendment of the undertaking could be allowed, because none had been given, and there was nothing to amend. The precise question has been decided by this court in a case in which leave was asked to file an undertaking here. The court said: "The section referred to [section 954] does not authorize it. It only authorizes a new undertaking when the one filed is insufficient. But in this case there has really been none filed. To allow new ones to be filed would be, in effect, to permit a new appeal to be perfected after the time fixed by law." Associates v. Wilkins, 71 Cal. 626, 12 Pac. Rep. 799. See, also, Berniaud v. Beecher, 74 Cal. 617, 16 Pac. Rep. 510; Wood v. Pendola, 77 Cal. 82, 19 Pac. Rep. 183.

The appellant contends that, as his appeal from the judgment was taken within 60 days after the entry of judgment, the statement on motion for a new trial may be looked to for the purpose of determining whether or not the decision is supported by the evidence. The Code provides: "But an exception to the decision or verdict on the ground that it is not supported by the evidence cannot be reviewed on an appeal from the judgment, unless the appeal is taken within sixty days after the rendition of the judgment." Code Civil Proc. § 939, subd. 1. It has been held by this court that there is a material difference between the rendition and the entry of a judgment. A judgment is rendered when it is announced by the court. It is entered when it is actually entered in the judgment book. Gray v. Palmer, 28 Cal. 416; McLaughlin v. Doherty, 54 Cal. 519; Estate of Cook, 77 Cal. 220, 17 Pac. Rep. 923, and 19 Pac. Rep. 431. This appeal was taken within 60 days after the entry of the judgment, but not within 60 days after its rendition. For that reason we are precluded, by the express language of the statute, from considering the question whether the decision is supported by the evidence. It is contended that, under the earlier statutory provisions limiting the time for taking appeals, the time commenced to run from the rendition of the judgment, and not from its entry, and that the Code has been so amended as to make the time commence to run at the latter date, and that, as the appeal cannot be taken until after the entry of the judgment, that part of the section we are considering should be so construed as to make it relate to the same time. But we know of no reason or any rule of law that would warrant us in changing one portion of the Code by judicial construction because the legislature has changed another by law. Besides, there is no apparent reason why the limitation of the right to use the statement for the purpose named should not be enforced under the present provisions of the Code, as well as under the former provision. The party appealing can secure the right to use the statement by prosecuting his appeal from the judgment within the time fixed. If he fails in this, he is not without his remedy. He still has his motion for a new trial, which, if properly prosecuted, furnishes him the same remedy. The evil of our system of practice is that it gives too many remedies; and attorneys, by hesitating which one to pursue, frequently lose them all. This is one of the many cases in which this has occurred. For the reasons stated we cannot look into the evidence to see whether or not it supports the decision.

The only other point urged in the appellant's brief is that the findings do not support the judgment. We have carefully examined the findings, and hold them to be entirely sufficient, and that they support the judgment rendered. Appeal from order denying new trial dismissed, and judgment affirmed.

We concur: PATERSON, J.; FOX, J.

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81 Cal. 456

HARRIGAN v. MOWRY. (No. 11,815.)

(*Supreme Court of California.* Nov. 22, 1889.)

ACTION TO QUIET TITLE—SUFFICIENCY OF EVIDENCE.

1. Where plaintiff conveys land to defendant in trust for herself, which defendant is to reconvey at the end of five years, the fact that, at the expiration of that time, plaintiff is in possession of the land does not authorize a finding that the legal title is in her.

2. An action to quiet title does not lie under Code Civ. Proc. Cal. § 738, where defendant claims no adverse title to plaintiff.

Commissioners' decision. Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

R. Percy Wright, for appellant. *C. H. Parker*, for respondent.

VAN CLIEF, C. Action to quiet title. The amended complaint, in two counts, and in the most general forms, (filed July 28, 1885,) alleges "that the plaintiff above named is now, and has been for a long time past, the owner of, and in the possession of, that certain piece or parcel of land situate, lying, and being in said city and county of San Francisco," (describing the lot.) "And the plaintiff further avers that the said defendant claims an interest therein adverse to the plaintiff, and that the claim of said defendant is without any right whatever, and that the said defendant has not any estate, right, title, or interest whatever in said land or premises, or any part thereof." The second count, for another lot in the city of San Francisco, is in the same form. The prayer, in substance, is that defendant be required to set forth the nature of her several claims; that all her adverse claims be determined; that it be adjudged that plaintiff is the owner of the lots, and that the defendant has no estate or interest therein; and that defendant be enjoined from asserting any claim thereto adverse to the plaintiff. This complaint, not being verified, was answered (1) by a denial of each and every allegation of both counts, and (2) by the affirmative allegations "that the defendant is the owner in fee of the real property described, as trustee of an express trust respecting the same, and that the plaintiff herein is the beneficiary of said trust." The court found, generally, that all the allegations in plaintiff's complaint are true, and that all the allegations in the defendant's answer are untrue; and specially found that the defendant was not, at the commencement of the action, the owner in fee of the lots, or any part thereof, as trustee of an express trust, or otherwise; and that the plaintiff is not, and has not been since the 13th day of January, 1884, the beneficiary of any trust concerning or relating to said property, or of any part thereof. As a conclusion of law, the court found that the plaintiff was entitled to judgment as prayed for in the complaint, and judgment was so rendered. Defendant appeals from the judgment, and from an order denying her motion for new trial, and relies wholly upon the point that the findings of fact are not justified by the evidence.

There was no substantial conflict in the evidence. It was proved by the plaintiff that on the 13th day of January, 1879, the estate of Eliza Haskell, deceased, was in process of administration in the probate court of the city and county of San Francisco, and consisted of real and personal property; that John L. Haskell—the stepfather of the plaintiff—was administrator of the estate; and that plaintiff, as the daughter and heir of the deceased, was entitled to an undivided one-third part of the estate. Under these circumstances, and on that day, (January 13, 1879,) the plaintiff executed a deed to John L. Haskell and the defendant, by which she granted and conveyed to them, for the consideration of one dollar, all her interest, it being an undivided one-third part, "of all the property, real, personal, and mixed, belonging to the estate of Eliza Haskell, deceased, and situated in said city and county," (and for a more particular description referring to county records, and to the papers on file in the probate court,) with all appurtenances, "together with all her claims, demands, and interest in and to the estate of Eliza Haskell, deceased;" "to have and to hold.

all and singular, the said hereinbefore described premises and property and estate, * * * for the uses and purposes hereinafter mentioned, for the benefit of the party of the first part, * * * namely, to take charge of, manage, lease, and preserve, and to take and receive the rents, issues, profits, increase, and income of, said estate, property, and premises, and out of the same to keep and preserve said property, premises, and estate in good order and repair, properly insured and preserved, and to pay all taxes, assessments, and liens imposed thereon, and to pay the residue of such rents, profits, increase, and revenue, as and for her separate estate, to the said party of the first part * * * for and during the term of five years, and at the end of said term to reconvey to said party of the first part * * * the property, premises, and estate herein granted. * * * The parties of the second part shall have no right to execute any conveyance or deed of, or to create any lien upon, the estate and interest of the said party of the first part without her written consent. * * * And it is further understood and agreed that said parties of the second part will pay over to the party of the first part the rents, issues, and profits due her monthly, so far as the same may be practicable. * * * That from time to time, and not less than once at the expiration of each and every term of three months from and after the acknowledgment of this agreement, a report in writing shall be made by said trustees to said party of the first part of the receipts, disbursements, and condition of said estate and interest, if demanded by the party of the first part. And said Volina E. Harrigan waives and releases all right or power to sell or dispose of or incumber the said property for and during said term of five years. [Usual *testatum* clause.] [Signed] VOLINA E. HARRIGAN. We, the undersigned, do hereby accept the above conveyance, upon the terms and conditions as above set forth. JOHN L. HASKELL. LAURA A. MOWRY."

The plaintiff further proved that on the 14th day of February, 1879, a decree of distribution was entered by the probate court giving to John L. Haskell and the defendant, as trustees of plaintiff under said deed, an undivided one-third part of the property of the estate of Eliza Haskell, deceased, consisting of both real and personal property, and including the two lots described in plaintiff's complaint. On May 13, 1880, by decree of the superior court, certain real property derived from said estate was partitioned. By this decree the two lots in question were set off to John L. Haskell and the defendant, as trustees of plaintiff under said deed of trust. The following testimony was given on behalf of the plaintiff but no evidence was introduced by the defendant:

Volina E. Harrigan, (the plaintiff,) on her behalf, said: "I am the plaintiff in this action, and am, and have been since the 13th of January, 1884, in the possession of the two pieces of real property described in the amended complaint in this action, and have been receiving the rents and profits thereof. Mr. Haskell and Mrs. Mowry were in possession of that property before that time. Question. What have you done in the way of exercising control over this property since the 13th of January, 1884? Answer. Oh, I have been in to see that the place was rented, and to see that repairs were made. My father would tell me that such and such repairs were to be made, and I would go and see if the work was really wanted. Cross-Examined. Q. What change was made on the 13th of January, 1884? Did you not receive the rents and profits before that? A. Well, I used to receive about so much a month before that time. Q. Who received the rents before the 13th of January, 1884? A. My father, that is, my stepfather, J. L. Haskell. Q. Did he receive the rents of the property after that time, and pay them over to you? A. He did for a while,—two or three months, or so. Q. Now, who actually collects the rents? A. Madison & Burke. Q. Didn't Madison & Burke always collect the rents before the 13th of January, 1884? A. Yes, sir. Q. Then no change was made on the 13th of January, 1884, except that you received the whole of the rents and profits? A. Yes, sir. By the Court. Have you made a demand on Mrs. Mowry for a deed? A. Yes, sir; I have. Cross-Examination Resumed. Q. Did you ever make any demand on Mrs. Mowry personally? A. No, sir; not personally. Q. At the 13th of January, 1884, did you receive any accumulated rents, or have any settlement of the account of rents? A. No, sir. Re-examined. Q. In what capacity did your father act when he collected the rents since the 13th of January, 1884? A. He was my agent. Q. Has he rendered you monthly statements since the 13th of January, 1884? A. He gave me one accounting for the full year last January. Q. How did he make out his accounts? A. To me. Q. As your agent? A. Yes, sir; as my agent."

Laura A. Mowry, called for plaintiff, said: "Question. What claim do you make to this property? What reason have you for not executing a quitclaim deed to it? Answer. I have not made any claim, except to have an accounting and settlement. By the Court. I understand you to say you make no claim, and assert no right, to the property; that the only question with you is the matter of the accounting and trust? A. For Mr. Haskell and myself to have an accounting with Mrs. Harrigan. Direct Examination Resumed. Q. Do you claim to hold any title to this property as a trustee? A. Only until there is an accounting. That is just what Mrs. Harrigan wished me to do. Q. You decline to make any conveyance until there is an accounting? A. And I am settled with. Q. Well, you claim that you have a right to hold this property until you are settled with? A. Yes, sir. Q. That is your claim? A. Yes, sir. Q. Do you consider that you have a lien upon that real estate until you are settled with for any claim which you may have? A. Well, I will tell you what I understand. I understand that I was put in there as a trustee. Q. You make no other claim than that you have stated? A. The only claim that I make is for Mr. Haskell and myself to make an accounting to our ward for exactly what we have received, and what we have paid out, and what there is on hand, and how we have delivered the profit to our ward. I do not wish to have it said afterwards that Mrs. Mowry had wronged her ward. I want an accounting. Q. Now, you have no claim except what grows out of this trusteeship? A. No, sir. Q. Was there a deed presented to you for signature? A. Yes, sir. Q. And you declined to execute it? A. No, sir. Q. You have never executed it? A. No sir; but I did not decline. I told Mr. Haskell that we should get together, and see exactly how we stood, and return to our ward exactly what was proper, and then I was ready and willing to sign. Q. Why did you insist on having an accounting before you executed the deed? A. Because I thought it was right, and I considered it my duty. Cross-Examined. Q. For whose benefit was the accounting you have sought? A. Mrs. Harrigan's, my ward, it was for her benefit. Q. Have you ever claimed, at any time, any interest adverse to her? A. No, sir; I have not; on the contrary, it is to assist and benefit her. Q. Have you not at all times been willing to do anything that would benefit her? A. Yes, sir; and have repeatedly asked Mr. Haskell to make an accounting. Q. Did you not demand it? A. I demanded it in writing of Mr. Haskell. Q. Will you state to the court if it is possible for you to prepare an account? A. It is an utter impossibility, because he refused me the books. I have no possible way of getting at it. Q. Who was the administrator of the estate of Eliza Haskell, deceased? A. J. L. Haskell. Q. Then your co-trustee was the person from whom you and he, as trustees, had to receive all the share of the personal property? A. Yes, sir. Q. Did you ever know positively that all or any considerable part of the personal property had been turned over by the administrator to the trustees? A. No; there is only $5,000 that I have any knowledge of. That was received by John L. Haskell and Laura A. Mowry, trustees, from John L. Haskell, administrator. It was turned over at once, when there was a partial distribution. Q. During all the period of five years, did you act in the matter? A. Always. Q. Some mention was made of Messrs. Sharp & McCeney having some claim against the trust-estate? A. Yes, sir. Q. Did you, or did you not, spend a large amount of time on behalf of Mrs. Harrigan in that matter? A. I did. Q. State about what you did as trustee. A. Sharp & McCeney were to get one-third of what they recovered for Mrs. Harrigan from Mrs. Haskell's estate as their fee. They claimed $25,000 originally as due to them. By reason of my exertions as trustee, that was reduced to $14,400, which they agreed to take, and relinquish all their interest in the estate. Q. Have you ever received any compensation for your services as trustee? A. I have not; nothing at all. Redirect Examination. Q. Now, as a matter of fact, Mrs. Mowry, you have not received any rents, issues, or profits of the estate of your ward, have you? A. Not directly. Q. Mr. Haskell did all the business, did he not? A. Yes, sir. Q. As between you and him? A. Yes, sir."

Charles G. Nagle, on behalf of plaintiff, said: "Question. Did you ever present Mrs. Mowry with a deed, and ask her to transfer this property? Answer. I did. Q. Was it accompanied by any release of claims or demands on the part of Mrs. Harrigan? A. I don't think it was at the particular time of the presentation; but afterwards, at the time of presenting the deed to Mrs. Mowry, she said she would take the deed, and go to her attorney with it, and would return the deed to me, and let me know whether she would execute it or not; and I asked her who her attorney was, and she would not inform me at the time, but afterwards she told me it was Mr. Mhoon, of Flournoy & Mhoon. I afterwards called upon her about the deed, and asked her several times, but got no definite answer. Afterwards it came about that I was to bring a release to Mrs. Mowry. The release was drawn up by you, and I copied it, and presented Mrs. Mowry with a copy of the release. She said that she believed that it was full enough. I believe I have a memorandum of it in my book."

Here the plaintiff rested, and no further evidence was offered on the part of the defendant.

1. The finding that the plaintiff was owner of the lots is not justified by the evidence. Conceding that plaintiff was in possession, and that possession is *prima facie* evidence of ownership, yet such *prima facie* evidence was rebutted and entirely overcome by the trust-deed, and other evidence introduced by the plaintiff showing that defendant and Haskell held the legal title. Sepulveda v. Sepulveda, 39 Cal. 17.

2. For the same reasons the finding that the "defendant has not any estate, right, title, or interest whatever in said land or premises, or any part thereof," is unsupported by the evidence. Nor is there any evidence that the defendant claimed any interest in the land adverse to the title of plaintiff. It appears that the defendant rightfully claimed that she and Haskell held the legal title as trustees for the plaintiff; but their legal title, as such trustees, was not adverse to the title of the plaintiff as sole beneficiary,—the only title proved in her.

3. But conceding, without deciding, that the plaintiff was entitled to a conveyance of the legal title, and that defendant wrongfully refused to convey it, an action to quiet title under section 738 of the Code of Civil Procedure was not appropriate, nor even permissible. Von Drachenfels v. Doolittle, 77 Cal. 295, 19 Pac. Rep. 518; Brewer v. Houston, 58 Cal. 345; Learned v. Welton, 40 Cal. 349; Frost v. Spitley, 121 U. S. 552, 7 Sup. Ct. Rep. 1129. I think the judgment and order should be reversed, and the cause remanded.

We concur. BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded.

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81 Cal. 61

ASHTON v. DASHAWAY ASS'N *et al.* (No. 12,069.)

(*Supreme Court of California.* Nov. 22, 1889.)

CORPORATIONS—MISAPPROPRIATION OF PROPERTY—ACTIONS BY MEMBERS.

1. A temperance society, owning improved land, was incorporated, without capital stock, "for

the purpose of promoting the cause of temperance," under Hitt. Gen. Laws Cal. § 1024 et seq., providing for the incorporation of "religious, social, benevolent, and learned associations." Some years afterwards, the membership having greatly decreased, a resolution was passed that the trustees sell the property, pay off some outstanding indebtedness, and "purchase other cheaper property suitable for the uses and purposes of the association." A petition asking for leave to sell, and stating, among other things, that the corporation was "purely and solely for the benevolent and laudable purpose of aiding and promoting the cause of temperance, and not pecuniary profit," was accordingly filed in the superior court, which granted the prayer of the petition, reciting the resolution in its order of sale. The property was sold, and a portion of the proceeds divided among a part of the members, including the trustees, pursuant to a motion "that the association donate to each member in good standing the sum of $1,500 for past services, on signing a receipt for the same;" but it was admitted on the trial that no services had been rendered other than being good and efficient members of the organization. *Held*, a misappropriation of corporate funds, and that any member not a party thereto could maintain a suit to compel a restoration.

2. Where trustees misappropriate corporate funds, claiming the right so to do, a member may institute proceedings for their restoration without demand on the trustees to take action in the matter.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

S. Heydenfeldt, Jr., and *Joseph P. Kelly*, for appellant. *Tilden & Tilden* and *David McClure*, for respondents.

Sharpstein, J. This was a suit by Charles Ashton, a member of the Dashaway Association, against the corporation, its five trustees, and a majority of the other members, to compel the restoration of funds alleged to have been misappropriated. The trial court nonsuited the plaintiff, who appeals from an order denying his motion for a new trial. The original association was an unincorporated temperance society. It was formed in January, 1859, at the Howard Engine-House, by 17 public-spirited men, who took a pledge to abstain from all intoxicating drinks, except for medical purposes, the necessity of which was to be certified by a physician, and adopted a constitution and by-laws. The initiation fee was fixed at 25 cents, and the dues at 12½ cents a week. The preamble was as follows: "We, the undersigned, anxious to advance our own interests, and to promote a spirit of good feeling, not only amongst ourselves, but our friends, and being impressed with the importance of concentrated effort to accomplish the object, and desirous of forming ourselves into an association in which we may labor together for the end proposed, have framed the annexed constitution," etc. It was provided that "it shall be the duty of members to seek out their friends in the city and vicinity, and bring them to the meetings, and introduce them to the members," and "to assist those members who are in need to obtain employment, and aid and encourage the poor and needy, as far as lay in their power." The name adopted was the "Dashaway Association," the meaning of which is said to be that it was the object to encourage the members and their friends to "dash away" the intoxicating cup from their lips. In May, 1859, a more extended constitution was adopted. After reciting that the original plans were "to bring under our banner all inebriates, not only here, but in other parts of the state," it provided for the establishment of branch associations, and that all persons admitted as members should take the pledge. The substance of the previous constitution was adopted.

The enterprise seems to have received the approbation and assistance of the public. The press gave it encouragement; the Reverend Thomas Starr King consented to deliver a lecture for its benefit; and donations of books, of building materials, and of money were received. On one occasion the association received a "donation in money" of $157.50; on another, a subscription of $1,200; on another, $2,107.83; on another, $134.50; on another, $154.75,—and letters of sympathy were received from other states. In 1860 the association purchased a lot on Post street, near Dupont, for the sum of $6,250, and a building was erected upon it for the use of the association. This is the lot which was subsequently sold, as mentioned below. It was mortgaged for part of the purchase money, and subsequently other mortgages were placed upon it. In 1862 the association was incorporated. The articles were evidently framed under the provisions of the incorporation of "religious, social, benevolent, and learned associations." 1 Hitt. Gen. Laws, § 1024 et seq. There was no capital stock. The articles state that the organization was "a benevolent association, formed for the purpose of promoting the cause of temperance." A "home" for the care of inebriates was provided, under the auspices of the association; but for this purpose a separate corporation was formed.

The association had a numerous membership. "There were thirty one hundred and sixty-three names before the incorporation, and forty-nine hundred and sixty-four since the incorporation." In 1882, however, from some cause which is not explained by the record, the membership had dwindled to 59; and in the following year notice was given of a meeting of members to consider the question of selling the property above mentioned, in order to pay the indebtedness, "and to reinvest in other property suitable for the association." At this meeting a resolution was passed that the trustees be instructed to sell the property, pay the indebtedness, "and purchase other cheaper property suitable for the uses and purposes of the association." A petition for leave to sell the property was accordingly filed in the superior court, stating, among other things, that the association was incorporated "purely and solely for the benevolent and laudable purpose of aiding and promoting the cause of temperance, and not pecuniary profit;" and the court granted leave to sell, reciting in its order the above-mentioned resolution. The property was then sold for the sum of $156,000. Of this sum $45,000 was used in discharging indebtedness; $31,543.54 was placed in savings banks, where it is to be presumed that it now is; and $73,500 was divided among 49 members, including the trustees. The answers deny that the defendants "unlawfully or fraudulently" took or received any of the money, or that they took or received any money "that was held by said corporation in trust," but do not deny the taking or receiving, and the evidence of the taking is uncontradicted. At a meeting of the members held in December, 1883, the minute-book shows the following entry: "Brother Eagan then moved that the association donate to each member in good standing the sum of $1,500 for past services, on signing a receipt for the same. Carried unanimously." And this is followed by a receipt in the following form: "San Francisco, Dec. 31, 1883. We, the undersigned, members of the Dashaway Association, hereby acknowledge the receipt of $1,500, donated to us for past services by order of the association." This receipt was signed by 49 members, including the trustees; the sum of $1,500 being opposite each name. It was admitted at the trial "that there were no services rendered by the defendant members other than in the line of being good and efficient members of the organization, in accordance with the constitution and by-laws and general objects of the assocation, and that that is all any of the defendants rendered to the society." The by-laws provide that "no officer of this association shall receive compensation for his services, except the secretary and collector, who shall receive such compensation as may from time to time be fixed by the association." It is admitted by the pleadings that the association "still is" a corporation, and no proceedings for its voluntary dissolution are shown.

The argument for the respondents is that the organization was not a charity, in its legal sense, and that therefore it could do what it pleased with its property. "Take all the evidence," say the learned counsel, "search the record through and through, and not one word indicating a charity can be found." We do not find it necessary to decide this question, and, for the purposes of this opinion, shall assume that the association stands upon the same footing as any other private corporation. So regarding it, we think it clear that any member has the right to the aid of the courts in preventing or setting aside such a plain misappropriation of the corporate funds as is above shown. That any stockholder or member has this right in equity is well established. The rule is thus stated in a recent work: "Even the majority have no right to direct the affairs of a corporation except in accordance with the provisions of its charter, for the powers of the majority are derived wholly from the agreement of the stockholders, as set out in the charter; and every individual stockholder has the right to stand upon his contract, and forbid any departure from its terms. It may accordingly be stated as a rule that any departure from the chartered purposes of a corporation is an injury to every individual stockholder, for which equity will, under proper circumstances, provide a remedy." Mor. Priv. Corp. §403. Another learned writer says: "It is *ultra vires* and illegal for the board of directors to donate the funds of the corporation to charitable or public purposes, or to aid corporations of a similar character, however praiseworthy the purpose of the donation may be. Nor can the directors legally use the funds of the corporation to induce promoters to abandon a proposed rival company. A stockholder may enjoin the directors from making free of tolls a bridge from which a corporation derives its income. The directors may be held liable for allowing the president to use the corporate funds for lobbying purposes. An unreasonable use of the corporate profits of a leased railroad to build up and improve the lessor railroad, without reference to the rights of the former, has been held to be good cause of complaint on the part of a stockholder in the leased railroad company; and, in general, any misapplication or waste of the property of a corporation may be remedied by a member thereof." Cook, Stocks, § 674. The supreme court of Rhode Island, in reference to the misappropriation of corporate funds by a director, said: "The jurisdiction does not appear to be so firmly settled and defined in England as in this country; but we do not believe any English judge has ever decided that a president or director who fraudulently converts or embezzles corporate funds cannot be sued in equity by a stockholder, when the corporation willfully neglects or refuses to bring the suit. Indeed, to hold that a corporation could gratuitously condone or release such a fraud by anything short of unanimous consent would be monstrous; for it would be, in effect, to hold that a president or director who can control a majority vote in the corporation may rob or despoil it with impunity." Hazard v. Durant, 11 R. I. 206, 207.

In accordance with those principles, it has been held that a stockholder may restrain the directors from paying an unfounded claim of the secretary for extra services, (Butts v. Wood, 37 N. Y. 317,) and may compel the repayment of funds misappropriated by the directors, (Sears v. Hotchkiss, 25 Conn. 177,) and may recover from a trustee property of the corporation which he has converted to his own use, (Carpenter v. Roberts, 56 How. Pr. 216,) and may prevent corporate securities from being misapplied to the benefit of other corporations, (Chicago v. Cameron, 120 Ill. 447, 11 N. E. Rep. 899,) and may have annulled a lease made in excess of corporate powers, (Mills v. Railroad Co., 41 N. J. Eq. 1,)[1] and may prevent the collection of payment of a tax illegally levied, (Dodge v. Woolsey, 18 How. 331,) and may prevent the payment of dividends out of a fund which ought to have been appropriated to repairs of the company's works, (Dent v. Tramways Co., L. R. 16 Ch. Div. 344,) and may prevent the conversion of the corporate assets by the officers, (Real Estate Co. v. Bank, 75 Ga. 45,) and may have restrained acts which amount to a violation of trust, or a breach of the charter, (March v. Railroad Co., 40 N. H. 548; Wilcox v. Bickel, 11 Neb. 154, 8 N. W. Rep. 436; Teachout v. Railway Co., 75 Iowa, 727, 38 N. W. Rep. 145; Manderson v. Bank, 28 Pa. St. 379,) or which amount to a fraud upon the company, (Ryan v. Railroad Co., 21 Kan. 365,) or to a breach of its charter, (Cook, Stocks, § 672.) In California the rule was laid down in Wright v.

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[1] Atl. Rep. 453.

Mining Co., 40 Cal. 20, in which case it was held that a stockholder could compel the company to refund the sum paid by him for the redemption of corporate property which the directors had allowed to be sold, and had wrongfully neglected to redeem, and WALLACE, J., delivering the opinion, said: "It is settled that courts of equity in this country will, at the instance of a stockholder, control a corporation and its officers, and restrain them from doing acts even within the scope of corporate authority, if such acts, when done, would, under the particular circumstances, amount to a breach of the very trust upon which, as we have seen, the authority itself has been conferred. Dodge v. Woolsey, 18 How. 341. And upon the same principle the court will, even after such an act has been done, relieve an injured stockholder from loss, if, in the mean time, no superior equity has intervened, nor the rights of innocent third parties attached." See, also, Neall v. Hill, 16 Cal. 145; Beach v. Cooper, 72 Cal. 99, 13 Pac. Rep. 161; Chicago v. Cameron, 120 Ill. 458, 11 N. E. Rep. 899. And the relief does not depend upon the existence of a fraudulent intent, although such intent very frequently exists.

Now, in the present case there was a plain misappropriation of corporate funds. The corporation was not dissolved, or, so far as appears, to be dissolved. It was a simple case of trustees who were in possession and in control of corporate funds, acting in pursuance of a vote of the majority of the members, "donating" the corporate funds to themselves and other members upon the pretext of "past services," although the fact was, as admitted at the trial, that no services had been rendered other than such as the parties were bound to render as members of the association. The answers deny that the association was not a corporation for profit. But it is too plain for discussion that this denial was untrue. The corporation was not for profit. Its articles define it as "a benevolent association, formed for the purpose of promoting the cause of temperance;" and it is evident, as stated in the petition for leave to sell the property, that the association "was incorporated purely and solely for the benevolent and laudable purpose of aiding and promoting the cause of temperance, and not pecuniary profit." This being so, the division of more than one-half of the corporate property among 49 members was a diversion of the same from the cause of temperature, which was the "benevolent and laudable" purpose of the institution, into the private pockets of said members. It was an attempt to make a profit out of an undertaking which was not for profit. It is not inconsistent with the conclusion that the preamble of the constitution of the unincorporated association stated that the object of the members was "to advance our own interests." It is perfectly clear, from the circumstances, that this meant their interests with respect to temperance and sobriety. But, aside from this, the old constitution was superseded by the articles of incorporation, which explicitly define the object of the association, as above stated. If such a transaction as appears here would be sanctioned, the majority of the members of any club, or social, religious, or benevolent society, could, without winding up the concern, divide up the funds whenever they felt in need of a little money. It does not appear that the plaintiff consented to the proceeding; he is not shown to have been present at the meeting at which the resolution above quoted was "unanimously carried;" his name does not appear on the receipt above set forth; the resolution offered by him at the meeting preliminary to the sale seems to us to have been perfectly proper; and his subsequent proceedings show, to his credit, that he was not a party to the transaction.

It is argued for the respondents, however, that a member or stockholder cannot have redress for any wrong or injury to the corporation "until after he has exhausted all the means within his reach to obtain redress of his grievances. He must make an earnest effort with the managing body of the corporation." This is undoubtedly the general rule. But the complaint alleges that the trustees of the corporation "control and manage its affairs, and were parties to the said unlawful and fraudulent acts, being aided and abetted by the said other defendants members; that it would be futile and useless to make a demand upon said corporation defendant, or upon its trustees or officers, to commence a suit to obtain the relief which the plaintiff seeks, or any relief whatever." The answers deny that the trustees "were ever parties to any unlawful or fraudulent transaction," but do not deny the remainder of the allegation; and from the whole case it is apparent that the defendants claimed the right to do what they did, and that the trustees were parties to the transaction. Under these circumstances, it was not necessary for the plaintiff to demand that they should take action. "The law does not require a useless act to be performed; and when it is claimed, from the answer, that, if a demand had been made, it would have been refused, it does not lie in the mouth of the defendant to object that no demand was made." Parrott v. Byers, 40 Cal. 622, 623. See, also, Heath v. Railroad Co., 8 Blatchf. 347; Mor. Priv. Corp. § 395; 3 Pom. Eq. Jur. 10. We see no material error in the admission of evidence; but, if there had been, it would not affect the result here. McCloud v. O'Neall, 16 Cal. 397. The order appealed from is reversed, and the cause is remanded for a new trial.

We concur: McFARLAND, J.; THORNTON, J.

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81 Cal. 270

SHOWERS v. WADSWORTH. (Nos. 12,299, 12,300.)

(*Supreme Court of California.* Nov. 22, 1889.)

SHERIFFS—INDEMNITY—MEASURE OF DAMAGES.

1. A judgment against a sheriff in an action brought by him in accordance with the wishes and directions of an attaching creditor, and under the control of the latter's attorneys, to settle the validity of the alleged preferred claims of certain laborers against the attached property, is conclusive of the sheriff's liability, in a subsequent action by him against the attaching creditor on a contract of indemnity for all loss and liability which the sheriff might incur by reason of such claims, though

the sheriff, after the judgment was rendered, discharged the attorneys because they, on behalf of the attaching creditor, refused to give a stay-bond, thereby preventing an appeal.

2. A contract to furnish a bond of indemnity will be treated as a contract of indemnity, if the bond is not furnished.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. G. Maguire, Judge.

Geo. C. Gorham, Jr., (*Haggin, Van Ness & Dibble*, of counsel,) for appellant. *P. Reddy*, (*W. H. Metson*, of counsel,) for respondent.

Hayne, C. Action by a sheriff upon a contract to indemnify him against liability arising from the claims of certain parties upon property which was in his custody, and which he delivered to the defendant upon receiving said contract. Judgment passed for the plaintiff, and the defendant appeals. The general features of the case are as follows: An action was brought against two mining companies by the defendant, Wadsworth, who, it appears, was acting in the interest of Wells, Fargo & Co., which corporation was the real owner of the claims. A writ of attachment was issued in the case, and under it the sheriff took possession of certain personal property of the mining companies. Thereupon certain of the miners who had claims for labor, and who claimed to be preferred creditors, gave notice of their claims to the sheriff and to the attaching creditor, under section 1206 of the Code of Civil Procedure, as amended in 1874, which provides, in substance, that, if such claims are undisputed, the sheriff shall satisfy them out of the property in his hands; and that, if they are disputed, the claimants shall establish their validity by action, which must be brought within 10 days. Judgment was rendered in favor of Wadsworth, the attaching creditor, (defendant here,) and the property was sold to him. He did not pay the price bid for the property, but induced the sheriff to deliver it to him without payment, upon his agreement, which provided that he would furnish the sheriff "a good and sufficient bond indemnifying him against all loss and liability which he may incur by reason of delivering the bullion attached, * * * or which he may become responsible for by reason of the preferred claims in said cases filed with him." The agents who acted for Wadsworth in the matter had authority to make such a contract. It is admitted by the pleadings that Wadsworth never gave a bond of indemnity. At the trial he applied for leave to amend his answer in this respect, but the court denied the application. This ruling is not complained of in the briefs filed; and, if it had been, we could not say that, upon the showing made, there was any abuse of discretion. It is therefore an established fact that the defendant failed to perform his agreement to give a bond of indemnity. After the property had been delivered to him, one of the claimants commenced an action against the sheriff, and the others were about to do so; and in order to prevent a multiplicity of actions, and to settle the question of the validity of the various claims, two suits were brought in the name of the sheriff against the claimants. Judgment in these suits was rendered in favor of the defendants, and it was thereby adjudged that the claims against the sheriff were valid. These suits were brought in consequence of the request of the sheriff that his interests should be protected; and we think that the request was properly made. It was made to the attorneys who had acted for Wadsworth in his transactions with the sheriff. Mr. Gorham was the one who arranged the transaction for the delivery of the property and the making of the contract of indemnity. The defendant, Wadsworth, says, with reference to him: "Mr. Gorham was acting as agent to do anything that was done. He was the only one that had authority to do anything. I sent him there to attend to that business,—to do what was necessary." And he acted as the attorney of Wadsworth, and not as attorney of the sheriff, though at all times he was acting under the direction of other attorneys. Mr. Haggin was acting for those whom Wadsworth represented. These gentlemen were applied to by the sheriff because they were the only attorneys for Wadsworth whom he knew in the premises.

Upon these facts we think that the judgment in favor of the plaintiff was right. The contract was, in substance, a contract of indemnity. In form, it was to furnish a bond of indemnity. But, so far as the principal is concerned, we think that, inasmuch as the contract was not superseded by such promised bond, it must be treated as itself, in effect, a contract to indemnify. The indemnity was against liability, and hence there was a right of recovery upon the contract as soon as the liability was incurred. Civil Code, § 2778, subd. 1, Tunstead v. Nixdorf, ante, 472, (No. 12,158, filed Oct. 1, 1889;) McBeth v. McIntyre, 57 Cal. 50.

The arguments of the learned counsel for the appellant go, in effect, to the point that no liability was incurred by the sheriff. They say that section 1206 of the Code of Civil Procedure is unconstitutional because it does not provide for notice to the judgment debtor; that no notice of the claims of the miners was in fact given to the judgment debtor; and that the claims were disputed, etc. But we think that the sheriff's liability was conclusively established by the judgments in the suits mentioned. We do not regard the form which the litigation assumed as important. The suits in question were brought for the purpose of determining the validity of the claims asserted against the sheriff. They were merely to cut off and forestall the multiplicity of actions which would otherwise have been brought against him. They were substitutes for actions against him; and, so far as the defendant Wadsworth's relation to them is concerned, it is clear that he stands in the same position as if the suits against the sheriff had been allowed to go on. This being the case, the sheriff having made a proper request that the indemnifier should litigate the claims against him, it is immaterial whether the indemnifier did so or not. If he neglected to do so, the judgments would be conclusive against him. "If, after request, the person indemnifying neglects to defend the person indemnified, a recovery against the latter, suffered by him in good faith, is conclusive in his favor against the former." Civil Code, § 2778, subd. 5. If he took charge of the litigation, the judgments are equally conclusive. Civil Code, § 2778; Dutil v. Pacheco, 21 Cal. 442. We think it clear that the attorneys for Wadsworth did conduct the litigation on his behalf. The court finds that the suits were brought "in accordance with the wishes and directions of the defendant, Wadsworth," and that his attorneys "had full control" of the same; and the evidence, in our opinion, sustains these findings. The judgments are therefore conclusive of the sheriff's liability.

The only argument that can be made against this proposition is that the attorneys for Wadsworth were discharged by the sheriff after the judgments had been rendered, and were thereby prevented from taking appeals which might have resulted in the reversal of the judgments. The reason for which they were discharged was that they, on behalf of Wadsworth, refused to give a stay-bond upon the proposed appeals. We think that the refusal justified the sheriff in refusing to proceed further with the litigation. Wadsworth, through his attorneys, had control of the suits. It was for his interest ultimately that they should be prosecuted. Having been requested to take charge of the litigation, he was bound to do so, and his indemnity embraced the costs of the litigation. Civil Code, § 2778, subds. 3, 4. The word "costs," in this provision, is used in an extended sense, and includes all things which are necessary in order to make the litigation effectual. The sheriff was not bound to suffer his property to be seized for this liability, against which the defendant had agreed to hold him harmless; nor was he bound to put his property out of his hands for the purposes of concealment; nor was he bound to give a bond to answer the liability in case the judgment should be affirmed. The contract of indemnity bound Wadsworth to answer this liability; and we see no reason why he should be allowed to compel the sheriff to bind himself, or get others to bind themselves, to answer a liability which he (Wadsworth) had agreed to become responsible for. For these reasons we think that the discharge of Wadsworth's attorneys after judgment does not do away with the conclusiveness of the judgments as against him. In the view we have taken, it is unnecessary to consider the other questions argued. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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81 Cal. 268

ROBERTSON v. WILLIAMS. (No. 12,005.)

(*Supreme Court of California.* Nov. 22, 1889.)

NEW TRIAL—EXCUSABLE NEGLECT.

Reliance on a verbal promise by plaintiff's attorney to notify defendant's attorney before taking up the case is excusable neglect, and authorizes the granting of a new trial, where no notice was given, and, the trial taking place in the absence of defendant and his attorney, judgment was rendered against him.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; M. A. EDMONDS, Judge.

J. N. E. Wilson and *Jas. M. Troutt*, for appellant. *Taylor & Craig*, for respondent.

HAYNE, C. This was an action for malicious prosecution. The trial took place in the absence of the defendant and his counsel, and resulted in a verdict for $1,500, for which judgment was entered. The defendant moved for a new trial on the ground of accident, surprise, etc., which motion was denied. The appeal is from the judgment, and the order denying a new trial. But the sole point made is that the trial court ought to have granted a new trial on the ground of surprise; and to this we agree. There were no opposing affidavits. It therefore stands admitted that the absence of the defendant and his attorney was caused by their reliance upon the promise of the plaintiff's attorney to notify the defendant's attorney before taking up the case, and the failure to comply with such promise. It is true that this promise is verbal, and therefore that it could not be enforced as such. But it seems to us that reliance upon the word of a reputable attorney is excusable neglect, for which relief may be given, so far as to set aside the advantage taken in violation of the promise. If the promise had been denied, then we think that, in view of the practical difficulty of investigations of that character, it would have been proper to refuse relief. But, the fact being admitted, we think that the motion should have been granted. The learned counsel for the respondent intimates in his brief that the promise was made so long before the trial that he had forgotten about it. But the affidavits do not show this; and, if they did, it is evident that the plaintiff's attorney had not forgotten the promise, but relied upon it. No objection is taken to the sufficiency of the record; and we assume, in consequence, that any objections which exist are waived. We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

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81 Cal. 303

GRAVES *et al.* v. MONO LAKE HYDRAULIC MIN. CO.

(*Supreme Court of California.* Nov. 26, 1889.)

CORPORATIONS—DEBTS TO OFFICERS—MORTGAGES—RATIFICATION—EVIDENCE.

1. The superintendent of a mining company testified that the services rendered by the president and secretary of the company outside of the performance of their duty as such officers were worth a certain sum, but it appeared that he resided at the mine, was seldom at the offices of the company, and did not know what services were rendered by the president and secretary. The only evidence as to the value of his own services was the fact that he was superintendent. *Held*, that this evidence was insufficient to show that these

officers had rendered services worth the sum stated, and that their charging the corporation therewith, by a resolution passed by their own votes, was fair and honest.[1]

2. Civil Code Cal. § 2230, provides that no trustee shall take part in any transaction concerning the trust in which he has any interest adverse to that of his beneficiary, except, *inter alia*, when the beneficiary, having capacity to contract, with full knowledge of the motives of the trustee, and of all the facts concerning the transaction which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. Section 2234 provides that every violation of said section is a fraud against the beneficiary of the trust. Section 2322 provides that an authority to an agent, expressed in general terms, however broad, does not authorize him to do any act that a trustee is forbidden to do by the section above quoted. *Held*, that where certain officers of a corporation have, in their capacity of directors and trustees of the stockholders, passed resolutions allowing and ordering to be paid an indebtedness to themselves, such resolutions are voidable by the corporation, or, upon its refusal, by a minority of the stockholders, whether the transaction was fair and honest or not.[1]

3. A note and mortgage to secure such indebtedness are likewise voidable where they are executed in pursuance of a resolution of the board of directors, at the instance of such officers, without passing upon the merits of the demand, and under a deception practiced by such officers, who informed them that the debts were fictitious, and that the mortgage, being for the purpose of preventing an attachment of the property of the corporation, would be canceled as soon as money could be raised to pay the other debts.

4. A finding that such mortgage was ratified by the holders of two-thirds of the stock is not warranted, where the evidence shows that certificates for a part of the stock necessary to make up the two-thirds had been canceled shortly after such attempted ratification, without showing that they remained in the hands of the person whose vote is alleged to have represented them until canceled.

Commissioners' decision. Department 2. Appeal from superior court, Mono county; R. M. Briggs, Judge.

Action by Albert Packard and R. N. Graves against the Mono Lake Hydraulic Mining Company to foreclose a mortgage. There was judgment for plaintiffs, and defendant appeals.

William F. Gibson and *William O. Parker*, for appellant. *W. E. F. Deal* and *A. Packard*, for respondents.

Vanclief, C. The defendant (appellant) is a mining corporation, organized in this state October 4, 1881, having its principal place of business in San Francisco, and its mining land and works in the county of Mono. Its capital stock is $1,000,000, divided into 100,000 shares, all of which was subscribed by and issued to the following persons: John D. Wilson, 24,950 shares; Daniel E. Jones, 24,950 shares; John Elbert, 24,950 shares; N. K. Grant, 24,950 shares; John F. Curtis, 100 shares; George Duncan, 100 shares. The directors during the first year, named in the articles of incorporation, were said Wilson, Jones, Elbert, Curtis, and Duncan. Wilson was elected president, Elbert secretary, and Jones superintendent of the mine. By article 7 of the by-laws, it is provided that "members of the board of directors shall receive no compensation for their services as such, nor shall the company be held liable for any services rendered, except it is so expressly provided; but members of the board shall be allowed their reasonable traveling expenses when actually engaged in the business of the company, to be audited and allowed as in other cases of demands against the company. The secretary and superintendent shall receive such compensation for their services as the board of directors shall determine." At a meeting of the board of directors held on the 21st day of October, 1882, at which only Wilson, Duncan, Jones, and Elbert were present, on motion of Duncan, seconded by Jones, the following resolution was passed: "Resolved, that the salaries of the president, secretary, and superintendent be, and are, fixed at $150 per month, to date from October 1, 1881; and the secretary be, and hereby is, instructed to pass to the credit of each of the above-named officers said amount, and to pay the same *pro rata* from the first funds available." Immediately thereafter, at the same meeting, the "secretary reported that the company was indebted to J. D. Wilson $10,185 26-100, to J. Elbert $10,185 26-100, and to D. E. Jones $8,871 8-100 for moneys advanced to pay the running expenses of the mine." "Whereupon, on motion of George Duncan, seconded by D. E. Jones, it was resolved that the claims of J. D. Wilson, J. Elbert, and D. E. Jones for moneys advanced this company, as above stated, be, and the same is hereby, approved, and the treasurer is hereby instructed to pay all, or any part, of said amounts *pro rata* out of the first funds available; and, should any assessment be levied upon the capital stock of this corporation before said accounts are paid, the secretary is instructed to apply any part of said indebtedness towards the payment of such assessment, should the parties so desire." On the same day—October 21, 1882—a stockholders' meeting was held, at which J. D. Wilson, J. Elbert, Charles H. Sinclair, George Duncan, and L. J. Wilson were elected directors, who appointed J. D. Wilson president, Charles H. Sinclair vice-president, J. Elbert secretary and treasurer, and D. E. Jones superintendent. At a special meeting of the last-named directors held on the 13th day of November, 1882, "C. H. Sinclair, vice-president, in the chair, George Duncan and L. J. Wilson present, L. J. Wilson was appointed secretary *pro tem*. The vice-president notified the board that Messrs. Jones, Wilson, and Elbert called for the money due them, and insisted on its being paid or secured." Thereupon the following resolutions were offered and adopted: "Whereas, this corporation, the Mono Lake Hydraulic Mining Company, is indebted to D. E. Jones in the sum of $8,871.-08, to J. D. Wilson in the sum of $10,185.26, and to John Elbert in the sum of $10,185.26 for moneys advanced, as appears by the books of the corporation, and which moneys are overdue, and the said Jones, Wilson, and Elbert demand to have paid; and whereas, the corporation is without funds to pay said indebtedness, or to pay other existing pressing liabilities and expenses necessary for the protection of its property, and the corporation is in need of the sum of $16,000 to meet said liabilities and expenses; and whereas, the said Jones, Wil son, and Elbert are willing to extend the time of payment of said moneys due them as aforesaid, and the said Wilson and Elbert are willing to advance to the corporation the said sum of $16,000 upon the corporation executing to them its note for the sum of $45,241.60, payable $8,871.08 to said Jones, $18,185.26 to said Wilson, and $18,185.26 to said Elbert, within six months from date, with interest thereon at the rate of 1 per cent. per month, which note shall be secured by a mortgage upon the real property and mining machinery of the corporation in Mono county: Now, therefore, it is resolved, that this corporation make, execute, and deliver to said Jones, Wilson, and Elbert its note for the sum of $45,241.60, payable six months after date, and in amounts following: $8,871.08 to Jones, $18,185.26 to Wilson, and $18,185.26 to Elbert,—and all payments made on said note, to be divided to and among said Jones, Wilson, and Elbert in the proportion of said amounts so due each as aforesaid, and also a mortgage to secure said note, duly signed, executed, and acknowledged, upon all the real property and mining machinery of the corporation in Mono county, California, and the vice-president of this corporation is hereby directed and authorized, in the name of and for the corporation, to make, execute, acknowledge, and deliver said note and mortgage to said Jones, Wilson, and Elbert, affixing to each the corporate name and seal of this corporation."

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[1] See note at end of case.

On the same day—November 13, 1882—the note and mortgage were executed for the corporation by Charles H. Sinclair, the vice-president. The following is a copy of the note: "$45.241 60-100. San Francisco, Nov. 13, 1882. Six months after date, for value received, the Mono Lake Hydraulic Mining Company, corporation, promises to pay to D. E. Jones, J. D. Wilson, and John Elbert the sum of forty-five thousand two hundred and forty-one and sixty one-hundredths dollars, (being eight thousand eight hundred and seventy-one and eight one-hundredths dollars to D. E. Jones, eighteen thousand one hundred and eighty-five and twenty-six one-hundredths dollars to J. D. Wilson, and eighteen thousand one hundred and eighty-five and twenty-six one-hundredths dollars to John Elbert,) with interest thereon at the rate of one per cent. per month from date until paid. Any payments on this note are to be divided to and among the said Jones, Wilson, and Elbert in proportion to their respective amounts as aforesaid. MONO LAKE HYDRAULIC MINING COMPANY. By CHAS. H. SINCLAIR, Vice-President. [Corporate seal.]"

On the 3d day of March, 1883, J. D. Wilson applied to Albert Packard, one of the plaintiffs, for a loan of money, offering to assign to Packard his (Wilson's) interest in said note and mortgage as collateral security for the payment of the loan. As a condition of the loan on the security offered Packard required a ratification of the mortgage by the stockholders of the corporation; whereupon J. D. Wilson and John Elbert, as stockholders, executed an instrument in writing, which, after reciting the execution of the note and mortgage, proceeded as follows: "Now, therefore, we, J. D. Wilson, as owner and holder of twenty-five thousand shares of the capital stock of said company, and John Elbert, as owner and holder of forty-five thousand shares of the capital stock of said company, which consists in the aggregate of one hundred thousand shares, do hereby ratify and affirm said mortgage. In witness whereof we have hereunto set our hands this third day of March, 1883. J. D. WILSON. JOHN ELBERT."

After this ratification, and on the same day, Packard loaned Wilson $6,000, for which he took Wilson's note for $7,000, payable March 13, 1884, with interest at the rate of one per cent. per month; and, as collateral security, Wilson then assigned to Packard all his interest in the note and mortgage of the defendant corporation of November 13, 1882. On August 21, 1883, Packard held notes of the defendant corporation which had been made or assigned to him, amounting to $6,738.96, and which, at the request of J. D. Wilson, he surrendered to the corporation, and in lieu thereof took the note of J. D. Wilson and John Elbert for the amount, ($6,738.96;) and, as collateral thereto, Wilson and Elbert, "by way of mortgage," assigned to Packard all their interest in the note and mortgage of the defendant of November 13, 1882. Among the notes surrendered as aforesaid by Packard was one made to him for $2,500, bearing interest at 1 per cent. per month, the consideration for which was only $2,000, the additional $500 being a bonus to Packard. On the 20th day of February, 1883, John Elbert assigned all his interest in the note and mortgage of the defendant of November 13, 1882, to D. E. Jones, "by way of mortgage," to secure payment of his note to Jones for $9,185.26, payable May 13, 1884, with interest at 1 per cent. per month. On March 18, 1884, D. E. Jones, by an instrument in writing absolute upon its face, expressing a consideration of $12,000, assigned to the plaintiff, R. N. Graves, all his right, title, and interest in the note and mortgage of the defendant corporation dated November 13, 1882. This action is brought by Packard and Graves, as assignees of Wilson, Elbert, and Jones, to foreclose the mortgage of the defendant to them of November 13, 1882.

The answer of defendant denies the execution of the note and mortgage. Denies the ratification of the mortgage by two-thirds of the stockholders. Denies that the defendant was indebted to Wilson, Jones, or Elbert in any sum or sums exceeding $200 to Jones, $3,724.20 to Wilson, and $3,724.20 to Elbert; and alleges that neither of these sums was due or payable, or to become due or payable until, by assessments or proceeds of the mine, the defendant should have available funds in its treasury to pay the same. Alleges that on October 21, 1882, and for six months thereafter, Wilson, Jones, and Elbert were the acting officers and managing agents of the defendant, managing all its business and affairs, and occupying fiduciary relations to the defendant and to its stockholders, and controlling the board of directors of the corporation; that they conspired together to cheat and defraud the defendant and its stockholders by obtaining evidence of indebtedness that did not exist, and to which they knew they were not entitled; that, in pursuance of this conspiracy, they procured the passage of the resolutions of the board of directors of October 21 and November 13, 1882, and the execution of the note and mortgage in suit, without any consideration therefor; and that the plaintiffs took the assignments of the note and mortgage with notice of the facts above stated.

The trial court found for the plaintiffs on all the material issues, and ordered a sale of all the real property described in the complaint, to pay the principal and interest due on the note and mortgage, and plaintiffs' costs and attorney's fees, which are found by the court to amount to $59,354.69. The defendant appeals from the judgment, and also from an order denying its motion for a new trial, and relies mainly on the ground that material findings of fact, necessary to support the judgment, are not justified by the evidence.

The case seems to have been tried by plaintiffs' counsel on the theory that although Wilson, Elbert, and Jones were directors and managing agents of the corporation, and trustees of the stockholders, on October 21, 1882, when their several demands were audited and allowed, and also on November 13, 1882, when the vice-president, Sinclair, was authorized to execute, and did execute, the note and mortgage for the sum of those demands, and $16,000 in addition thereto, yet they did not represent or improperly influence their principal (the corporation) in those transactions, and that they dealt fairly and honestly with it, while it was properly represented by other agents who were not interested in the debts allowed and secured; and therefore that the note and mortgage were not voidable at the mere election of the defendant, without regard to the fairness and honesty of the transactions which induced their execution, but were enforceable, by proof on the part of the plaintiffs that they had been fairly and honestly obtained. And accordingly it appears that plaintiffs' counsel assumed the *onus* of proving, not only the execution of the note and mortgage, but also the fairness and honesty of all transactions leading to their execution or involved therein. Counsel for appellant contends that the judgment cannot stand, even upon the theory of respondents' counsel above indicated, for the reason that the findings of fact supporting that theory are not justified by the evidence. They further contend that in passing the resolutions of October 21 and November 13, 1882, admitting and allowing the demands for which the note of the latter date was given, and in authorizing the execution of the note and mortgage, Wilson, Elbert, and Jones really and substantially represented and controlled the defendant; and therefore that the defendant has properly elected to avoid and repudiate the note and mortgage, regardless of the honesty or dishonesty of the transactions which led to their execution. And they further contend that the mortgage was not ratified by the holders of two-thirds of the stock of the corporation, and is therefore void.

As to the fairness and honesty of the resolution of October 21, 1882, by which it was made to appear that the corporation acknowledged itself indebted to Wilson, Elbert, and Jones in the sum of $29,241.60 "for moneys advanced to pay the running expenses of the mine," it is to be observed that the allowance of one year's back salaries to Wilson, Elbert, and Jones, amounting to $5,400, and constituting a part of the indebtedness, was not shown to have been warranted by the by-law above set out, nor to have been just or equitable. The plaintiffs, as they were bound to do, attempted to prove the services, and the value thereof, for which these salaries had been allowed; and for this purpose called Mr. Jones, the superintendent, who resided in Mono county, and was seldom in San Francisco, where the office of the company was kept, and where Mr. Wilson and Mr. Elbert must have rendered the greater portion of those services. Being asked if Mr. Wilson rendered any services outside of the performance of his duty as president and director, Mr. Jones answered: "Yes, sir. Question. How much of his time was occupied outside of his duties? Answer. I think he put in his whole time visiting the mine, etc., and helped every way he could to make it a success. Q. Do you know the reasonable value of those services? A. I do. I think about $150 a month. I was interested, and thought he earned it." Being asked what was the value of Mr. Elbert's services "outside of his duties as secretary and treasurer," he answered: "Outside, and with secretary, $150 per month. * * * Well, he was busy all the time. He put in all his time, and we were certainly willing to allow him $150 a month." On cross-examination, being asked what any of the directors did in the management of the business of the corporation, he answered: "I don't know. I was up in the mountains. The books will show. I ain't keeping any books." There was no other evidence tending to prove what services were rendered by Messrs. Wilson and Elbert, and no evidence whatever to prove the services, or value of services, rendered by Mr. Jones, except that he was superintendent. Mr. Elbert was not called as a witness for any purpose; and, although Mr. Wilson testified at the trial as to other matters, he was not asked, and did not testify, as to his services, or the services of Elbert or Jones. Under the peculiar circumstances of this case, the evidence was unsatisfactory, and insufficient to prove that these officers of the corporation had performed services in one year, over and above their duties as directors, of the value of $5,400, and that they, as such officers, had fairly and honestly charged the corporation with that sum by the resolution of October 21, 1882, passed by their own votes.

Another item which constituted a part of the indebtedness was $12,633, proceeds of sales of the "Grant Stock," which had been applied to the use of the corporation. By the resolution of October 21, 1882, this sum was charged to the corporation, and credited to Wilson, Elbert, and Jones,—one-third of it to each. This stock (called the "Grant Stock," about 20,000 shares) was purchased in the fall of 1881 from N. R. Grant (to whom it had been issued as one of the incorporators) by Wilson, nominally, and paid for with money realized from sales of a portion of the same stock. This stock was delivered to the secretary, Elbert, and sold by him in small lots to different persons prior to February, 1882. The appellant contends that prior to the sale of this stock by the secretary, and while Wilson, Elbert, and Jones owned all the stock, except 200 shares held by the other two trustees, they agreed with each other to set it aside as working capital of the corporation, and to apply the proceeds of the sale thereof to the payment of the expenses of opening and improving the mine until it should become self-sustaining, and then, if there should be any residue, to divide it equally between them; and that the purchasers of the "Grant Stock" were informed of this agreement, and promised by Elbert and Wilson, at the times of their several purchases, that there should be no assessment on stock until after the proceeds of the "Grant Stock" should be exhausted. J. D. Wilson testified that such was the understanding between Elbert, Jones, and himself; and his testimony as to this was strongly corroborated by the following-named witnesses, most of whom had purchased portions of the "Grant Stock:" J. C. Winans, secretary of the company for a time; Charles H. Sinclair, director and vice-president; Thomas S. Russell, director until after October 21, 1882; E. S. Paddock; George Bill; and Joseph Wilson. An account of the receipts from the sales of the "Grant Stock" was entered in the cash-book,—the only book of accounts kept by the company; but neither Wilson, Elbert, nor Jones was credited with any part of the receipts from such sales before October 21, 1882. Jones, however, testified positively that no agreement or understanding ever existed to the effect that any part of the "Grant Stock" should be set aside or used as working capital of the company, but that such stock was the private property of Wilson, Elbert, and himself. It seems, from the record, that there was a decided preponderance of evidence in favor of the defendant; yet the court found for plaintiffs on this issue.

Another item which entered into and constituted a part of the indebtedness for which the note and mortgage were executed was $16,000, which was to be advanced to the defendant "to pay pressing liabilities and expenses necessary for the protection of its [corporation's] property," as expressed in the preamble of the resolution of November 13, 1882. Although this resolution must be understood to mean that Wilson and Elbert were to advance the $16,000, immediately after the execution of the note and mortgage, "to pay the pressing liabilities," there is no pretense that they advanced a dollar for any purpose before the 3d day of March, 1883,—three and a half months after the execution of the note and mortgage,—when it is claimed that Wilson borrowed $6,000 from Packard, and applied it to the payment of the debts of defendant; but it does not appear what debts he paid, and there is no evidence that he applied any part of the $6,000 to the payment of such debts, or to any use of the defendant, except the testimony of Packard, who says, only, that he was informed by Wilson, Elbert, and Levison, attorney for defendant, that the $6,000 had been applied to the payment of the debts of the defendant.

It further appears that, nine months after the execution of the note and mortgage, (August 21, 1883,) Packard, at request of Wilson, delivered to defendant, through Mr. Levison, notes of the defendant, made to Packard and others, amounting to $6,738.96, and in lieu thereof took the note of Wilson and Elbert for that amount, collaterally secured by an assignment of their interest in the note and mortgage in suit. There was no evidence or pretense of any other advance to defendant, or payment of its debts, by Wilson or Elbert, after the execution of the note and mortgage of November 13, 1882.

The sixteenth finding (not excepted to) is that "all the moneys loaned by said Packard to said J. D. Wilson and to said John Elbert, represented by said notes of $7,000 and $6,738.96, were paid to defendant, and were used to pay defendant's debts contracted in carrying on its business and working its mines." This finding must be taken as true, but there is no evidence of any loan of money to Wilson or Elbert, except the $6,000, for which Wilson gave his note of $7,000, on March 3, 1883. But if we consider the note of defendant, amounting to $6,738, surrendered by Packard, (August 23, 1883,) as a loan to Wilson and Elbert, the whole amount loaned to them by Packard would be only $12,738. Deducting from this the interest which the defendant was paying upon its debts (1 per cent. per month) from November 13, 1882, when the $16,000 should have been advanced, until the debts are alleged to have been paid by Wilson and Elbert, ($6,000, March 3, and $6,738, August 21, 1883,) amounting to about $750, it will appear that Wilson and Elbert only advanced, by paying debts, what was equivalent to an advance of less than $12,000, on the date of the note and mortgage, when, according to the resolution of that date, the $16,000 should have been advanced. Therefore, besides the difference between advancing $16,000 at the date of the note and mortgage, and the purchasing of demands against the defendant to that amount three and a half to nine months afterwards, we find a deficiency of $4,000 in the amount of the demands claimed to have been paid, and, consequently, an admitted failure of the consideration of the note and mortgage to that extent, at least. But the defendant was not bound to accept the alleged payment of its debts by Wilson and Elbert in lieu of the money that they agreed to advance upon the execution of the note and mortgage. Davis v. Mining Co., 55 Cal. 360; Koehler v. Iron Co., 2 Black, 715; 1 Mor. Priv. Corp. § 522.

The fairness, honesty, and good faith of the transactions under consideration are further impeached by the testimony of Charles H. Sinclair, Thomas S. Russell, and E. S. Paddock. Sinclair was first elected a director on October 21, 1882, in place of Jones, but took no part in any business meeting until the meeting of November 13th, at which he was authorized to execute the note and mortgage of that date. He testified that when he was elected he had no experience in the business of corporations; that Mr. Jones, whose place he took on the board of directors, requested him to look out for his interests, and that he (Sinclair) promised Jones that he would do so as if they were his own; that at the meeting of November 13th he was told by Wilson and Elbert that the company owed only about $8,000 or $9,000, and that the mortgage to them and Jones was to be executed as mere matter of form, to prevent an attachment of the property mortgaged until money could be raised to pay the debts, and that the debts, to secure which the note and mortgage were given, were fictitious; that Jones, who was not present at the meeting, had told him substantially the same; that Wilson and Elbert, who were then directors, were present at the meeting, and requested that the resolution authorizing the execution of the note and mortgage be passed, and that it certainly would not have been passed without their request; that it was understood that the company would not be compelled to pay the mortgage, and therefore that it would harm nobody; and that, while the resolution was being acted upon by the other three directors, Wilson and Elbert retired into an adjoining room as a matter of form. Thomas S. Russell, who had been a director up to October 21, 1882, testified that he understood in October, 1882, that the company was very little in debt; that he did not understand that it was indebted to Wilson, Elbert, and Jones in the sums mentioned in the resolution of October 21, 1882; and that Elbert had told him that the mortgage was put on to save trouble,—it would give them time to raise money to meet whatever obligations there were. E. S. Paddock, who was a small stockholder, testified in substance, that Elbert told him that the mortgage was given to protect the property from other debts, as they feared an attachment; that the mortgage would be canceled when the outstanding debts were paid; and that they did not intend to enforce the mortgage. Jones was called in rebuttal, but did not dispute a word of Sinclair's testimony; nor did Wilson, who was present at the trial.

The sixth finding, to the effect that the "Grant Stock" was the property of Wilson, Elbert, and Jones, and that the proceeds of the sale thereof belonged to them, though not satisfactorily proved, would not, in an ordinary case, be disturbed, as the evidence as to it was substantially conflicting; and it may be allowed to stand in this case without affecting the result, and it is therefore unnecessary to decide whether it is justified by the evidence or not. But the ninth finding, "that on and prior to August 21, 1883, J. Elbert and J. D. Wilson paid, in advance, to defendant the sum of $16,000, which is included in said note and mortgage, which sum was used by defendant in payment of debts of defendant;" and the tenth finding, that "all transactions between J. D. Wilson, J. Elbert, and D. E. Jones, with reference to said debts and said note and mortgage, were fair and honest, and the making and executing of said note and mortgage were for the benefit of defendant and all its stockholders,"—are not, nor is either of them, justified by the evidence on any theory of law possibly applicable to the case. The view most favorable to respondents, and which seems to have been adopted by their counsel, is that the case falls within the first exception to the general rule expressed in section 2230 of the Civil Code, as follows: "Sec. 2230. Neither a trustee nor any of his agents may take part in any transaction concerning the trust in which he, or any one for whom he acts as agent, has an interest, present or contingent, adverse to that of his beneficiary, except as follows: (1) When the beneficiary, having capacity to contract, with a full knowledge of the motives of the trustee, and of all other facts concerning the transactions which might affect his own decision, and without the use of any influence on the part of the trustee, permits him to do so. * * *" Section 2234 of the same article provides that "every violation of the provisions of the preceding sections of this article is a fraud against the beneficiary of a trust." These provisions of the Civil Code expressly apply to the directors of corporations in their relation of trustees of the stockholders; and are made to apply to them in this case, as agents of the corporation, by section 2322 of the same Code, which provides that "an authority, [of an agent,] expressed in general terms, however broad, does not authorize an agent * * * (3) to do any act which a trustee is forbidden to do by article 2, c. 1, of the last title," (which title includes the sections above quoted,)—since it does not appear that the directors of the defendant corporation had any specific authority to deal with it as they are shown to have done in this case; and, if they claim authority for their acts, they must claim it under "an authority expressed in general terms;" in which case sections 2230 and 2234 of the Civil Code, in regard to trustees, apply to them as mere agents of the corporation.

Under these conditions, the resolutions of October 21, 1882, allowing and ordering paid to Wilson, Elbert, and Jones all the indebtedness for which the note and mortgage were afterwards given, except the $16,000 to be advanced by Wilson and Elbert, cannot be sustained, for the sufficient reason, among others, that it was not a case in which, being interested in the transaction adversely to the corporation, Wilson, Elbert, and Jones merely dealt with it while it was represented by other agents, but a case in which, as agents of the corporation, they dealt with themselves. They represented both parties to the transaction. Of the directors, only Wilson, Elbert, Jones, and Duncan were present at the meeting that adopted those resolutions. The demands of Wilson, Elbert, and Jones were not considered or allowed separately, but all together in the same resolutions, which could not have been adopted unless at least two of the interested directors had voted for them. Clearly, therefore, the resolutions of October 21, 1882, were voidable at the election of the corporation, or at the election of a minority of the stockholders, in case the corporation had refused to avoid them, without regard to whether they were fair and honest or not. Andrews v. Pratt, 44 Cal. 309; San Diego v. Railroad Co., Id. 106; Wilbur v. Lynde, 49 Cal. 290; Chamberlain v.

Wool-Growing Co., 54 Cal. 103; Tracy v. Colby, 55 Cal. 67; Wardell v. Railroad Co., 103 U. S. 651; Koehler v. Iron Co., 2 Black, 715; 1 Mor. Priv. Corp. §§ 516-520. It is not intended to decide, however, that these directors may not have recovered from the corporation the value of money or property honestly advanced by them, and which had been used by and for the benefit of the corporation in carrying on its business, or the value of services rendered by them outside of the duties of their office, in a proper case, and upon a proper showing. The circumstances under which such recovery may be had are indicated in Mor. Priv. Corp. §§ 526, 715, 716. But no proper case for such recovery is made here. Indeed, there is no foundation for it in the complaint. The sole object of the action is to foreclose a mortgage executed to secure the payment of a note alleged to have been made by the corporation to its directors, and by them assigned to the plaintiffs. There is no count for the value of money or property advanced to, and used by, or for the benefit of, the corporation, nor for the value of services rendered by the assignors of the plaintiffs. In Gardner v. Butler, 30 N. J. Eq. 702, VAN SYCKEL, J., said: "The rule is that the trustee cannot fortify himself by a contract which he makes with himself, or for his own benefit, and set it up, either at law or in equity, as a valid obligation. * * * But, while the express undertaking is without legal force, the directors of a company have a right to serve it in the capacity of officers, agents, or employes, and for such services the law will enable them to recover a just and reasonable compensation. * * * No claim which they may make against their company can acquire any support or validity from the fact that they have expressly sanctioned it. It must rest exclusively upon its fairness and justice, and be enforced upon the *quantum meruit*." The decision of this court in Wilbur v. Lynde, 49 Cal. 290, rests upon the principles thus announced by Justice VAN SYCKEL.

The meeting of November 13, 1882, nominally composed of the three directors,—Sinclair, Duncan, and L. J. Wilson,—which adopted the resolution authorizing Sinclair to execute the note and mortgage, did not pretend to investigate or to pass upon the merits of the demands to be secured by the mortgage. That meeting was notified by the vice-president "that Messrs. Jones, Wilson, and Elbert called for the money due them, and insisted on its being paid or secured." Thereupon the resolution authorizing the note and mortgage was adopted, reciting that the company "is indebted to D. E. Jones in the sum of $8,871 8-100, to J. D. Wilson in the sum of $10,185 26-100, and to John Elbert in the sum of $10,185 26-100, for moneys advanced, as appears by the books of the corporation," that is, by the resolutions of October 21, 1882; for it appears that those sums were never credited on those books until that date. The resolution further recites the need of the sum of $16,000 to pay other pressing liabilities of the corporation, and that "Wilson and Elbert are willing to advance to the corporation the said sum of $16,000 upon the corporation executing to them" the note and mortgage in the form in which they were executed. The resolution only purports to authorize additional security for the debts audited and ordered paid by the resolution of October 21st, adopted by the votes of Wilson, Elbert, and Jones, and also to secure the $16,000 to be advanced by Wilson and Elbert, and, therefore, does not cure the infirmity of the alleged debts theretofore allowed, and evidenced only by the resolution of October 21st. No part of the transactions of November 13, 1882, resulting in the execution of the note and mortgage, appears to have been fair or honest on the part of Wilson, Elbert, and Jones. We have seen that Wilson and Elbert never did advance the $16,000 to the corporation; that they admitted to Sinclair and others that the debts to be secured by the mortgage were fictitious; that the object of the mortgage was to prevent an attachment of the property; and that they did not intend to enforce it, but would cancel it as soon as money could be raised to pay the other debts. They were present at the meeting immediately before the resolution was offered, and requested its adoption, and retired to an adjoining room while the resolution was being acted upon, as matter of form; and Sinclair testified that the resolution certainly would not have been adopted had they not requested its adoption. If the undisputed testimony of Sinclair is true, Wilson and Elbert were substantially present when the resolution was acted upon, and influenced its adoption. Their conduct and representations tended to deceive the other three directors as to the true object of the mortgage, and as to their motives in requesting the adoption of the resolution, and also as to their intention to advance the $16,000. That their conduct and representations had this effect is confirmed by the sequel. It is therefore quite clear that their conduct in procuring the execution of the note and mortgage does not come within the first exception to the rule provided by section 2230 of the Civil Code, but is governed by that rule. It cannot be said that the corporation, "without the use of any influence" on the part of Wilson, Elbert, and Jones, and "with full knowledge" of their motives, "and of all other facts concerning the transaction which might affect its decision," permitted them so to deal with it. The corporation, therefore, may repudiate the note and mortgage, as it has elected to do, thus leaving the respective assignees of the plaintiffs to such remedy as each may be entitled to upon *quantum meruit* allegations.

Finding 11, that the mortgage was duly ratified on the 3d day of March, 1883, by the holders of two-thirds of the stock, is not justified by the evidence. In the written instrument by which Wilson and Elbert attempted to ratify the mortgage, they declare that Wilson was then the holder of 25,000, and Elbert the holder of 45,000 shares of the capital stock of the company. To prove this, the plaintiffs called Richard Barnard as an expert book-keeper, who testified that he had examined the defendant's stock-book of certificates, from No. 1 down to and including certificate No. 147, with the stubs and indorsements, for the purpose of ascertaining how many shares of defendant's capital stock were held by Wilson and Elbert on March 3, 1883; that he thereby found that Wilson held on that day 11,850 shares, of which he gave a list. He also gave a list of certificates and number of shares held by Elbert on that day, as shown by that book, amounting to 38,300 shares. He then gave a list of canceled certificates, Nos. 119, 120, 121, and 122, of 5,000 shares each, and Nos. 124 and 125, of 500 shares each, amounting to 21,000 shares, which he found reattached to their stubs. All these certificates appeared to have been issued to D. E. Jones in October, 1882, and across the face of each was written, "Canceled March 17, 1883." No. 119 was indorsed: "Transferred Feb. 20, 1883. D. E. Jones, Tr." No. 120, same indorsement. No. 121, same. No. 122 is indorsed: "Transferred Feb. 20, 1884, J. Elbert, Tr.;" and "Feb. 20, 1884, D. E. Jones." Nos. 124 and 125 are indorsed simply, "D. E. Jones, trustee," without date. Plaintiffs also put in evidence that part of said certificate and stub book containing the stubs, and canceled certificates thereto attached, from 1 to 147 inclusive, all of which are copied into the transcript. It does not appear, however, by the stubs or otherwise, what was the number of the certificate issued in lieu of any one of these six canceled certificates, as the place on the stubs in which this number should have been entered remains blank. Nor does it appear to whom any of the lieu certificates were issued. On the part of plaintiffs D. E. Jones testified that he assigned and delivered these certificates to J. Elbert absolutely on February 20, 1883. On the part of defendant, J. D. Wilson testified, as an expert book-keeper, that he had examined said book of certificates and stubs for the purpose of ascertaining how many shares of stock Elbert had on March 3, 1883, and that it appeared from said book that Elbert was the holder of only 37,800 shares on that date. John Elbert was not called, and did not testify as a witness in the case, although it appeared by the testimony of J. D. Wilson that he (Elbert) was present during a part of the time while the depositions of the eight witnesses on the part of the defendant were being taken in San Francisco on May 27, 1884, and that witness saw him in San Francisco on October 1, 1884, seven days before the commencement of the trial, and, so far as witness knew, Elbert had been in San Francisco all the time since the taking of said depositions.

In the absence of any other evidence than that of the assignment of the six certificates in question by Jones to Elbert on February 20, 1883, perhaps the disputable presumption that Elbert continued to be the holder of the stock represented by those certificates (21,000 shares) on March 3, 1883, might have been indulged. Section 1963, Code Civil Proc. But from the cancellation of those certificates on March 17, 1883, the inference is not that Elbert held them until that day, but that he may have assigned them at some time prior to their cancellation, and possibly before March 3, 1883, (the date of the alleged ratification.) The presumption, under any circumstance, could only be "that a thing once proved to exist continues as long as is usual with things of that nature." There is no evidence as to how long the assignees of mining stocks usually hold them, nor as to how soon, after assignment, the assignee usually presents the certificates to the corporation for transfer and cancellation; and, since the law does not fix or limit these times, the court has no means of ascertaining them, unless it may take judicial notice of the usual course or mode of such transactions in mining stocks, which seems to have been done, to a limited extent, in Brewster v. Sime, 42 Cal. 143, which, perhaps, is of doubtful authority on this point. But it seems to be settled that certificates of stock indorsed in blank by the owners to whom they were issued, pass by mere delivery, without further indorsement, and without transfer on the books of the corporation, although they are not negotiable securities, in the commercial sense, or within the definition of the Civil Code. Brewster v. Sime, 42 Cal. 143; Cook, Stocks, § 441; Thompson v. Toland, 48 Cal. 111; Sherwood v. Mining Co., 50 Cal. 412; Winter v. Mining Co., 53 Cal. 431; Barstow v. Mining Co., 64 Cal. 388, 1 Pac. Rep. 349, Arnold v. Johnson, 66 Cal. 402, 5 Pac. Rep. 796. It follows that Elbert may have assigned the certificates indorsed to him in blank by Jones before the 3d day of March following, by mere delivery; and the same certificates may have passed through several persons in the same manner before the 17th of March, when they appear to have been canceled at the instance of persons not identified by the evidence. Moreover, it is to be observed that the certificate numbered 122 (for 5,000 shares) appears to have been indorsed by Elbert on the 20th day of February, 1884, the same date of the indorsement by Jones, (page 271;) the year 1884, instead of 1883, evidently being a typographical error, as Jones testified it was in 1883, and the indorsements were so read by him, and by counsel on the trial, (folios 350 to 364.) This tends to prove that Elbert assigned that certificate on the same day it was assigned to him by Jones; and deducting the 5,000 shares represented by that certificate from the number of shares claimed by respondents to have been held by Elbert and Wilson March 3, 1883, viz., 71,150 shares, would leave them only 66,150 shares,—516 shares less than two-thirds of all the stock.

Another circumstance strongly tending to prove that Elbert did not hold the stock in question on the 3d day of March, 1883, is that, in the instrument of that date, by which he and Wilson attempted to ratify the mortgage, he only declared himself to be the holder of 45,000 shares, which is 14,300 shares less than was claimed for him on the trial. That instrument was signed only 11 days after the 6 certificates (21,000 shares) were assigned to him by Jones. He had been the secretary of the corporation, and appears to have entered in the book all the issues, transfers, and cancellations of stock up to that time. Under these circumstances, it seems incredible that he underestimated the number of shares then held by him by 14,300 shares, while it is admitted that Wilson, in the same instrument, overestimated his by 13,000 shares. Again, it is unaccountable, by the record, that plaintiffs did not call Elbert as a witness or take his deposition as to this and other important issues of which the burden of proof was upon them, upon any other ground than that they feared, at least, if they did not know that his testimony would be against them for it appears, *prima facie*, that they might have taken his deposition, if they could not have induced him to attend at the trial.

There is nothing in the point that plaintiffs took their respective assignments of the note and mortgage without notice of any defense thereto, since the note is not a negotiable promissory note. Civil Code § 3087. Besides, only Wilson's first assignment to Packard was made before the note became due. The second assignment to Packard by Wilson and Elbert, and the assignment by Jones to Graves, were made after the maturity of the note. Undoubtedly, all the assignments to the plaintiffs were without prejudice to the defenses pleaded. Code Civil Proc. § 368. I think the judgment and order should be reversed, and a new trial ordered.

We concur: FOOTE, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the judgment and order are reversed, and a new trial ordered.

NOTE.

CORPORATIONS—CONTRACTS WITH OFFICERS. A contract between a corporation and individuals, some of whom are directors of the corporation, is voidable at the option of the corporation. Thomas v. Railroad Co., 3 Sup. Ct. Rep. 315, reversing 2 Fed. Rep. 877; Meeker v. Iron Co., 17 Fed. Rep. 48; Munson v. Railway Co., (N. Y.) 8 N. E. Rep. 355; Bernard v. Myroleum Co., (Mass.) 17 N. E. Rep. 887. A director of a corporation is not absolutely prohibited from entering into a contract with it through his fellow-directors; but the validity of such contract depends upon its nature and terms, and the circumstances under which it is made. Hubbard v. Investment Co., 14 Fed. Rep. 675; Thomas v. Sweet, (Kan.) 14 Pac. Rep. 545; Appeal of Hammond, (Pa.) 16 Atl. Rep. 419. Such contract will be enforced when shown to have been made for the benefit of the corporation, and to be just. Trust Co. v. Weed, 2 Fed. Rep. 24. A director of a corporation may become its creditor, and take security for his debt, but his conduct in enforcing such claim will be more closely scrutinized than that of an ordinary creditor, and the proceedings set aside if it appears that he has not acted in good faith as director. Hallam v. Hotel Co., (Iowa,) 9 N. W. Rep. 111. See, also, Garrett v. Plow Co., (Iowa,) 29 N. W. Rep. 395. On a sale of corporate property to one of the directors taking part in the transaction as buyer and seller, it devolves upon the directors to establish the good faith of the transaction, and that the sale produced the full value of the property. Wilkinson v. Bauerle, (N. J.) 7 Atl. Rep. 514. The sale by the president of a national bank, to himself and cashier, of the stock of the bank owned by the bank, may be ratified by the bank or its legal representative; but a sale by himself to the bank of its own stock, where he acts in the double capacity of seller and buyer, cannot be ratified, when the purchase of the stock by the bank is not necessary to prevent loss upon a debt previously contracted. Bundy v. Jackson, 24 Fed. Rep. 628. Directors of insolvent corporations cannot legally grant preferences to their relatives who are corporation creditors. Adams v. Milling Co., 35 Fed. Rep. 433; Same Case, (on rehearing,) 36 Fed. Rep. 212. See, also, on the effect of directors becoming interested adversely to the corporation, Cook v. Sherman, 20 Fed. Rep. 167, and extensive note; Baker v. Harpster, ante, 415; Barr v. Railroad Co., 5 N. Y. Supp. 623.

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BURKE v. MASCARICH. (No. 12,569.)

(*Supreme Court of California*. Nov. 27, 1889.)

SLANDER—ACTION FOR—PLEADING—INSTRUCTIONS—PRIVILEGED COMMUNICATIONS.

1. In an action for slander, where defendant admits the making of the charge complained of, but neither alleges its truth in his answer nor attempts to prove it at the trial, it is error to instruct that the law allows the defendant to plead the truth of the matter alleged to be defamatory, and that this does not remove the burden from the plaintiff to prove it false, even though defendant does not set up the truth of the alleged slanderous matter.

2. The reckless repetition of a mere rumor concerning the character of a candidate for public office, without any attempt to investigate its truth or probability, is not privileged.

Commissioners' decision. Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Chase & Chase, for appellant. *W. S. Tinning* and *L. B. & L. Mizner*, for respondent.

HAYNE, C. Action for slander. Verdict and judgment for defendant. Plaintiff appeals. The answer does not set up the truth of the charge alleged to have been made against the plaintiff, which was slanderous *per se:* and at the trial the defendant admitted that he made it. No attempt was made to prove that the charge was true, and none could have been made under the pleadings. In this state of the case the court gave the following instruction: "The law allows the defendant, in an action for slander, to plead the truth of the matter alleged to be defamatory, and this does not remove the burden from the plaintiff to prove that the alleged slanderous matter is false, even though the defendant does not set up the truth of the alleged slanderous matter." This was, in effect, to tell the jury that it was necessary for the plaintiff to prove a matter which was admitted by the pleadings, and was manifestly erroneous.

There are other errors in the record; but, as they need not arise upon a retrial, we deem it sufficient to say that, while a communication from one voter to another concerning the character of a candidate for public office may be privileged, and consequently excusable even though it turns out to have been untrue, yet that the reckless repetition of a mere rumor, without any attempt at investigation of its truth or probability, is not within the protection of the rule.

We therefore advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are reversed, and the cause remanded for a new trial.

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STANLEY *et al.* v. McELRATH. (No. 12,187.)[1]

(*Supreme Court of California*. Nov. 27, 1889.)

JUDICIAL NOTICE—JUDGMENTS—WAIVER OF PROTEST BY INDORSER—NOVATION.

1. Code Civil Proc. Cal. § 1875, subd. 3, providing that courts may take judicial notice of "public

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[1] Reversed in banc. See 25 Pac. 16, 86 Cal. 449.

and private official acts of the * * * judicial department of this state," does not authorize a court to dispense with formal proof of its judgment in another cause.

2. In an action against the maker of a note for the amount paid thereon by the indorser, it is no defense that the indorser paid it without proper demand and notice; for, as these are for the benefit of the indorser, he may waive any defects therein.

3. The execution by an indorser of his own note, which is given and accepted in full payment of the note on which he is liable as indorser, constitutes a novation under Civil Code Cal. § 1530, providing that "novation is the substitution of a new obligation for an existing one," and is made (section 1531) "by the substitution of a new obligation between the same parties with intent to extinguish the old obligation;" and the maker of the first note becomes liable to the indorser, though the holder, instead of canceling it, indorsed it without recourse to the indorser.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JONH HUNT, Judge.

Wm. H. Fifield, for appellant. *Henry N. Clement*, for respondents.

GIBSON, C. This action was brought by C. M. Hitchcock, who has since died, to recover from the defendant the sum of $6,136.50, with interest, on account of the payment, for and on behalf of the defendant, of a certain promissory note made by him on February 11, 1879, for $4,500, with interest, payable to the order of Hitchcock, at the London & San Francisco Bank, Limited, on April 11, 1879, and which note he (Hitchcock) indorsed solely for the accommodation of defendant, who thereupon negotiated it to the said bank, and received the full amount of note in money for his own benefit, and then at maturity let it go to protest for non-payment. Subsequently, when the statute of limitations had about run against the note, Hitchcock paid it by giving his own note to, and which was received by, the bank in full satisfaction and payment of the protested note, which was by the bank indorsed without recourse, and surrendered to Hitchcock. Defendant, by his answer, admitted the making, indorsement, and negotiation of the note, but denied that Hitchcock was an accommodation indorser thereon to any greater extent than $3,631.28, and averred that the remaining $868.72, at the time the note was negotiated, was due from him to the defendant on account of a certain note, theretofore made by Hitchcock in favor of defendant, and by the latter negotiated to the above-named bank, and afterwards by him paid to the bank. He also denied that the note was protested: that notice thereof was given to plaintiff; and that Hitchcock paid the note; and claimed the said sum of $868.72 as an offset, and the further sum of $4,000 for services rendered as an attorney to Hitchcock, by way of counter-claim.

The complaint is sufficient to sustain an action by plaintiff, either for money paid out to the use of defendant, or upon the note as an equitable assignee thereof. The trial resulted in a denial of the offset and counter-claim of defendant, and a judgment against him for the full amount of plaintiff's demand. The appeal is from this judgment, and an order denying a new trial.

The appellant urges as the principal reasons why his appeal should be sustained—*First*, that there is no evidence to support the findings in which his offset and counter-claim are disallowed; *second*, that his note was not legally protested, and hence Hitchcock could not be held as an indorser and had no right to pay the note, but, having paid it, he acted as a volunteer and could not recover of the appellant,—the maker of the note: *third*, that Hitchcock's note, given to and accepted by the bank in payment of appellant's note, did not and could not constitute such a payment as entitled Hitchcock to recover therefor.

(*a*) The court found that it was not true that Hitchcock was an accommodation indorser only to the extent of $3,631.28 of the amount of the note, but that he indorsed the note wholly for the accommodation of appellant; and, further, that the offset and counter-claim could not be allowed, because they had formed the basis of separate actions prosecuted by the appellant, as plaintiff, against Hitchcock in the same court in which the action was tried, and which had been fully adjudicated. Respondents concede that there is no evidence in the record to show such adjudication, but in support of the findings argue that, as the claims were adjudicated in the same court, under section 1875, Code Civil Proc., which permits the courts of this state to take judicial cognizance of certain matters without formal proof, the trial court properly dispensed with formal proof of its own records showing the adjudications, and took judicial notice of them for the basis of its findings. The method suggested would be an easy one for supplying proof of a judgment, and, if it could prevail, would place all judgments in the same court beyond the reach of inquiry as to their reliability, since what a court can judicially notice in a case cannot be overcome by evidence. The scope of the above Code provision was evidently misapprehended, for while the court could take judicial notice of (subdivision 3) "public and private official acts of the legislative, executive, and judicial departments of this state and of the United States," it could not dispense with proof of such judicial acts as might be in judgments. For example, we know judicially that the superior court, from whence this appeal came, is divided into 12 departments, and that a judge presides in each, but we cannot know without competent proof what the judicial acts of the several judges may be. Thus said this court in People v. De La Guerra, 24 Cal. 73: "In the trial of one case the court can no more take judicial notice of the record in another case in the same court without its formal introduction in evidence than if it were a record in another court; much less can this court take notice of the existence of a record not introduced in evidence in the court below." To the same effect is Water Co. v. Cowles, 31 Cal. 215. This error alone, if it does not affect the merits of the case, will not warrant a reversal, because it is a well-settled rule that a judgment which is sustained by the record will not be reversed because one of the reasons upon which it is based is erroneous. Kidd v. Teeple, 22 Cal. 255; Webster v. King, 33 Cal. 348; Helm v. Dumars, 3

Cal. 455. As the appellant did not, at the trial, adduce any evidence in support of his affirmative defenses, he therefore failed to establish them; and the court properly found against them, although for an erroneous reason. It is therefore obvious that, as the findings were justified, the reason is immaterial, and did not affect the merits of the case.

(b) A promissory note may be protested in this state. McFarland v. Pico, 8 Cal. 626; Kellogg v. Box Factory, 57 Cal. 327. And when protested, the protest is *prima facie* evidence of the demand, non-payment, and notice to any or all of the parties to the note. Pol. Code, § 795. "But," said this court in Kellogg v. Box Factory, "it is not necessary, in order to fix the liability of indorsers, that a note should be protested for non-payment. A presentation of it to the maker upon the day of its maturity for payment, a refusal by him to pay it, and notice to the indorsers of such presentation and refusal, are sufficient."

The present case, however, illustrates the convenience of a protest, at least to banking institutions. The note was payable at the London & San Francisco Bank, Limited, which was at the same time the holder of the note. Now, to avoid making a demand upon itself, and a refusal of payment for lack of funds in its hands belonging to the maker of the note, it called in a notary for its convenience, whom it constituted its agent to make the necessary demand of payment at the bank, and who was authorized to place the dishonor of the note in a form that would constitute *prima facie* evidence thereof. The convenience of a notary in this respect was recognized by STORY J., as long ago as 1822, in Nicholls v. Webb, 8 Wheat. 326. Hitchcock, as indorser, was entitled to notice of the dishonor of the note, but as it was for the benefit of himself and the holder, and not for that of the maker, he could waive it, if he saw fit to do so. Civil Code, § 3135, subd. 1; 2 Daniel, Neg. Inst. § 1090. In Curtis v. Sprague, 51 Cal. 239, which was an action upon a note against the maker and an indorser, who was treated as a guarantor, the latter having promised to pay the note after maturity, and with full knowledge that the holder had failed to make a demand of payment, and give notice of non-payment, the court said: "It is well settled that a promise by an indorser or guarantor, after maturity, to pay the note, with notice of the laches, dispenses with the necessity of proving demand and notice." This rule is almost universal wherever the law merchant prevails. Daniel, Neg. Inst. § 114; Story, Prom. Notes, § 274. So, if a notice may be completely waived by an indorser, or entirely dispensed with by his promise to pay after maturity, it is plain that he may determine whether he will treat a notice that may be imperfect as sufficient or not. Hence, as Hitchcock brought into court at the trial one of the duplicate notices of dishonor, made out and sent to him at two different places by the notary, it is evident that he at some time received the one he produced. Whether he received it in time was for him, not the maker, to determine. That he (Hitchcock) considered that the notice was in time, and effectual, may be inferred from the fact that he never questioned it; but with a knowledge of its defects, if any existed, at all times afterwards admitted his liability upon the note, and subsequently, and just before the statute of limitations had fully run against it, paid it. If no demand and notice had been given, and the indorser voluntarily paid the note at any time before it became barred, how could the maker be injured? He is the one that is primarily liable, and it matters not whether he is compelled to pay to the holder in the first place, or to his accommodation indorser, after the latter has paid the holder of the note, in the next place.

The plaint of the maker of the note in this case, that notice of dishonor was not given to his accommodation indorser, does not come with as good grace as it might from an indorser whom the indorsee was seeking to hold in an action upon the note, wherein it would be incumbent upon the plaintiff to prove a proper demand and non-payment and notice in order to hold him. Here the indorser admitted the receipt of notice and the demand, the latter being undisputed, and acted upon them, besides in paying the note, as he had a right to do at any time before it was barred. Besides, it seems the appellant at one time was satisfied with the manner in which the notice of dishonor was given, and the consequent liability of Hitchcock, as he, several times after the dishonor of the note, promised both the bank and Hitchcock that he would pay it, and did make several small payments to the bank on account of interest. Therefore the findings in this respect are fully sustained by the evidence.

(c) "Novation is the substitution of a new obligation for an existing one," (Civil Code, § 1530;) and it is made "by the substitution of a new obligation between the same parties, with intent to extinguish the old obligation," (Id. § 1531.) This is in accordance with the Roman law upon this subject; and, says Judge Story in his work on Promissory Notes, § 105: "It shows that common sense, in its application to the every-day transactions of human life, speaks the same language, and is regulated by the same motives of convenience and policy and justice, in all civilized countries, however wide their distance or remote their ages from each other. Thus we are told in the institutes that the ancient lawyers at Rome held that a novation—the substitution of a new debt for an old one thereby extinguishing the former — (Evans, Poth. Obl. marg. p. 546; Dig. Lib. 46, tit. 2, c. 1) arose when a second contract was intended to dissolve a former." And again, in section 438: "A negotiable promissory note will, by our law, operate as an extinguishment of a prior existing debt if it is so intended between the parties. The only question is as to the proof of such intention." Applying this doctrine in this case, the testimony of Hitchcock, the indorser of the note, and that of Scrivener, the managing agent of the bank that held the note, indisputably shows that the note of Hitchcock was given and received in absolute extinguishment of the latter's liability as indorser upon the appellant's note. Hence, as between Hitchcock and the bank, the appellant's note was fully paid, and a novation was thereby perfected between Hitchcock and the bank.

It makes no difference to the appellant, that we can perceive, that the bank, instead of canceling the note, indorsed it without recourse to Hitchcock, because between him and the maker he, as an accommodation indorser, stood towards the bank as a surety for the maker. Therefore the appellant, as principal debtor, was bound to reimburse his surety for his disbursements in satisfaction of the note, including necessary costs and expenses. Civil Code, § 2847. See Waldrip v. Black, 74 Cal. 409, 16 Pac. Rep. 226, and Fowler v. Strickland, 107 Mass. 552. In the first case Waldrip signed a note as surety for and with the two defendants, they having executed a mortgage on realty to secure him against possible loss. He was compelled to pay the note to the holder, who, upon such payment, indorsed the note to Waldrip. The latter, to obtain reimbursement, brought suit upon the note against the makers, and to foreclose the mortgage. Held that, having paid the note, he became the equitable assignee thereof, and was entitled to enforce it as the holder thereof, as well as to foreclose the mortgage as collateral security.

In Fowler v. Strickland, which was similar to the present case, the note for $2,000 sued on was an accommodation note, made by the defendants to the plaintiff, as payee, who indorsed it for the accommodation of the defendants. They, defendants, thereupon negotiated it to one Loomis for the full amount of the note, and the plaintiff, as such indorser, thereby became liable for such amount in an action on the note by Loomis or other lawful holder. At the maturity of the note one of the defendant makers of the note informed the plaintiff that they would be unable to meet the note, and the plaintiff would be obliged to pay it. Soon after, the plaintiff took up the note by giving Loomis, the holder, in payment three promissory notes, signed by himself and another person, aggregating $700, and nothing further. The court, by Gray, J., held that "the plaintiff had the same right as any other person to purchase the note from Loomis for such price as might be agreed on between them. Even if, by the terms of such an agreement, Loomis had retained any interest in the proceeds of the note which he delivered to the plaintiff, the latter, in an action against the defendants on the note, could have recovered the full amount thereof, although he might have held a part of the proceeds in trust for Loomis. If he purchased the entire interest of Loomis in the note at the time of its delivery by Loomis to him, he might recover the whole amount to his own use. The defendants, having received the whole amount of the note at the time of its original negotiation, and being now no longer liable to any action by Loomis, the amount of their liability in this action against them as makers of the note is not affected by the question of how much the plaintiff paid to Loomis, or whether the sum recovered will belong to Loomis or to the plaintiff." Of what concern then is it to the appellant here whether Hitchcock's note is ever paid or not? It ought to be sufficient for him to know that it relieved him of his responsibility to the bank upon his own note, of which he received the fruit. At one time, as we have seen, he was satisfied of the liability of his indorser upon the notice of dishonor, which he now strenuously seeks to avoid on this appeal.

Our conclusion is that, whether we regard the action as one upon the note by an equitable assignee, or one for money paid to the use of the defendant, the liability of the appellant in either case is manifest from the evidence; and, as there is no prejudicial error in the record, the judgment and order ought to be affirmed.

We concur: Belcher, C. C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(84 Cal. 544)

FALK v. STROTHER, Auditor. (No. 12,061.)

(*Supreme Court of California.* Dec. 2, 1889.)

MANDATE TO COUNTY AUDITOR.

Under the act of the California legislature commonly known as the "Consolidation Act," (article 6, § 92,) providing that any person may appeal from the rejection of his claim by the county auditor to the county board, whose decision thereon shall be final, a writ of mandate will issue against the auditor to pay a claim allowed by the county board on appeal from its rejection by him, though the rejection may have been justified on its first presentation.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. Rearden, Judge.

George Flournoy, Jr., (*Philip A. Galpin* and *Wilson & Wilson*, of counsel,) for appellant. *Oliver P. Evans* and *M. A. Edmonds*, for respondent.

Sharpstein, J. This appeal is from a judgment directing a peremptory writ of mandate to issue out of the superior court of the city and county of San Francisco commanding the defendant, Fleet F. Strother, auditor of said city and county, to audit and allow the demand of the plaintiff, Ray G. Falk, for his salary as agent of the board of election commissioners for the detection of fraud, and the scrutinizing of the registration of voters, and appointment of election officers for the half month of September, 1886. Said board of election commissioners approved and allowed his claim and demand for a half month's salary as agent aforesaid. Such demand was afterwards presented to the defendant, auditor as aforesaid, and he refused to audit and allow the same. The plaintiff then appealed from the decision of defendant to the board of supervisors of said city and county, and said board approved and allowed said demand. Thereafter plaintiff presented his said claim, so approved and allowed by said board of supervisors, to defendant, and requested him to allow and audit the same, and make the proper entries in the proper books, in like manner as in other demands allowed by him, and to make the proper indorsement on the same.

Section 92 of article 6 of the act of the legislature commonly known as the "Consolidation Act" provides that "if any person fee aggrieved by the decision of the auditor or other proper officer or officers of said city and county, except the board of education, in the rejection of, or refusal to approve or allow, any demand upon the treasury, presented by such person, he may appeal, and have the same passed upon by the board of supervisors, whose decision thereon shall be final; and, if the said board shall approve and allow the demand, it shall afterwards be presented to the auditor, and entered in the proper book, in like manner as other demands allowed by him, and an indorsement must be made of its having been so entered before it can be paid." Conceding, as we do, that the auditor was justified in refusing to audit and allow this claim when presented to him for that purpose, was it not his plain duty, after his decision had been appealed from to the board of supervisors, and reversed by that board, to enter it in like manner as other demands allowed by him? Such appears to be the duty enjoined on him by law, and the law must be obeyed. After an appeal has been taken from the decision of the auditor, and his decision reversed by the board of supervisors, the duty of the auditor is simply ministerial or clerical. He can no longer exercise any discretion in the premises. The law plainly prescribes his duty. Judgment affirmed.

I concur: McFarland, J.

I concur in the judgment: Thornton, J.

(81 Cal. 248)

Kerigan v. Southern Pac. R. Co. *et al.*

(No. 12,120.)

(*Supreme Court of California.* Nov. 22, 1889.)

Carriers of Passengers—Connecting Lines.

A railroad company which sells a coupon ticket over its own and connecting lines, containing the condition, referred to in each coupon, that the company, in issuing the ticket, acted for itself over its own line, and as agent of the connecting lines, but assumed no responsibility beyond its own line, and would not permit stop-over privileges, is not liable for injuries received by the holder while riding on the connecting line.[1]

Department 2. Appeal from superior court, city and county of San Francisco; John W. Armstrong, Judge.

B. McKinne and *George B. Gillen*, for appellant. *W. H. L. Barnes*, for respondents.

Per Curiam. Action for damages for bodily injuries received by plaintiff through the alleged negligence of defendants while carrying plaintiff as a passenger on a stage-coach from Gilroy Hot Springs to Gilroy. Both defendants answered, but at the trial the defendant corporation only appeared, and, after the plaintiff closed his case, it moved for and obtained a nonsuit as to itself. The case was then given to the jury, who returned a verdict for plaintiff against defendant Paine. From the judgment of nonsuit plaintiff appeals. The facts are as follows: On the several dates hereinafter mentioned, the respondent corporation owned and was operating a steam railroad for the carriage of passengers and baggage between San Jose and Gilroy in either direction, and the defendant Paine was the owner of and operating a stage line between Gilroy and Gilroy Hot Springs for the carriage of passengers and baggage in either direction. On the 23d of June, 1885, the plaintiff purchased of the respondent a round-trip special excursion ticket from San Jose to Gilroy Hot Springs and return to San Jose, entitling him to transportation over the railway and stage line above mentioned. The ticket was in the form of a coupon ticket, and had three coupons attached to it. The first provided for one continuous passage from San Jose to Gilroy; the second, for one passage from Gilroy to Gilroy Hot Springs; the third, for one passage from Gilroy Hot Springs to Gilroy; and the main ticket, for one continuous passage from Gilroy to San Jose. Among other matters not material here, the ticket contained on its face the following: "Issued by the Southern Pacific Railroad Company, acting for itself over its own line, and as agent for the line named in the accompanying checks, but assuming no responsibility beyond its own line. * * * In consideration of this ticket being sold at a reduced price from the regular first-class rate, it is hereby understood and agreed upon by the purchaser that it will not be good for passage after October 31st of the year indicated by agent's punch mark in the margin, that it is not transferable, and no stop-over privileges will be granted." These conditions were referred to in each of the coupons. On the 27th day of June, 1885, when the appellant was returning from Gilroy Hot Springs to Gilroy, upon said ticket, as a passenger, on a stage-coach of the stage line belonging to the defendant Paine, the stage-coach, while descending a steep grade on the road, and making a sharp turn around a bank on one side, was upset against the bank, solely through the negligence of the driver, and the appellant was crushed between the bank and stage-coach and severely injured. The claim of appellant is that the respondent, by selling him the ticket from San Jose to Gilroy Hot Springs, via Gilroy, and return to the first place, undertook, as principal, to transport him over the connecting stage line from Gilroy to Gilroy Hot Springs and back to Gilroy, and is liable as such principal for the default of the owner of the stage line.

Doubtless, a railway company may so issue tickets to places beyond its own line, and so control the transportation of its passengers as to be held to have contracted for the entire distance, and, in consequence, be answerable in damages for negligence occurring on any one of the connecting lines. Such is the effect of the following cases, cited by appellant, viz.: Railroad Co. v Blake, 7 Hurl & N. 987; Buxton v. Railway Co., L. R. 3 Q. B. 549; Ward v. Vanderbilt, 4 Abb. Dec. 521; Williams v. Vanderbilt, 28 N. Y. 217; Van Buskirk v. Roberts, 31 N. Y. 671; Quimby v. Vanderbilt, 17 N. Y. 307; McElroy v. Railroad Corp., 4 Cush. 400; Schopman v. Railroad Corp., 9 Cush. 24; McLean v. Burbank, 11 Minn. 277, (Gil. 189;) Carter v. Peck, 4 Sneed, 203; Wheeler v. Railroad Co., 31 Cal. 46. But we understand the rule to be that where there are several connecting lines, and the plaintiff seeks, as in the present case, to recover of one for an injury received upon another of the connecting lines, he must establish a contract with the line he endeavors to hold, or that it had some interest in, or control over, the transportation of passengers by the line in default. Wylde v. Railroad Co., 53 N. Y. 156; Railroad Co. v. Schwarzenberger, 45 Pa. St. 208; Railroad Co. v. Connell, 18 Amer & Eng. R. Cas. 339; Hartan v. Railroad Co., 114 Mass. 44; Brooke v. Railway Co., 15 Mich. 332; Knight v. Railroad Co., 56 Me. 234; 2 Redf. R. R. (6th Ed.) 313, 314. Do the facts in the present case show a contract between the appellant and respondent whereby the latter undertook to carry the former to Gilroy Hot Springs and back again to San Jose? The only evidence upon this point is that the appellant purchased, paid for, and accepted the ticket containing the notice and conditions above set forth, and that he rode upon it from one of the termini to the other and back again. There is not a word to show that the respondent undertook differently from what appears upon the face of the ticket. The sections of the Civil Code cited by appellant refer only to contracts of railroad companies for carriage over their own lines. The nonsuit was properly granted, and the judgment is affirmed.

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[1] See note at end of case.

NOTE.

Common Carriers — Connecting Lines. In the absence of a contract to carry to the ultimate destination, the liability of a common carrier is limited to its own route; and the fact that it receives goods with knowledge that they are destined to a point beyond its line, and names the through rate, does not establish such a contract. McConnell v. Railroad Co., (Va.) 9 S. E. Rep. 1006; Ortt v. Railway Co., (Minn.) 31 N. W. Rep. 519. While a railroad company cannot be compelled to carry beyond its own termini, it may contract to carry further over its own and other lines, and it then assumes all the obligations of a carrier over all the lines. The connecting carriers become its agents, and it is liable for their negligence. Railroad Co. v. Roach, (Kan.) 12 Pac. Rep. 93; Washington v. Railroad Co., (N. C.) 7 S. E. Rep. 789. The connecting carriers are also liable to the person injured by their negligence, (Railroad Co. v. Roach, supra;) but not as on a breach of a contract to carry safely, as there is no contract between such connecting line and the injured person, (Railroad Co. v. Mount Vernon Co., [Ala.] 4 South. Rep. 356.) See, also, cases cited in note 1; Harris v. Railway Co., (R. I.) 5 Atl. Rep. 305, and note; Fox v Railroad Co., (Mass.) 19 N. E. Rep. 222; Jennings v. Railway Co., 5 N. Y Supp. 142.

(81 Cal. 275)

People v. Tonielli. (No. 20,543.)

(*Supreme Court of California.* Nov. 23, 1889.)

Threatening Letter—Information—Evidence—Appeal.

1. An objection that the venue was not proved will not be heard on appeal, where the record does not affirmatively show that fact, nor that it contains all the evidence in the case.

2. Pen. Code Cal. §§ 518, 519, declare that extortion is the obtaining of property from another with his consent, induced by wrongful use of force or fear, etc., and that fear such as will constitute extortion may be induced by a threat to expose or impute to a person any disgrace. Section 523 provides that a person who, with intent to extort money from another, sends him a letter expressing or implying, or adapted to imply, such threat, is punishable as though he had actually obtained the money. Section 950 provides that an information must contain a statement of the acts constituting the offense in ordinary and concise language, so that a person of common understanding may know what is intended. *Held*, that an information is sufficient which charges that defendant sent a letter to a certain person which expressed and implied, and was adapted to imply, a threat to impute disgrace to him, and to expose it; which letter, as set out, stated that the writer, having found out all the facts charged against such person in a certain newspaper, would, for a certain amount, not only disclose nothing, but prevent discovery by his antagonists, "should they employ detective," but on condition that an answer must "come before night."

3. Though the letter introduced in evidence contains the word "another" between "employ" and "detective," the variance is immaterial.

4. The admission in evidence of the people's translation of the newspaper article referred to in the letter was not prejudicial error, as it tended to explain defendant's motive and object, and as he himself introduced the same article translated with but immaterial variance.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

Ash & Mathews, for appellant. *George A. Johnson*, Atty. Gen., for the People.

Foote, C. The defendant was convicted of an attempt to extort money by means of a threatening letter. From the judgment rendered in the premises, and from an order denying his motion for a new trial, he appeals. One ground of alleged error is the insufficiency of the information as against a demurrer interposed thereto. The part of the pleading attacked material to this controversy reads: "In the superior court of the city and county of San Francisco, state of California, the 19th day of September, A. D. eighteen hundred and eighty-eight, A. P. Tonielli, *alias* Tonielli, is accused by the district attorney, by this information, of the crime of felony, to-wit, extortion, committed as follows: The said A. P. Tonielli, *alias* Tonielli, on the third day of August, A. D. eighteen hundred and eighty-eight, at the said city and county of San Francisco, with intent feloniously to extort money and property from one Edward Larcher, did then and there willfully, unlawfully, and feloniously send to said Edward Larcher a certain letter and writing; did express and imply, and was adapted to imply, a threat to impute to the said Edward Larcher disgrace, and to expose the same, which said letter and writing was then and there in the words and figures following, to-wit: 'City, Aug. 3, 1888. E. Larcher, City—Dear Sir: Having been asked by Mr. Deshayes of "Le Bayard" to find facts that might serve as proofs of what he asserted in his paper against you, I was to find out these facts, and I have found all, whilst he was naturally to pay me. But, before I reveal anything, I wish to let you know that, if you give me $300, I will not only say nothing, but also frustrate all their efforts in finding anything, should they employ ——, detective. I want $100 at once, and balance when the case comes out. I guaranty that, if I keep silent, they will lose the case, and you get your $20,000. Answer must come before to-night. Address 721½ Bush street. Yours, truly, A. P. Tonielli,'— contrary to the form, force, and effect of the statute," etc. Extortion is defined by the Penal Code as follows: "Sec. 518. Extortion is the obtaining of property from another, with his consent, induced by a wrongful use of force or fear, or under color of official right. Sec. 519. Fear such as will constitute extortion may be induced by a threat, either (1) to do an unlawful injury to the person or property of the individual threatened, or to any relative of his or member of his family; or (2) to accuse him, or any relative of his, or member of his family, of any crime; or (3) to expose or impute to him or them any deformity or disgrace; or (4) to expose any secret affecting him or them."

The appellant claims that the information does not contain facts sufficient to constitute the offense charged. The defendant is specifically charged in the information with sending a letter to E. Larcher which expressed and implied, and was adapted to imply, a threat to impute to him disgrace, and to expose the same, (which letter, as set out in the pleading, purports to have been subscribed by the defendant,) and was so sent, as charged, with the felonious intent to extort money from Larcher. The defendant was convicted as charged, under section 523 of the Penal Code, which is: "Every person who, with intent to extort any money or other property from another, sends or delivers to any person any letter or other writing, whether subscribed or not, expressing or implying, or adapted to imply, any threat such as is specified in section 519, is punishable in the same manner as if such money or property were actually obtained by means of such threat." As we view it, the letter claims that the writer has found out all the facts charged against Larcher in a paper called "Le Bayard," for obtaining and communicating which the former was to receive pay from one Deshayes, who published the charges against Larcher: that being possessed of all this knowledge damaging to Larcher's character, before informing Deshayes, his employer, he wishes to get money from Larcher, and then he will not only refrain from revealing what he knows to Larcher's antagonists, but will frustrate their attempts to find out these facts, if a detective be employed to do it; the guaranty being further made that, if Tonielli keeps silent, the other side will lose its case, and that Larcher will get $20,000 that he has sued for. But an answer must come before night to a certain place on Bush street. It is clear to the ordinary mind that Tonielli intended to declare, and did virtually declare, to Larcher: "I have found out the truth of all the charges made against you in a certain newspaper publication in Le Bayard. I can get paid for this information from the newspaper man who employed me to ferret it out, and, if I do, you will suffer disgrace. But I will not reveal what I know, if you will pay me $300 not to do it. But, if you don't let me know by to-night that you will pay me, I will tell all I know against you, as charged in the paper." This kind of a letter expresses, implies, and is well adapted to imply a threat to impute disgrace to Larcher, and to expose it, if money is not paid to prevent it. And this brings the information within the statute supra, and of the Penal Code, § 950. Extortion, and the attempt to do so, as charged, are made felonies. Pen. Code, §§ 519, 520, 523.

It is further claimed that the venue was not proven. The record shows that the trial took place in the city and county of San Francisco, state of California, and nowhere in the record is it even remotely intimated that the letter was sent or received anywhere else than in said city and county and state. It is in evidence by a witness that it was received in "San Francisco;" that the envelope was postmarked there. It was said in People v. Manning, 48 Cal. 338: "Another point made by the appellant is that the venue was not proved. No witness testified in so many words that the killing occurred in the city and county of San Francisco. But the whole testimony, taken together, left no room for a reasonable doubt on this point. We think the venue was sufficiently proved." The same rule may be applied to the case in hand. Besides, the record does not affirmatively show that it contains all the evidence given on the trial, or that the venue was not proved; hence no objection on that ground can be heard on appeal. The defendant must show error affirmatively. People v. Huff, 72 Cal. 117, 13 Pac. Rep. 168; People v. Marks, 72 Cal. 46, 47, 13 Pac. Rep. 149, and cases cited; People v. Leong Sing, 77 Cal. 119, 19 Pac. Rep. 254; People v. Carroll, ante, 129.

The variance claimed between the allegations of the information and the proof on the trial is that the letter, as set out in the pleading, has a blank space between the words "employ" and "detective," while the letter introduced in evidence has the word "another" filling the blank space. We do not perceive the materiality of the variance. It does not in any way alter the sense of the letter as expressing or implying a threat to impute disgrace to Larcher, and to expose it, if money is not paid to the writer by Larcher. The variance, being immaterial, should be so regarded. People v. Hughes, 41 Cal. 236.

It is further urged, on behalf of the appellant, that the newspaper article, as translated for the people was inadmissible. We do not so regard it. It tended to explain the reason, motive, and object of the writer of the letter, which referred to the article. Again, the appellant suffered no injury, for he introduced the same article in evidence translated with but slight and immaterial difference.

Upon the whole case, we perceive no prejudicial error, and advise the affirmance of the judgment and order.

We concur: BELCHER. C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(81 Cal. 356)

PEKIN MINING & MILLING CO. v. KENNEDY *et al.* (No. 12,453.)

(*Supreme Court of California.* Nov. 29, 1889.)

EXECUTION—SALE—EQUITY—FRAUD—MINING CORPORATIONS—DEEDS.

1. At a constable's sale, March 22, 1884, one who volunteered his assistance to the justice to

write out the certificate of sale inserted his own name as purchaser, and the certificate was signed by the constable and recorded. Afterwards the mistake was discovered, and a new certificate was issued to the real purchaser, which recited the sale as taking place July 12th, and which was filed for record July 19th, and the constable executed a deed to the assignee of this certificate. *Held*, that no title passed to the assignee as against the persons having the right to redeem from the sale, who in the mean time, without notice of the second certificate, had paid the necessary amount, and received a certificate of redemption from the holder of the first certificate.

2. A sale of land under execution on a judgment against persons having no title, though in possession, cannot pass the title.

3. A part of a tract of land was conveyed to a corporation, and afterwards the grantor conveyed the entire tract to O., from whom, by mesne conveyances, plaintiff derived title. Defendants claimed that O. took the deed for their benefit; but it appeared that one of the defendants, who was a grantee from O., and a director and superintendent of the corporation, had conspired with the other defendants to defeat the title of the corporation by this deed to O. *Held*, that the equitable claim of defendants, being founded on fraud, could not stop the flow to plaintiff of the legal title to that part of the land which had not been conveyed to the corporation.

4. The deed of a mining corporation does not pass the title to its mining land, unless it is shown to have been ratified by two-thirds of its stockholders, as is provided by Laws Cal. 1880, p. 131. Following McShane v. Carter, ante, 178.

In bank. Appeal from superior court, El Dorado county; George E. Williams, Judge.

Blanchard & Swisler, for appellants. *Marcus P. Bennett*, for respondent.

McFarland, J. This is an action of ejectment to recover a tract of land containing about five and one-half acres, situated in section 29, township 9 N., range 10 E., M. D. M., in El Dorado county. The findings and judgment were for plaintiff, and defendants appeal from the judgment and from an order denying a new trial.

The land in contest constitutes a part of what is known as the "Oro Fino Quartz Mine," which was surveyed by a United States mineral surveyor, and marked out, etc., in 1880. No patent seems to have been obtained for the land as mining ground; but plaintiff claims to have acquired the United States government title through one Charles P Schenck, who was a homestead claimant of that part of said section 29 which includes the land in contest. In June, 1882, Schenck received a patent from the United States for the land covered by his homestead claim, but on September 11, 1880, when he was only a homestead claimant, and had not made his final proof, by a deed which was never recorded, he "granted and quitclaimed" a part of the land described in the complaint to one William H. Miller. The deed was drawn by Miller on a blank in which was printed the word "grant," and immediately after that word he wrote the words "and quitclaim." He knew that Schenck had not proved up his homestead claim. Prior to the year 1883, and subsequent to November, 1881, the land described in said deed from Shenck to Miller had been conveyed from said Miller, through mesne conveyances, all recorded, to the Oro Fino Gold Mining & Milling Company of El Dorado, a mining corporation existing under the laws of the state of Illinois; which corporation had built a mill on the land at a cost of $18,000, and had sunk a shaft to the depth of 130 feet, and had done other work, at large expense. On April 9, 1885, a deed was made which purports, on its face, to be the deed of said last-named corporation, and which, if it be a valid deed of said corporation, conveys to the plaintiff herein all the land described in the complaint. The name of the corporation is signed to it, and also the names of persons assuming to be its president and secretary, who acknowledged it in due form before a notary, and it has affixed to it the corporate seal. There was no evidence offered, however, to show that the deed had been authorized by the trustees of the corporation, or that it was ratified by two-thirds of the stockholders, nor was there any other proof of its execution; and defendants objected for these reasons to its introduction. The objection was overruled.

On February 20, 1884, said Schenck, having then obtained his patent from the United States as hereinbefore stated, executed to one Frank B. Ogden a quitclaim deed to all the land sued for in this action; on July 9, 1884, said Ogden by deed bargained, sold, and quitclaimed all said land to A. J. Mason, Robert Gay, and Peter Baker; and on February 21, 1887, said Mason, Gay, and Baker, by deed "granted, bargained, and sold" all said land to the plaintiff herein. So the plaintiff claims the government title through said patentee, Schenck, by two courses: *First*, the one which ended in the alleged deed from the Oro Fino Corporation to plaintiff; and, *second*, the one which ended in the deed to plaintiff from said Mason, Gay, and Baker. Defendants deny the title of plaintiff, and set up title in one Mathilda de Lescault, with whose consent they claim to be in possession. We think, however, that no title was shown to be in said Lescault. Her asserted title rests upon execution sales under two judgments,—the one known as the "Phelps Judgment," and the other as the "Park Canal Company Judgment."

With respect to the sale under the Phelps judgment, the facts, as found by the court, are these: In 1883 the said W. H. Miller made two trips from California to Chicago, where the principal place of business of the said Oro Fino Mining Corporation was, for the purpose of procuring himself to be elected a director, and to be appointed the superintendent of said mine, and on the last trip was successful. After his return, and while he was such superintendent, and as such in charge of said mine, he entered into a contract (about which, however, there had been former negotiations) with the defendants Kennedy and Bargion, by which the three were to take possession of and work the mine—including the mill and all the land described in the complaint herein, and the adjoining ground of said corporation, known as the "McMahon Ground"—as partners, ignoring the right of said corporation, and intending to get the title unto themselves. In accordance with this agreement, Miller let the said two defendants into joint possession with him, and the three commenced to work the mine as partners. The facts of Miller's director-ship and superintendency of the corporation, and the right of the latter to the mine, were well known to said defendants. In September, 1883, one Josiah Phelps commenced an action in a justice's court against said Oro Fino Corporation to recover a small sum of money. Miller appeared as managing agent and superintendent, and answered for the corporation. At the trial Kennedy appeared for the corporation at the request of Miller, and judgment was rendered against the corporation for $186.85 and costs. Execution was issued and levied on the mine, and on March 22, 1884, the day of the constable's sale, the mine was knocked down to Kennedy for the sum of $280. It had been agreed between Miller, Bargion, and Kennedy that the latter should bid off the property in his own name. But it had also been agreed between Miller and Frank B. Ogden (hereinabove mentioned) that said Ogden should attend the sale for the purpose of procuring the title to said mine to be taken in his (Ogden's) name. Ogden attended the sale, and it was agreed between him and Kennedy that, for the purpose of deterring bidders, Ogden should give public notice at the sale that the mine did not belong to said Oro Fino Corporation, but was the property of him, (Ogden.) Such notice was accordingly given, and the mine was bid in by Kennedy, as before stated. But another complication arose. Ogden volunteered his assistance to the justice of the peace to write out the certificate of sale, and inserted therein his own name as purchaser, instead of that of Kennedy This was not known to or discovered by the constable (Cline) or Kennedy. It was signed by the constable, and filed in the office of the county recorder, as provided by law. This was on March 22, 1884, and the mistake was not discovered until the next July; and on the 12th of said July the constable undertook to remedy the mistake by issuing another certificate to Kennedy, but this second certificate recited a levy and sale as taking place on said 12th day of July, instead of March 22d. It was filed for record July 19, 1884. Kennedy assigned his certificate to Ella C. Gates on August 18, 1884, and on September 22, 1884, the constable executed a deed to said Gates. On December 30, 1884, the said Gates executed a grant deed of the mine to the said Mathilda de Lescault. The said Gates and Lescault were relatives of defendants, and there is no evidence that they were purchasers for value. But, in the mean time, Mason, Gay, and Baker, (hereinbefore mentioned,) having the right to redeem, paid the said Ogden on September 20, 1884, the full amount necessary to redeem the mine from said sale of March 22, 1884, and received from said Ogden a certificate of such redemption, which was recorded October 1, 1884, and they had no knowledge that there was any other certificate of sale than the one in which Ogden was named as purchaser, unless the recording of the second certificate to Kennedy in July constituted legal notice. Under these circumstances we think that no title to the premises in contest passed to Lescault through the sale under the said Phelps judgment. If the officer could amend the certificate after the lapse of several months, and if the redemptioners were called upon to look for additional certificates of the sale, still an examination of the records would not have disclosed any certificate referring to the sale of March 22, 1884; and we think, therefore, that the redemption was fully accomplished. But, in addition to that, the sale itself was invalid for fraud,—fraud, *First*, by the director and superintendent (and those who conspired with him) against the absent corporation, whose rights he was bound to protect, and, *second*, fraud through the conspiracy to deter bidders and prevent a fair sale.

The facts about the Park Canal Company sale are, briefly, these: While Miller, Kennedy, and Bargion were working the mine they incurred a liability to the Park Canal & Mining Company, and the latter company brought a suit in the justice's court against the three. It got service on Kennedy and Bargion, but not on Miller, and took judgment against all three. Execution was issued, and the interest of the three in the mine was sold to one Crawford, who assigned his certificate of sale to Lescault, to whom the constable afterwards made a deed. It is needless to determine the question discussed by counsel whether or not a joint judgment against three defendants, where only two are served, is valid against either; for, as the defendants in that action had no title to the mine, therefore Lescault got no title through the sale.

The only question, then, is whether plaintiff has shown title which will support ejectment. It is clear that plaintiff has title to all that part of the premises in contest which was not conveyed by Schenck to Miller by the deed of September 11, 1880, and which went by mesne conveyances to the Oro Fino Mining & Milling Company; that is, to all that part conveyed by Schenck, for the first time, to Ogden on February 20, 1884, and which went from Ogden to Mason, Gay, and Baker, and from the latter directly to plaintiff, by their deed of February 21, 1885. The only thing which defendants have to say against this view is that Ogden took the deed from Schenck for the benefit of Miller and themselves. But while Miller, who procured the deed to be made by Schenck to Ogden, told Kennedy and Bargion that Ogden was to hold the title for their benefit and his own, (thus cutting off the title of the Oro Fino Corporation, of which he was director and superintendent,) he told Schenck that Ogden was to hold for the Oro Fino Corporation, and Schenck executed the deed with that express understanding. The only complaint which defendants have, therefore, on this score, is the failure to have Schenck do what he did not intend to do; and they cannot successfully stop the flow of the legal title by the obstruction of asserted equitable claims founded on their own fraud.

But the title to that part of the land in contest, described in the first deed of Schenck to Miller, and which carried the title afterwards acquired from the United States, seems still to be in the Oro Fino Mining & Milling Company. This result comes from the fact that no evidence was offered to prove that the deed from the corporation to plaintiff was ratified by two-thirds of its stockholders, as provided in section 1 of the act concerning mining corporations, which went into effect April 23, 1880. St. 1880, p. 131. In McShane v. Carter, ante, 178, (filed September 2, 1889,) a majority of this court held that under said statute a deed of a mining corporation of any part of its mine, not shown to have been so ratified, does not pass the title. Upon the authority of that case we therefore hold that the title to that part of the premises in contest, now under discussion, is still in the Oro Fino Mining & Milling Company, and not in plaintiff. For this reason the judgment must be reversed. Judgment and order reversed, and cause remanded for a new trial.

We concur: Beatty, C. J; Sharpstein, J.; Fox, J.; Works, J.; Paterson, J.; Thornton, J.

(81 Cal. 334)

Donovan *et al.* v. Judson. (No. 12,350.)

(*Supreme Court of California.* Nov. 29, 1889.)

Contracts—Limitation of Actions.

Decedent entered into a written contract with defendant by which she agreed, without specifying the time for doing so, to convey certain land to him, and defendant agreed, "in consideration of the premises," to pay decedent $12,000, "within fifteen months after final judgment" in a certain case. *Held*, that payment by defendant did not depend upon decedent's performance of her contract, and cause of action against defendant arose, and the statute of limitations began to run, at the time specified for the payment of the money, though decedent had not executed the conveyance.

Department 2. Appeal from superior court, city and county of San Francisco; J. G. McGuire, Judge.

Page & Eells for appellant. *E. P. Cole* and *Roger Johnson*, for respondents.

Sharpstein, J. The plaintiffs, who sue as the administrator with the will annexed and devisees and legatees of Margeret Dalton, deceased, allege that on the 24th day of March, 1873, said Margaret Dalton and defendant entered into an agreement in writing, by which it was mutually covenanted and agreed between them that the said Margaret Dalton should grant, transfer, and convey, without incumbrances, all her right, title, and interest in and to a certain piece and parcel of land in said agreement described, to the said Judson, upon his demand and payment by him to the said Margaret Dalton of the sum of $12,000, 15 months after final judgment should have been entered in the case of Egbert Judson v. Paul Malloy in the district court of the fourth judicial district, in and for the city and county of San Francisco, and that said Judson should pay interest thereon at the rate of 9 per cent. per annum until the same should be paid, from and after 90 days from the entry of said final judgment. A copy of said agreement is attached to and made a part of the complaint. After reciting in said agreement that Margaret Dalton claimed to be the owner of said premises, and that there was litigation pending in regard to the same, which it was desirable to terminate, and said Margaret Dalton being desirous of disposing of her interest in said premises, said agreement proceeds as follows: "Now, therefore, in consideration of the premises hereinafter mentioned, said Margaret Dalton and said Michael Dalton, parties of the first part, hereby agree to and with the said party of the second part to execute a deed of conveyance in due form of law, in favor of the said party of the second part, of all the right, title, and interest of said Margaret Dalton, without incumbrances, in and to the premises described. *Second.* In consideration of the premises, said party of the second part agrees to and with said first party to pay the said Margaret Dalton the full sum of twelve thousand dollars in United States gold coin, within fifteen months after final judgment for plaintiff shall have been entered in the case of Egbert Judson v. Paul Malloy et al., in the district court of the fourth judicial district of the state of California, in and for the city and county of San Francisco, and number 12,091, and said party of the second part shall pay interest upon said sum of $12,000, at the rate of 9 per cent. per year, until the same shall be paid, from and after ninety days from the entry of such final judgment. It is understood that judgment is not final while motion for a new trial or appeal is pending." It is further alleged in the complaint that Margaret Dalton was, long prior to the execution of said agremeent, and up to the time of her death, the wife of Michael Dalton; that Margaret Dalton died on the 23d day of June, 1873, without executing to said Judson any conveyance of said land; that final judgment in favor of said Ebgert Judson was duly entered in said action of Judson v. Malloy et al., and all litigation therein finally ended, on March 27, 1873. On the 11th day of June, 1885, the superior court of the city and county of San Francisco, sitting as a court of probate, by an order made on the petition of plaintiff Donovan, as administrator, etc., in the matter of the estate of Margaret Dalton, then pending before said court, directed and authorized said plaintiff Donovan to make and execute a deed of said premises to said defendant, pursuant to the terms of said agreement. And thereupon said plaintiffs executed conjointly a good and sufficient deed of said premises to said defendant, who refuses to accept said deed, or any deed, or to pay said sum by him covenanted to be paid to said Margaret Dalton. Defendant, by virtue of said contract, entered into, and has ever since retained, the possession of said premises. Wherefore plaintiffs demand judgment, etc. This action was commenced on July 24, 1886. The complaint was demurred to on the ground, among others, that the cause of action was barred by sections 337, 338, and 343 of the Code of Civil Procedure. The demurrer was overruled, and the defendant answered, pleading several defenses, among which is the plea that the cause of action is barred by the provisions of section 337 and of section 343 of the Code of Civil Procedure. A trial was had, and judgment entered in favor of plaintiffs. Defendant moved for a new trial, which was denied, and from the judgment and order denying his motion for a new trial he appeals.

The only question which we deem it necessary to consider is, did the cause of action accrue four years before the commencement of this action? If so, it is barred by the provisions of the Code, pleaded by the defendant. Counsel for respondents contended that no cause of action accrued against appellant until a conveyance of the interest of Margaret Dalton in the premises was executed to Judson; that the execution of such a conveyance was a condition precedent to the right to demand the sum which he covenanted to pay. By reference to the agreement, it will be seen that Judson agrees to pay the sum specified "within fifteen months after final judgment for plaintiff should have been entered in the case of Egbet Judson v. Paul Malloy et al." The covenants to convey and to pay are independent covenants. No time is fixed for the execution of the conveyance. It might be executed before or after the time fixed for the payment of the sum to be paid by Judson. Had it been executed before that time, no cause of action would have accrued for the recovery of the money before the time fixed for its payment. No time is fixed for the execution of the conveyance and the case is clearly within the rule stated by Sergeant Williams in his note to Pordage v. Cole, 1 Wms. Saund. 320*b*, which has been accepted in England and this country as a correct explication of the law on this question. He says: "If a day be appointed for payment of money, or part of it, or for doing any other act, and the day is to happen or may happen before the thing which is the consideration of the money or other act is to be performed, an action may be brought for the money, or for not doing such other act before performance, for it appears that the party relied upon his remedy, and did not intend to make the performance a condition precedent; and so it is where no time is fixed for performance of that which is the consideration of the money or other act." In this case no time is fixed for the execution of the conveyance which Margaret Dalton covenants to execute to Judson. It is therefore clear that he did not intend to make the performance of that covenant a condition precedent to the payment which he covenants to make at a specified time. In none of the many cases in which covenants have been held to be independent covenants were they more clearly so than in this case. We must ascertain, if possible, the intention of the parties from the written agreement entered into between them. But there is nothing in the conduct of the parties, as disclosed by the record before us, inconsistent with their written agreement. In Morris v. Sliter, 1 Denio, 59, BRONSON, C. J., said: "I think the defendant has plainly agreed that he would pay the money, and trust to a remedy on the plaintiff's covenant in case the deed should not be duly delivered, and he must abide by his contract." In Mattock v. Kinglake, 10 Adol. & E. 56, LITTLEDALE, J., said: "A time being fixed for payment, and none for doing that which was the consideration for the payment, an action lies for the purchase money, without averring performance of the consideration." We do not doubt that a cause of action accrued in favor of Margaret Dalton, against the defendant, at the expiration of the time within which he agreed to pay her the stipulated sum specified in his covenant. Such being the case, it is clear that the action was barred by the provisions of the Code, above cited, and that the court erred in its conclusions of law on the findings that it was not so barred. The court also erred in overruling the demurrer to the complaint for the reason that it did not state facts sufficient to constitute a cause of action. Judgment and order reversed, and cause remanded, with directions to the court below to enter judgment for the defendant.

We concur: THORNTON, J.; McFARLAND, J.

(3 Cal. Unrep. 170)

BATES v. GREGORY *et al.* (No. 13,138.)

(*Supreme Court of California.* Nov. 30, 1889.)

MUNICIPAL BONDS—FUNDING ACTS—LIMITATION OF ACTIONS.

1. Act of March 26, 1851, (St. Cal. 1851, p. 391,) incorporating the city of Sacramento, and investing it with authority to sue and be sued; and acts of April 26, 1853, (St. Cal. 1853, p. 117,) and April 10, 1854, (St. Cal. 1854, p. 196,) authorizing the issuance of bonds of the city,—gave the purchaser of such bonds the right to sue the city, if they were not paid when due; and this right could not be impaired by subsequent legislation.

2. Act of March 22, 1864, (St. Cal. 1864, p. 217,) entitled an "Act to provide for the liquidation of the indebtedness of the city of Sacramento which accrued prior to January 1, 1859," and empowering the board of trustees of the city to issue new bonds, in liquidation, to all holders of claims against the city, was passed merely for the purpose of completing the funding of the city's indebtedness, and did not withdraw claims, existing before the passage of the act, from the operation of the statute of limitations; and an action for *mandamus* to compel the board of trustees to issue bonds, as therein provided, in place of those issued by the city under acts of April 26, 1853, and April 10, 1854, cannot be maintained where such bonds have since the act of 1864 become barred by the statute of limitations.

THORNTON, J., dissenting.

In bank. Appeal from superior court, Sacramento county; JOHN HUNT, Judge.

A. C. Freeman and *W. C. Belcher*, for appellant. *A. P. Catlin*, for respondents.

FOX, J. This was an application for a writ of mandate to compel the defendants, as trustees of the city of Sacramento, to issue to petitioner new bonds of the city in accordance with the provisions of the act of March 22, 1864, in exchange for unpaid bonds held by him, which were issued under the provisions of the acts of April 26, 1853, and April 10, 1854. The defendants, in their answer and upon the trial, contended that the claims were stale, and barred by the statute of limitations. This contention prevailed, and resulted in a judgment for the defendants; from which, and an order denying a new trial, plaintiff appeals.

March 26, 1851, the city of Sacramento was incorporated by an act of the legislature, passed on that date, entitled "An act to incorporate the city of Sacramento." (St. 1851, p. 391.) By this act the government of the city was placed in the hands of a mayor, recorder, and a common council, who were constituted a body politic under the name of the "Mayor and Common Council of the City of Sacramento;" with authority to sue and be sued; to borrow money, and pledge the faith and credit of the city therefor; and to levy and collect taxes. April 26, 1853, another act was passed, entitled "An act to extend and better define the powers and duties of the common council of the city of Sacramento, and to authorize the establishment of free schools in said city," (St. 1853, p. 117,) which conferred upon the mayor and common council the power to issue bonds for the purpose of raising funds to pay the then existing indebtedness of the city. In the exercise of the power thus granted, the mayor and common council of the city of Sacramento issued a certain bond dated the 6th day of May, 1854, and numbered 418, for the sum of $544.45, and made payable to Jonathan Williams or bearer on the 1st day of July, 1874, unless sooner called in, together with 40 semi-annual coupons thereto attached for $27.22 each. Another act was passed April 10, 1854, entitled "An act authorizing the mayor and common council of the city of Sacramento to issue bonds for certain purposes," (St. 1854, p. 196,) under which the mayor and common council of the city of Sacramento issued two certain bonds for the sum of $1,000 each, respectively numbered 361 and 384, and dated 24th and 26th April, 1854; and attached to each bond were 40 semi-annual coupons for $50 each. Both bonds were made payable on the 1st day of July, 1874, unless sooner called in. Bond No. 361 was made payable to Edward McGowan or bearer, and No. 384 to Stow and English or bearer. April 24, 1858, another act was passed, which consolidated the city of Sacramento with the county, under the corporate name of the "City and County of Sacramento." This act vested all the revenue and property of the city of Sacramento in the consolidated government, and provided for the funding of all claims existing against the city on the 1st day of January, 1859, and fixed the time at June 1, 1859, within which the holders of such demands might present them for funding. This time was thereafter extended to the 1st day of October, 1859, (St. 1859, p. 359,) and subsequently to January 1, 1862, (St. 1861, p. 308.) April 25, 1863, an act entitled "An act to incorporate the city of Sacramento" (St. 1863, p. 415) was passed, creating the present "City of Sacramento." This last act provided, among other things, that all the property and revenue which belonged to the mayor and common council of the city of Sacramento on the 30th day of April, 1858, should become the property of the city of Sacramento, and that it should have power to sue and be sued, and defend, upon any obligation: provided, that such obligation was not made or entered into prior to the passage of the act. On the 22d day of March, 1864, an act was passed entitled "An act to provide for the liquidation of the indebtedness of the city of Sacramento which accrued prior to January 1, 1859," (St. 1864, p. 217.) By this last act the board of trustees of the city were empowered to issue to all holders of claims against the city which accrued prior to January 1, 1859, bonds payable to bearer on February 1, 1903, to bear date of May 1, 1864, and bear interest from January 1, 1859, at 6 per cent. per annum, payable annually, after the first six years, on the 1st day of January, at the office of the city treasurer. The act prescribed no time within which creditors should present their demands for liquidation, but provided that bonds should be issued for all claims which accrued prior to January 1, 1859, that the board of trustees, upon examination, should consider "legal and just."

The petitioner, on October 17, 1887, presented the three bonds above described to the defendants for funding, and demanded in lieu thereof, under the act of 1864, the issuance of bonds to him equal in amount to the principal and interest due on the bonds which he offered to surrender. This demand was refused by the defendants. The appellant, upon these facts, argues that the statute of limitations was suspended by the acts of 1858, 1863, and 1864, as to all persons holding claims who might choose at any time to accept their provisions; and that the act of 1864 is a continuing offer held out to the creditors of the city of Sacramento which can only be withdrawn by a repeal of the act; and all who have claims such as are mentioned in the act, and accept its terms, can enforce the funding of their obligations by *mandamus*. It is conceded by respondents that *mandamus* is the proper remedy, if the claims of the petitioner are not stale or barred.

The act of incorporation of the city of Sacramento of 1851, and the acts of 1853 and 1854, under which the bonds of petitioner were issued, expressly authorized suits against the corporation upon such obligations. The inhibition of the act of 1858, in the first section thereof, is that "the city and county shall not be sued in any action whatever, nor shall any of its lands, buildings, improvements, property, franchises, taxes, revenues, actions, choses in action, and effects be subject to any attachment, levy, or sale, or any process whatever, either mesne or final;" and that prescribed in the first section of the act of 1863 is that the city may "sue and be sued, and defend, upon any bond, covenant, agreement, contract, matter, or thing whatever, of which courts of law or equity have jurisdiction: provided, however, that such bond, covenant, agreement, contract, matter, or thing that is the cause of action has been made or entered into after the passage of this act." These inhibitions clearly applied only to obligations of the city and county and city, respectively, incurred after the passage of the several acts. The restriction in the first act was to prevent the city and county of Sacramento from being sued upon any obligation incurred by it as such; and that in the second act, to protect the city of Sacramento against suits upon claims for which the former city and county had alone become liable. The act of 1864 did not enlarge or affect these restrictions in any way. The rule is, as stated by Judge Dillon in his work on Municipal Corporations, (volume 1, § 69,) that, "if a municipal corporation becomes indebted, the rights of the creditors cannot, it is clear, be impaired by any subsequent legislative enactment." Meyer v Brown, 65 Cal. 538, 4 Pac. Rep. 25, 625. The bonds of petitioner were issued under the acts of 1853 and 1854, under which the city could sue and be sued, and the privilege to sue thereby became a part of and entered into the contract of the city with the holders of such bonds. Petitioner's bonds are therefore within the above rule, and the protection of the state and federal constitutions, which prohibit the passage of laws impairing the obligations of contracts; therefore the right to recover upon the bonds by suit after they matured, remained unaffected by the acts of 1858 and 1863. If, however, the petitioner had surrendered his bonds under the acts of 1858 or 1864, in exchange for those provided for in said acts, the inhibition against suing thereon, contained in the act of 1858, would have become as much a part of the new contract thus created as the privilege to sue granted by the acts of 1851, 1853, and 1854 did of the bonds in question here. Kennedy v. City of Sacramento, 10 Sawy. 33, 19 Fed. Rep. 580; Meyer v. Porter, 65 Cal. 67, 2 Pac. Rep. 884; and Meyer v. Brown, supra.

The claim of petitioner, that the act of 1864 was a continuing offer which he could take advantage of at any time before such offer should be withdrawn by repeal, cannot be supported. The purpose of the legislators in passing the act of 1864 was merely to complete the funding of the city indebtedness, not to withdraw claims founded on such indebtedness from the operation of the statute of limitations. This is manifest when the act is construed in connection with the legislation bearing on the same subject, beginning with the act of 1858; all of which show a complete plan to fund and adjust certain indebtedness of the city. As an inducement for its creditors to co-operate with it in the accomplishment of this object, the act of 1858 held out the opportunity, if taken advantage of before June 1, 1859, subsequently extended to January 1, 1862, to obtain bonds in exchange for the old ones, in one of four classes, that would run, respectively, until 1888, 1893, 1898, and 1903, dependent upon the order of issuance. These bonds would run from 14 to 29 years longer than the old bonds, and would draw interest at the rate of 6 per cent. per annum, payable annually, and carried with them the pledge of an annual tax for municipal purposes, and an interest and sinking fund to pay the interest on the bonds as it accrued, and to effect the redemption of the bonds at maturity. The same opportunity was again renewed by the act of 1864, except that all new bonds issued thereunder were to run until 1903, or 29 years longer than the bonds held by petitioner; and the interest would be payable from January 1, 1859, and annually after the first 6 years. The benefit of the interest and sinking fund was a material advantage that could be gained by a surrender of the old bonds, as they were mere naked promises to pay, for which the general faith and credit of the city alone was pledged, and upon which the payment of interest stopped in 1858; no provision for the payment thereof having been made in the act of 1858, or any subsequent legislation, which we think is a circumstance showing a desire on the part of the legislature to compel creditors to fund their claim. Therefore, to say that the act of 1864 was intended to withdraw all claims therein mentioned from the operation of the statute of limitations would be to ignore the object of the legislation referred to, and encourage the holders of such claims to defeat the efforts of the city to adjust and fund its indebtedness. Besides, as the bonds of petitioner had yet 10 years to run before maturing, when the act of 1864 was passed, there was no necessity for a suspension of the statute of limitations; and, aside from what seems to us to be the object of the act, it is not reasonable to impute to the legislators who passed it an intention to provide for a necessity which did not exist, when they failed to give any expression in their act from which such an intention might be inferred. Again, it is a well-settled rule that the repeal of statutes by implication is not favored, and we are of the opinion that the same principle should apply with equal force to the suspension of the operation of statutes. It was, of course, optional with the petitioner to exchange the bonds or not; but having refused to exchange them from 1858 to 1874, and waited 13 years longer before offering to do so, his right to have his bonds funded is now barred, if it is within the provisions of sections 337 and 338 of the Code of Civil Procedure, pleaded in defendant's answer to his petition.

The Code of Civil Procedure (section 337) provides that an action must be commenced within 4 years "upon any contract, obligation, or liability founded upon an instrument in writing executed in this state." When petitioner, by his assignors, accepted the bonds from the city of Sacramento, a contract was thereby created between them whereby the city became obligated to pay the principal and interest of the bonds on or before the 1st day of July, 1874. This contract, it will be observed, was in writing, and was evidenced by the bonds. The right to maintain an action upon the bonds after July 1, 1878, 4 years after the maturity thereof therefore depended upon whether the plea of the statute of limitations would be made. The statute of limitations is a personal privilege that may be used as a means of defense by pleading it; otherwise, it is waived. Grant v. Burr, 54 Cal. 298. In this case this defense was not waived, the defendant having specially pleaded the bar of said section 337, and it constitutes a complete defense to this action. It follows that the judgment and order appealed from must be affirmed. So ordered.

We concur: McFARLAND, J.; SHARPSTEIN, J.; WORKS, J.; PATERSON, J.

BEATTY, C. J., took no part in the decision of the above cause.

THORNTON, J. I dissent. The proceeding herein is not barred by the statute of limitations. The Code of Civil Procedure classifies the procedure in this case as a special proceeding of a civil nature. See part 3, p. 371, Code Civil Proc. The contents of the page just cited are a part of the Code, (Sharon v. Sharon, 75 Cal. 16, 16 Pac. Rep. 345,) and define the character of the procedure mentioned in part 3 of the Code of Civil Procedure. The right to commence this proceeding did not exist until a demand was made for the issuance of bonds to the petitioner, and its refusal by the board of trustees of the city of Sacramento. The demand and refusal were made but a few days before this proceeding was begun. No statute of limitations that we know of effected a bar herein. Nor were the bonds of a former issue held by petitioner barred by the statute of limitations. This was, in fact, determined by the case of Underhill v. Trustees, 17 Cal. 177, which applies with all its force to this case. The court, in its opinion, by BALDWIN, J., states the case in relation to the defense of the statute of limitations, and disposes of it. The court said: "The important question is that arising under the statute of limitations. The bonds upon their face are payable at dates which show a bar under the general statute. But the plaintiff, to avoid the bar, sets up several acts of the legislature applicable to this corporation, which he alleges are sufficient to take the case from the influence of the statute. The bonds are dated 25th of March, 1853, and due two years afterwards. The first of these acts was passed March 9, 1855, and is entitled 'An act to reincorporate the city of Sonora;' at this time the bonds were not barred. The tenth section provides that the trustees shall have power, and it shall be their duty, semi-annually to raise, by tax on the real and personal property within the city, a revenue of 1 per cent., etc.; and section 16 provides: 'In case the public debt is not liquidated at the expiration of three years, the trustees shall have power to levy a sufficient tax, in addition to the 1 per cent. authorized in section 10, to pay the outstanding debt.' The second section of the act of 1858 is in the same words, except that six years are specified instead of three. It is contended that this is not only a recognition of the existence of these debts by the legislative authority, but a provision for their payment. This provisional office of levying the tax, being a public duty of the officers of the corporation, cast upon them by the public law, carried with it a legal obligation to discharge it, which might doubtless have been enforced by appropriate proceedings. It afforded, in other words, a remedy to the bondholder for the enforcement of the claim as a valid money obligation. These acts were passed at the instance of the corporators, according to the averments of the complaint. With the assent of the city, this legislative recognition and provision are equivalent to the same acts done with full authority by the corporation. Indeed, we suppose they would be sufficient without such assent, by virtue of the control which the legislature possesses over these municipal bodies. The legislative acts, then, recognize the debt, and make provision for its payment. This is enough to withdraw the case from the operation of the statute. It is equivalent to a trust-deed by the city, setting apart property out of which the money due was to be paid at a given time, if not sooner paid, upon a claim acknowledged to be an outstanding debt; and we cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute merely because the creditor waited after this for his money. The plea of the statute, if successful, would, under these circumstances, be nothing less than an act of unqualified repudiation of a just and honest obligation, to the payment of which the faith and honor of the defendant are pledged. The respondent suggests, in justice to the city, that she is equitably entitled to set up this defense. We think the equities of the case, if there be any,—of which we cannot now judge,—must be set up in some other form."

It has long been settled in this state that municipal corporations, of which the city of Sacramento was and is one, are parts of the state government, and entirely under the control of the legislature. The latter proposition here stated was broadly true under the former constitution of this state, during the existence of which the acts of the legislature referred to in this case were passed. Important restraints on the legislative power were made in the present organic law; but they have no bearing on the question before us, the acts having been passed long before the present constitution went into effect. As to the nature of a public municipal corporation, I refer to Payne v. Treadwell, 16 Cal. 220, where the subject is fully and ably discussed. Many cases subsequently decided approved the rulings there made, which can easily be found by any one familiar with the reports of the decisions of this court. It is no longer a debateable question with us that a municipal corporation can be a trustee. It is in its essence a trustee of public trusts. The acts of the legislature concerning the indebtedness of Sacramento, providing for its funding, refunding, and payment, create a trust for the benefit of its creditors. The trust was an express one. It created a fund for the payment of creditors, the proper administration of which can be enforced, and should be enforced, in its letter and intent by the courts of the state. It is unnecessary to recapitulate the provisions of that statute. They have been fully and frequently stated in former decisions of this court. The statute of limitations never runs against an express trust until the repudiation of the trust by the trustees. This is settled law in this state. The cases which sustain this proposition are numerous. They may be found cited and commented on in any work on the statute of limitations. See Ang. Lim. §§ 166, 168, 169, et seq., 468, 469, et seq., where the cases are cited and fully discussed. See, also, Wood, Lim. in index, word "Trusts," where the text is referred to, in which the cases are cited and discussed. A common mode of creating express trusts is seen in the cases of executors and administrators. Ang. Lim. § 168. The retention of funds by them is consistent with their character, and they may be held to answer after a long period. Section 168. The devise of land to trustees or executors is a direct trust, and the statute does not run after the testator's death. Ang. Lim. §§ 169, 468. Instances of express or direct trusts are also seen in the case of assignees in bankruptcy, who are trustees for creditors. Wood, Lim. p. 420, § 202, and cases cited. See In re Leiman, 32 Md. 225, where the rule is elaborately discussed. Other instances might be referred to, but the foregoing are deemed sufficient.

The trust in this case has never been, and it is confidently asserted cannot and should not be, repudiated. Nor is the trust a stale one. It is a continuing trust, lasting at least until 1903. That such a trust can be stale is a delusion. The decision in Underhill v. Trustees, 17 Cal. 173, is in line with the cases above referred to, and was ruled on the same principle. Where a direct trust is created, the trustee can only set the statute into action by repudiating the trust. The statute only commences to run from some unequivocal act of repudiation, and there is none such here. If there was an attempt to repudiate the trust as to the bonds involved in this proceeding, it occurred only a short time before it was commenced, and a sufficient time had not then elapsed to effect a bar. It should be observed that the acts of the legislature under which this funding was had abolished the corporation of the city of Sacramento, and created a new one entitled the "City and County of Sacramento." All the assets of the old were transferred by the acts referred to to the new corporation, and the creditor was forbidden to sue the new corporation on any of the old indebtedness, like that of petitioner here. Instead, he was permitted to fund his claims; to obtain new bonds for old. The old corporation had gone out of existence by a valid legislative enactment, and it is difficult to perceive how it could be sued. Can a nonexistent corporation be sued? It would seem not. A corporation is a person,—an artificial one,—and, if it has ceased to exist, it cannot be sued any more than a dead man can. It has met its death, and persons who have ceased to live are not judicial persons. They have no longer standing in a court of justice. Inasmuch as the old corporation had died, and the new one could not be sued by the petitioner on his own bonds, it would be highly unjust to hold it to be law that the statute of limitations ran against him on such bonds; but, whether he could sue or not, we have shown that by the operation of the acts of the legislature the statute did not, and could not, run on these old bonds against the creditor now asking the interposition of the court.

It may be contended that the writ of mandate is, with us, one retaining its character as a prerogative writ, to be issued only in the sound discretion of the court, (so held in Water-Works v. San Francisco, 52 Cal. 117;) and that in the exercise of such discretion it should not issue in this case, for the reason that the petitioner has waited so many years before applying to exchange his bonds for new bonds to be issued under the act or acts of the legislature referred to by counsel. To the ruling in the case cited, as to the nature of the writ of mandate, Justice RHODES refused to accede, for reasons which seem to me very cogent. But it will be here conceded that the decision in 52 Cal. is correct. I think that for sound and controlling reasons this court is called on to so exercise its discretion as to order the issuance of the writ asked for herein, although the bonds presented by the petitioner were issued in 1854. The discretion referred to is a judicial discretion. As said by Lord MANSFIELD in Rex v. Wilkes, 4 Burrows, 2539: "Discretion, when applied to a court of justice, means sound discretion, granted by law. It must be governed by rule, not by humor; it must not be arbitrary, vague, and fanciful, but legal and regular." Lord KENYON, in Wilson v. Rastall, 4 Term R. 757, thus characterizes it: "The discretion to be exercised * * * [by a court or judge] is not a wild, but a sound, discretion, and to be confined within those limits within which an honest man, competent to discharge the duties of his office, ought to confine himself." WALLACE, J., speaking for the court in Ex parte Hoge, 48 Cal. 5, says of this discretion: "This 'discretion' to do 'justice' is not an arbitrary discretion to do abstract justice, according to the popular meaning of that phrase, but is a discretion governed by legal rules, to do justice according to law, or to the analogies of the law, as near as may be." 48 Cal. 5, 6. In Lybecker v. Murray, 58 Cal. 186, it is said: "Under no circumstances is the discretion of the court to be exercised arbitrarily, but it is a discretion governed by legal rules, to do justice according to law, * * * as near as may be;" citing Ex parte Hoge and Ex parte Marks, 49 Cal. 681. See, also, People v. Lewis, 64 Cal. 401-403, 1 Pac. Rep. 490. It will be observed that there is no such thing as arbitrary discretion in the administration of the law vested in courts of justice. The discretion, however broad it is, has its limitations as above pointed out. It must be exercised with great care, within the defined limits, always for the purpose of doing justice, never of doing or sustaining injustice. It must be exercised upon an anxious and careful consideraton of all the circumstances surrounding the transaction or *res gestæ* under consideration. Judicial responsibility is never more oppressive than when a matter of right is submitted to the discretion of a court. Therefore it should be always careful to observe the limits which define it, heedful of the maxim, *misera est servitus, ubi jus est vagum aut incertum.*

There are the strongest reasons in this case to induce this court to exercise its discretion in granting the prayer of the petitioner. In the first place, we have seen that the bonds of petitioner are not barred by any act of limitation, and it should not be so held. The case above cited from 17 Cal. is correctly decided, and solves this; nor are the coupons on such bonds barred,—especially so held in Meyer v. Porter, 65 Cal. 67, 2 Pac. Rep. 884 See, also, Freehill v. Chamberlain, 65 Cal. 603, 4 Pac. Rep. 646. Provision is made by the acts of the legislature above alluded to for funding the bonds issued before the enactment by the city of Sacramento. The city was unable to meet its obligations, and time was granted to it by the operation of these acts. The creditors accepted the proposition to extend the time of payment of the debt before contracted, and received new bonds in exchange for old indebtedness. If there was any delay to present bonds issued in 1858 to be exchanged under the act for new bonds, certainly the city was not hurt by it, and the creditor did not lose his right to payment, or to receive new bonds, because he was indulgent and forbearing to the embarrassed debtor. As was said by BALDWIN, J., in Underhill v. Trustees, supra: "We cannot conceive of any principle of law or justice which would hold the claim to be barred by the statute merely because the creditor waited after this [that is, after the passage of the act of the legislature] for his money." The *bona fides* of the bonds presented by petitioner is not impeached or assailed in any way. No fraud is hinted at in relation to them, nor to the indebtedness for which they were issued. The bonds were properly issued for actual existing indebtedness. They remained unpaid.

Further, such has been the conduct of the authorities of the city that it does not lie in their mouth to appeal to this court so to exercise its discretion as to refuse the writ asked for. They continued for years after the passage of the acts to issue new bonds in exchange for the old ones without raising this question. It is so found by the court below. These exchanges of bonds amounted to the sum of $90,630. According to the finding, (3,) at the time of the passage of the act of March 22, 1864, there were outstanding unpaid claims against the city of Sacramento amounting to about $100,000, including the three bonds involved herein. After the passage of said act, up to and including the year 1880, the board of trustees of the city of Sacramento issued under the act of March 22, 1864, new certificates in exchange for old bonds of the city, and other demands accruing prior to the 1st day of January, 1859. The following new bonds are found to have been issued, under the act of 1864, in the year mentioned, and for the amounts named below, viz..

In 1864	$21,642
In 1865	11,499
In 1866	5,754
In 1867	580
In 1867	216
In 1870	3,113
In 1872	39,611
In 1873	1,311
In 1875	1,100
In 1876	1,100
In 1878	2,404
In 1879	100
In 1880	2,200
The whole amounting to	$90,630

Why, then, should the defendants here be allowed to invoke the exercise of discretion by courts, when year after year, up to 1880, they were funding the old bonds by issuing new ones in their stead? There is nothing in the act of 1864 to inhibit their being funded. No day is named in the act of 1864, as in the former acts, after which the old bonds then outstanding should not be funded, and the new bonds issued in their stead. The act of 1864 provided that bonds should be issued for all claims which accrued prior to the 1st of January, 1859, that the board of trustees should, on examination, consider legal or just. It is nowhere alleged or claimed or contended by defendants that the bonds of petitioner are not legal or just. The findings (1, 2, 3) of the court distinctly negative any such pretense or contention. Nor is it claimed or contended that the board of trustees refused to fund them because they were not legal or just. The failure to present them, under these circumstances, should not be allowed to operate against the holder. The trust was a continuing one, and the holder of the old bonds had a right to present them, and get new bonds in exchange, at any time during the continuance of the trust. The language is strong enough to amount to a mandate. It is to fund bonds found to be legal and just. We do not say that the conduct of the board constituted a technical estoppel on them, but it furnishes the strongest reason why its refusal to fund should not be regarded. It is said that, inasmuch as the act of 1864 did not prescribe a time within which the old indebtedness should be presented, it should be presented within a reasonable time after the passage of the act. This may be conceded. The bonds involved in this case were not presented in a reasonable time. Why were they not? It was during a continuance of a trust to last at least till 1903. It may be conceded that they could not be presented after 1903, though some of the bonds for the payment of which the debt was created might then have remained unpaid; but why could they not be presented before that time? The creditor here has certainly been conspicuously indulgent to an embarrassed debtor. Should he be punished for his kindness by losing his debt, honestly contracted, and honestly owing? This would be a strange position to assume in a court of justice. As the statute of limitations, under the act, could not run, it would be strange to hold, as was held in the court below, that the creditor was barred by laches. It is not a case where there was never a statute of limitations which could bar the debt. But for the legislation on the subject, the statute would run against bonds and coupons. But the legislature speaks with direct and undisguised tone, and in effect says, "We have provided a mode by which you can have time to pay this debt, but you must not, and shall not, plead such statute." There was nothing unfair or unjust in this; on the contrary, it was just all around, when the creditor consented, and was evidently helpful and beneficial to the embarrassed municipality.

Further, as the operation of the statute or of lapse of time were in effect and in reality suspended by the legislation regarding this indebtedness, we cannot perceive how laches could be predicated of the creditor under the facts of this case. It is held to be settled law in New York, under a statute of limitations substantially identical with the statute of this state, that laches cannot be held to take place when there is an existing statute of limitations applicable to the matter litigated; and properly so, for the reason that the doctrine of laches grew up in courts of equity in regard to matters in litigation because there was no statute of limitation applicable, and hence they proceeded on the ground of unexplained delay as evidence, and, by analogy to the statute, refused to enforce the claim because of laches or staleness of the demand sought to be enforced. See Derby v. Yale, 13 Hun, 277; Wood, Lim. § 62; and Morse v. Royal, 12 Ves. 373. And certainly no such reason as staleness of demand or laches can be held or assumed to exist, during the running of a continuous trust, years before its expiry, when, by the very meaning and intent of the settlement prescribed by the legislature, the operation of the statute of limitations is suspended, and is to cease running. The board of trustees are the trustees of the creditors for the payment of the indebtedness above referred to, with ample means of payment placed in their hands by the legislature. They can, under powers vested in them by the legislature, levy taxes on the property of the city to raise funds for such payments. They can do this every recurring year; and they have abundant property within the city, subject to their power to levy and collect taxes, to raise these funds during each recurring year. There is no excuse of inability to provide for the means of payment. The means to raise the funds necessary are amply sufficient, and at hand, right before their eyes; and accordingly the idea cannot be entertained for a moment that the tax-payers of Sacramento, owning ample taxables, are unwilling to pay the debts of their city government, honestly contracted for their benefit, or that they desire the stain of repudiation to rest upon their growing and lovely city, to mar its fair fame and its conspicuous beauty.

Further, as to the defense of limitation. The act of limitation is founded on the ground that the proofs of a defense to a claim may cease to exist, or be destroyed by lapse or operation of time. This cannot be so in this case. The claim here asserted is bonds signed, sealed, and delivered, having the attestation of such *indicia* of genuineness and *bona fides*. They were issued after the original indebtedness was examined into, and found to be justly and honestly due. It would be strange if a register or record was not kept of them by the city authorities. No doubt there was, for their genuineness and honesty are not impugned in this case by any one. These evidences constitute a permanent record, and they may be fairly inferred to exist, and to be in the hand of the city government. No testimony as to the bonds of the petitioning creditor has been lost. They remain in the form of a permanent record, as a check on any one who may dare to present spurious bonds for funding, and to expose such an attempt. The bonds of the petitioner are presented to the trustees for their inspection, and it is not pretended in any way that they were or could be at all deceived or entrapped. Why, under these circumstances, any delay or laches or staleness should be held to operate against the petitioner here, I cannot see. The whole matter is well attested, and the circumstances existing explained. The city was much embarrassed, and was slow in making payments, even of the interest on the bonds. The creditor indulgently waited, and now it is urged he should be mulcted for it by losing his debt. Can this be just or equitable, under any view that can be taken of the case? I can see no particle—no *scintilla*—of equity in any such contention.

Another matter may be adverted to in this connection. It is clear that the legislation in relation to the funding of these bonds was accepted by the authorities of the city of Sacramento, if these acts were not passed by their procurement. It is found in Freehill v. Chamberlain, reported in 65 Cal. 603, 4 Pac. Rep. 646, (see eleventh finding in this case,) that these acts were procured to be passed by them. Can we not look to the record in the case cited, under section 1875, Code Civil Proc. subd. 8? These facts are of general interest, as a part of the history of the city of Sacramento. Courts should be able to look to them. It is said by HEYDENFELDT, J., speaking for a concurring court in Irwin v. Phillips, 5 Cal. 146, that "courts are bound to take notice of the political and social condition of the country which they judicially rule." In Conger v. Weaver, 6 Cal. 556, the same learned judge, speaking for the court, said: "Every judge is bound to know the history and leading traits which enter into the history of the country where he presides." Should not these facts be noted as a part of the history of the country? Certain it is, the acts were accepted by the government of Sacramento after they were enacted, and they have reaped the benefit from them that they were designed to secure. After carrying out these acts, and acting under them, they should not now be permitted to turn round, and urge lapse of time as a reason why they should not acknowledge and fund the bonds of an indulgent creditor.

For the foregoing reasons I am of opinion that the lapse of time in asking for the funding of the bonds herein involved, furnishes no reason or excuse why the prayer of the petitioner herein should not be granted; that to refuse such a prayer would be highly unjust, and sanctioning repudiation of an honest debt; and that the judgment should be reversed, and the cause remanded, with directions to the court below to enter a judgment for petitioner as asked for by him.

(81 Cal. 378)

KOHL *et al.* v. LILIENTHAL *et al.* (No. 11,719.)

(*Supreme Court of California.* Nov. 30, 1889.)

CAPITAL STOCK OF CORPORATION—DIVISION AMONG STOCKHOLDERS.

1. Two mining corporations, owning adjoining claims, conveyed their lands to a third corporation, organized for the promotion of their mutual interests, each receiving in consideration a certain amount of the capital stock of the new corporation. One of the original corporations distributed such stock among its stockholders, and subsequently certain stockholders of the other brought an action against it to compel a like distribution, in pursuance of an alleged agreement. *Held*, that evidence of the distribution made by the former corporation was inadmissible, as it was not organized under the laws of the same state as the latter, and as there was no contract between them as to the disposition to be made of such stock.

2. Civil Code Cal. § 309, prohibits the directors of corporations from dividing, withdrawing, or paying to the stockholders, or any of them, any part of the capital stock, but provides that there may be a division and distribution of the capital stock of a corporation which remains after the payment of its debts, upon its dissolution or the expiration of the term of its existence. *Held* that, where a mining corporation conveys its lands to another corporation in consideration of a part of the capital stock of the latter, such stock becomes the capital of the former corporation, which neither the directors nor the stockholders can distribute among themselves until the corporation is dissolved in the manner prescribed by law, or until the term of its existence expires. Reversing 20 Pac. Rep. 401.

MCFARLAND and THORNTON, JJ., dissenting.

In bank. On rehearing. For opinion on hearing in department, see 20 Pac. Rep. 401.

Mesick & Maxwell, Garber, Thornton &

Bishop, and *F. A. Berlin*, for appellants. *Stewart & Herrin* and *Wm. M. Pierson*, (*J. F. Lewis*, of counsel,) for respondents.

Fox, J. In 1882, two mining corporations, the Head Center Consolidated Mining Company, organized under the laws of California, and the Tranquillity Mining Company, organized under the laws of New Jersey, were in possession of adjoining mining claims in the Tombstone mining district, in the territory of Arizona. Litigation of a vexatious character had arisen between them, and, for the purpose of discontinuing the strife and of promoting the mutual interests of both companies, negotiations were entered into with a view to effecting a consolidation of the interests and properties of the two. Being organized under the laws of different states, they were advised that this could not be done by a consolidation of companies, as provided by the laws of California. After considerable negotiation on the subject, it was decided to organize a third company, to be known as the "Head Center & Tranquillity Mining Company," with a nominal capital stock, consisting of 200,000 shares, and to which each of the old companies should transfer its mining ground, each in consideration of $5, and of 100,000 shares of the stock of the new company. This new company was incorporated on the 1st of December, 1882, and a board of seven directors selected, three to represent the interests of the stockholders of each of the old companies, and a seventh, who was impartial between them. To this new company, when organized, a proposition was formally made, to convey the grounds, known as the "Head Center" and "Yellow Jacket" claims (they being of the property of the Head Center Consolidated Mining Company) to it, in consideration of the sum of $5, and of 100,000 shares of the stock of the company, and a like proposition on the part of the Tranquility Mining Company, to convey to it the Tranquillity Mining Claim, with its appurtenances, for a like consideration, and both propositions were accepted by resolution of the board of directors, unanimously passed. On the 4th of January, 1883, at a meeting of its board of directors, the Head Center Consolidated Company passed the necessary resolutions authorizing its president and secretary to make the necessary conveyances to carry out this proposition, and on the 25th of the same month, at the annual meeting of the stockholders of the same company, at which 160,165 shares of the 164,211 outstanding shares of the stock of the company were represented, this action of the directors was ratified; and on the 27th of February following a deed was executed accordingly. On that day, Mr. Benjamin, to whom the secretary of the new company had been directed to issue the 100,000 shares of stock in the new company for the Head Center Company, directed the secretary to issue 99,980 shares of the stock to him as trustee, and the remaining portion of it, in pieces of five shares each, to several of the directors, and Jewell, to whom it had been ordered that the 100,000 shares paid for the property of the Tranquillity Company should be issued, directed that 99,975 shares of it be issued to Mr. Kohl as trustee, and the rest to the remainder of the directors, which was done.

The stock thus issued was deposited in the Anglo-California Bank, to be held subject to the joint order of Kohl and Foster. Although the question of what disposition was finally made of that part of it which was issued in payment for the property of the Tranquillity Company is not involved in the issues of this cause, it is claimed that it was distributed to the shareholders of the original Tranquillity Company in proportion to their respective number of shares of Tranquillity stock, and that no question was ever made as to the right to make such distribution; and this fact is urged upon us as strongly persuasive of the correctness of the claim of these plaintiffs to have that part of the stock of the new company which was issued in payment for the property of the Head Center Company distributed among its stockholders, in proportion to the number of shares held by them, respectively, in said last-named company. But we fail to see the force of that argument, or how evidence of what the stockholders of a New Jersey corporation may have done, or agreed to do, was in any manner relevant or material in this action. The laws of New Jersey may permit such a distribution of the assets which form the capital stock of a corporation organized under its laws. But, whether they do or not, the action of the stockholders of a New Jersey corporation, in the matter of the distribution of the assets of their own company, cannot change the laws of California; and for this reason, as well as because there was no contract between the two companies on the subject of the disposition which should be made of the stock of the new company when received, nor any reason why there should be such a contract, the admission of evidence upon that subject (as to what the Tranquillity people did with their stock) was error, manifestly prejudicial to the defendants in this cause. The mining ground of the Head Center Consolidated Mining Company so conveyed to the Head Center & Tranquillity Company did not comprise all the property of the former company. It had, and still has, left a mill for the reduction of ores, and is still carrying on corporate business and reducing ores, a part of the time, at least, at said mill, and keeps a general agent and superintendent in Arizona to look after its affairs. It was not free from debt at the time it sold this property, but some six months afterwards levied and collected an assessment, and paid up its then existing indebtedness. Its term of corporate existence has not expired, and it has not attempted to, and does not propose to, disincorporate. Under these circumstances the plaintiffs, Kohl, Moody, and Rehfisch, bring suit against the defendants, the Head Center Consolidated Mining Company and certain of its officers, alleging that they (the plaintiffs) are the owners and holders of 63,138 shares of the capital stock of the Head Center Consolidated Company, and as such, and by reason thereof, are entitled to have and receive to their own use 39,115 shares out of the 100,000 shares of the capital stock of the Head Center & Tranquillity Mining Company so received for the sale of the property of the Head Center Consolidated Company, and pray a decree compelling the defendants to transfer, issue, and deliver the same to them, and restraining the defendants from representing, voting, or dealing in any way with the shares so claimed by plaintiffs. The defendants claim that these shares are the property and assets of the Head Center Consolidated Company; that the company has no right, under the law, to distribute them to its stockholders, and that its directors are entitled to represent and vote them at all meetings of the Head Center & Tranquility Company. The plaintiffs had judgment in the court below, and from this, and an order denying a motion for new trial, the defendants appeal. The grounds of the appeal, briefly stated, are that the judgment is unsupported by the findings and any admissions in the pleadings, and that the findings are unsupported by the evidence.

We have already substantially stated most of the facts as found by the court or admitted by the pleadings, so far as they are necessary to this opinion. There is, however, one other fact found by the court necessary to the support of its judgment, if, under the law, it could be supported at all, but which finding we do not think is supported by the evidence. That finding is that it was "mutually understood and agreed by and between the stockholders of both the old companies that the stock of the new company should be equally divided between, and belong to, the stockholders of the old companies." We are unable to find competent or satisfactory evidence of any such agreement; especially of such an agreement among the stockholders of the company defendant here, or between any portion of such stockholders. There is plenty of loose and vague talk of an "understanding" of that kind, and we have no doubt that some of the stockholders did suppose, and in some sense understood, that there would be such a distribution of the stock as plaintiffs are here seeking to enforce. But this is an understanding which each of the stockholders who had it at all had with himself, or with such others, part only of the whole, as happened to share it. It was not the basis of any treaty or agreement among the stockholders, or between them and the directors. But, suppose there had been such an agreement among even a large majority of the stockholders. It would have been an agreement to change the terms of an existing contract which the statute had made between the whole body of stockholders, and would not have bound the non-concurring minority. If but a single stockholder, owning but a single share of the stock, had objected, the directors would have been bound to regard his protest. There is no pretense that all of the stockholders of this corporation consented to the distribution of this stock. Over 4,000 shares of the stock outstanding were unrepresented at the meeting which ratified the consolidation. A large amount of the stock was represented by proxy, and the proposition to distribute did not, and could not, come before the meeting. The "understanding" that there was to be a distribution must be referred to some other occasion. The witnesses who testify to it leave it in the clouds. Only a minority of the stock, scarcely a third, is represented by the plaintiffs in this action, and the holders of a very large proportion of the stock positively deny that any understanding or agreement to distribute the stock of the consolidated company ever existed. But it would make no difference if the fact were otherwise. Even if a small minority of the stockholders have not consented, this court should not command the directors to do what by the plain language of the statute they are forbidden to do. Nor is there any force in the suggestion that the minority, if it be a minority, are not here objecting. Naturally, they are not here objecting in their own names, because they have not been made parties to this action. But they are represented here by the directors, who, as in duty bound, are urging the objection in their behalf. Manifestly, the interests of all the absent stockholders are involved in the litigation; and, unless the directors are to be heard upon this ground, it results that the rights of the stockholders are to be adjudicated without a hearing. The statute (Civil Code, § 309) which controls the directors, and by which we are also bound in this case, reads as follows: "The directors of corporations must not make dividends, except from the surplus profits arising from the business thereof; *nor must they divide, withdraw, or pay to the stockholders, or any of them, any part of the capital stock;* nor must they create debts beyond their subscribed capital stock, or reduce or increase the capital stock, except as hereinafter specially provided. For a violation of the provisions of this section the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen, are in their individual and private capacity jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the capital stock so divided, withdrawn, paid out, or reduced, or debt contracted; and no statute of limitations is a bar to any suit against such directors for any sums for which they are made liable by this section. There may, however, be a division and distribution of the capital stock of any corporation which remains after the payment of all its debts, *upon its dissolution, or the expiration of its term of its existence.*" (The italics are our own.) The term "capital stock," as used in this section, has a very different meaning from that of "shares of the capital stock," as representing the interest which the holders thereof have in the business and property of the corporation whose shares they hold. "Capital stock," as used in this section, is frequently otherwise and as well expressed by the simple word "capital," and means the money and property with which the company carries on its corporate business. Martin v. Zellerbach, 38 Cal. 309. It is vested in the corporation as a sacred trust, for the protection of its creditors. Id.; and Railroad Co. v. Bee, 48 Cal. 398. This money and property of the corporation constitutes the actual capital of the company, to which all persons having dealings with the corporation, by means whereof they may become its creditors, or become personally liable for its debts, (as shareholders do become, under the laws of this state, for their proportionate share of all its debts created while they are stockholders,) look, and have a right to look, to determine the measure of the company's responsibility, and of their security. The bare fact that a man holds "shares in the capital stock" of a corporation gives him no legal title to the property of the corporation. That remains in the corporation, and not in the shareholders. Gorham v. Gilson, 28 Cal. 484; Gashwiler v. Willis, 33 Cal. 19; Ditch Co. v. Zellerbach, 37 Cal. 591; Wright v. Mining Co., 40 Cal. 20; Clark v. San Francisco, 53 Cal. 311; Johnson v. Kirby, 65 Cal. 483, 4 Pac. Rep. 458; McCormick v. Insurance Co., 66 Cal. 363, 5 Pac. Rep. 617. The shares simply represent the proportion to which the respective shareholders, who may be such at the date of distribution, are severally entitled in the distribution of profits arising from the corporate business which may be made from time to time, and in the final distribution of the estate of the corporation, when from any cause it shall cease to exist, and its estate shall have been fully administered. This event may happen at the expiration of the term of its corporate existence, or it may be accomplished earlier, with the consent of the holders of two-thirds of its shares, and upon the judgment of a court of competent jurisdiction. Code Civil Proc. §§ 1227–1233. But this event has not happened in this case. The Head Center Company has sold its mine to a new corporation for 100,000 shares of the stock of such new corporation; but it has not ceased to exist as a corporation, and does not propose to do so. It remains a corporation, with full corporate power and capacity, and is also exercising those powers. The mine which it sold constituted the bulk of its capital, or "capital stock." The stock which it received in exchange for its mine stands in the place and stead of the mine, precisely the same as if it had been money, or any other kind of property, instead of stock; and by the plain terms of the section of the Code cited the directors are forbidden to divide it among the stockholders.

But it is said that this section operates only to restrain the directors, and does not prevent the stockholders from doing by agreement what the directors are forbidden to do. As already shown, we do not think the evidence proves any such agreement by the stockholders; but, if it did, we hold that even the unanimous assent or agreement of the stockholders would not authorize such a distribution. The inhibition runs against the directors because they are, under the law, the managers of the business of the corporation. What the directors cannot do—with few exceptions, of which this is not one—the stockholders cannot do, or authorize to be done. The inhibition of the statute has regard, not only to the rights of existing creditors, but to those of all persons who may deal with the corporation on the faith that its capital has not been divided. Certainly, the effect and operation of the statute, if unrepealed by judicial construction, would be to afford a large measure of protection to future as well as existing stockholders and creditors; and, having that effect, it ought to be supposed that such was its purpose. It cannot be assumed that the legislature intended that corporations who have divided up among their stockholders the capital stock with which they were doing business should continue to maintain a corporate existence, with power to contract, incur debts, and perpetrate the numberless frauds that would under such circumstances be within their power. A contrary intention is clearly implied in the express provisions of the Code of Civil Procedure relating to the dissolution of corporations (sections 1227–1233) and of the Civil Code, above quoted, allowing distribution of their remaining capital after payment of their debts, upon dissolution or expiration of their term of existence. When a method of procedure is prescribed by which a corporation may be dissolved, that method must be followed. When it is provided that the application must be made to the superior court, and must be in writing, verified, and must show "that at a meeting of the stockholders, called for that purpose, the dissolution of the corporation was resolved upon by a two-thirds vote of all the stockholders, and that all claims and demands against the corporation have been satisfied and discharged," there will be none so bold as to contend that a voluntary dissolution of a corporation can be effected without compliance with these requirements; and it is equally certain that when the legislature has said, in the same section of the Code in which it has forbidden the directors to divide the capital stock of a corporation among the stockholders, that the remaining capital may be distributed, after the payment of all its debts, upon its dissolution or the expiration of its term of existence, the intention was that there should not be a distribution under any other circumstances. And why, it may be pertinently asked, should any court go out of its way to order a distribution in any other mode, or under any other circumstances, than the statute prescribes? If the debts of the Head Center Company are paid and two-thirds of its stockholders desire a distribution nothing could be easier than to accomplish everything that is sought in this action by simply pursuing the statute. Why, when there is a plain and speedy statutory remedy, should this extraordinary remedy be allowed? The only answer to this question must be that the parties desiring this distribution cannot comply with the statute,—that two-thirds of the company do not desire to dissolve and distribute the capital; therefore this court is called upon to order a distribution without dissolution, and to sanction the continued existence of a corporation with little or no capital; in other words, to do what the statute has never authorized the court to do, and has forbidden the directors to do. And this, too, when to do it we must establish a precedent under which less than two-thirds of the stockholders of a corporation may at any time compel a distribution of the whole, or any part, of its capital, upon the most loose, vague, and unsatisfactory oral testimony that there was an "understanding" among the stockholders that it should be divided. In other words, stockholders who have heretofore imagined that in entering a corporation they were becoming parties to a contract, the terms of which were written in the statutes of the state, are to be informed that the contract may be changed, and their rights impaired, by an "understanding" among an indefinite number of their fellow-stockholders. A wide door would thus be thrown open to frauds, and contract rights would be taken away from contracting parties without their consent.

The statute upon this subject is too plain to admit of a doubt, or to leave room for construction. It was so held and adjudged by this court more than 20 years ago, in a well-considered and able opinion, which has ever since been accepted as established law, under which rights in property have accrued to an untold amount, which ought not now to be disturbed. Upon the faith of this statute, as it was found in almost identical terms with the present section 309, Civil Code, in section 13 of the corporation act of 1853, and of the decision referred to, (Martin v. Zellerbach, supra,) thousands of people, and, no doubt, among them these plaintiffs, have assumed the liabilities of shareholders in corporations, which, possibly, they would not have assumed, had they not been thus assured of the protection resulting from keeping the capital of the corporation intact until its final dissolution. The only difference between that case and this was that there the two corporations uniting to form the third were both domestic corporations, and the consideration for the transfer of the property to the new corporation was not by "understanding," but by actual agreement of both corporations, and of all the shareholders of each, that the stock of the new corporation should be issued and delivered directly to the shareholders of the old ones, in proportion to the number of shares which they respectively held in the old. The court held in the most emphatic terms that the language of the statute left no room for construction or doubtful interpretation, and that this agreement for the distribution of the shares of the stock of the new corporation, received for the transfer of the property of the old companies, was in direct violation of the statute; that these shares must remain the property of the old companies in lieu of the property for which they had been received and as constituting the capital of the old companies, not to be distributed until their dissolution, and the payment of their debts. This has been the written law of this state for more than 35 years. Under it all our corporations have come into existence, and their stock has been distributed among its people. It has constituted one of the bulwarks of corporate stability, and one of the chief securities of persons dealing with corporations, either as creditors or shareholders. The legislature has not changed it by enactment. The court cannot do it by interpretation. Judgment and order reversed.

We concur: BEATTY, C. J.; WORKS, J.; PATERSON, J.; SHARPSTEIN, J.

MCFARLAND, J. I dissent. The simple project of the two corporations, having adjoining mining claims, consolidating by each conveying to a new corporation created for that express purpose, and the persons who held the stock of the two old ones taking their proportionate shares of stock in the new one, there being no creditors, does not seem to me to be at all within the provisions of section 309 of the Civil Code, against directors' making dividends or paying capital stock to stockholders. I cannot conceive how, in the case at bar, the new corporation is to do any business or maintain its existence; for, according to the theory of the appellant, the new corporation has only two, and can only have two, stockholders, each of which is itself a corporation. It would be better to have the whole attempt at consolidation void for impossibility.

THORNTON J. I dissent. I am of opinion that there was evidence sufficient to sustain the finding of the court that it was agreed among the stockholders that 100,000 shares of stock in the new corporation should be divided among the stockholders in the Head Center Consolidated Mining Company as they held shares in the Head Center Company. I adopt the opinion of the commissioners, formerly rendered in this case, as a correct exposition of the law applicable to it.

(81 Cal. 524)

CITY OF EUREKA v. CROGHAN. (No. 11,695.)

(*Supreme Court of California.* Dec. 2, 1889.)

DEDICATION—WHAT CONSTITUTES—ACCEPTANCE.

1. A person owning a tract of land in a town conveyed a portion of it, describing it as being bounded by certain streets, "if extended." Some four months afterwards he conveyed another portion of the land, including that which would have been occupied by the streets above mentioned. *Held*, that these facts are insufficient to support a finding that any of the land was dedicated to the public for use as a street, as the latter conveyance revoked the offer, if any there was, in the former, there having been no formal acceptance of such offer.[1] Reversing 19 Pac. Rep. 485.

2. A map, which was not made by the owner of the land alleged to have been so dedicated, and not shown to have been made with his consent or by his authority, and to which no reference is made for description in the deed containing the alleged offer to dedicate, is of no effect on the question of dedication.[1]

3. Where there is no formal acceptance of such offer to dedicate by the city, to constitute an acceptance by the public their use must be shown to have been under a claim of right, and not by a temporary license of the owner.[1]

THORNTON, J., dissenting.

In bank. On rehearing. For opinion on hearing in department, see 19 Pac. Rep. 485.

E. W. Wilson, (*E. W. McKinstrey* and *Horace L. Smith*, of counsel,) for appellant. *S. M. Buck*, for respondent.

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[1] In general, as to what constitutes a dedication of land to public use, see note to City of Eureka v. Croghan, (Cal.) 19 Pac. Rep. 485; People v. Davidson, (Cal.) 21 Pac. Rep. 538, and note; Baker v. Vanderburg, (Mo.) 12 S. W. Rep. 462, and note.

PATERSON, J. The only question to be determined in this case is whether the land in controversy was dedicated by Cushing to public use as a street. On April 7, 1870, Cushing, who was then the owner of the land in controversy, together with other lands, executed to one Leary a deed of land, which was described therein as follows: "Commencing at a point distant in a southerly direction 600 feet from the north-west corner of block 108, as laid down on the official map of the town of Eureka made by J. S. Murray, and filed in the office of the county recorder of said county, July 28, 1859, said point of commencement being the north-west corner of a block of land bounded on the north and west by Tenth and F streets, if said streets were projected; thence running south, along the east line of F street, if said street were extended southerly, 120 feet; thence easterly, at right angles with said F street; thence northerly, and parallel with F street, 120 feet; thence westerly, along the south side of Tenth street, 120 feet, to the place of beginning, being the north-west quarter of the block," etc. On August 8, 1870, Cushing sold to the appellant another portion of land, including the premises in controversy. At the time appellant purchased, the whole tract was uninclosed. From the date of his purchase he has always paid taxes on the land, and in 1876 he built a house upon the west half of the land in controversy, and constructed fences across the same. In 1884 he fenced in the eastern half of the land. Between April 7, 1870, and the time in 1876 when appellant built a house upon the western half of the premises, the public passed over the lands in controversy, but the city authorities never worked or improved the same, nor was any ordinance or order passed accepting them for public use.

We think that the evidence is insufficient to support the finding of the court below that the land in controversy was dedicated to the public for use as a street. The only evidence of dedication is found in the description of the land in the deed made by Cushing to Leary. To constitute a valid dedication the *animus dedicandi* must be shown to exist. It must be shown clearly, indicated by unequivocal acts, and there must be an acceptance by the public. Until such acceptance, the declaration or act of the owner is a mere offer, and cannot be made effectual as an irrevocable dedication. Hayward v. Manzer, 70 Cal. 476, 13 Pac. Rep. 141. We think that the subsequent conveyance of the land in controversy was a complete revocation by Cushing of the offer, there having been no acceptance by the public or by the city authorities at the time he conveyed to appellant. The act of Cushing in conveying to Leary by the description given above is qualified by his subsequent conveyance of the land in controversy to Croghan. If the conveyance to Leary be taken as an offer by Cushing to dedicate the land in controversy to public use, the subsequent deed to Croghan operated as a revocation of that offer. In determining whether there was a present intention on the part of Cushing to dedicate the land to public use at the time he conveyed to Leary,—and the intention is the soul of every act of dedication,—the conveyance to appellant about four months thereafter of the land in controversy is an important matter to be considered. It is certainly as strong an indication of the non-existence of the *animus dedicandi* as the first deed was of an intention to dedicate to public use.

It is true, no formal acceptance on the part of the respondent was necessary, but in the absence of such formal act the owner had the right at any time prior to a public use to revoke his offer, and resume possession and control of the property. People v. Reed, ante, 474, (filed October 9, 1889.) The cases relied upon by the court below in support of its judgment, we think, are not applicable. People v. Blake, 60 Cal. 499, and Breed v. Cunningham, 2 Cal. 369. In those cases the parties who dedicated the land to public use had platted the same into lots, blocks, streets, and alleys, and had sold the lots and blocks with reference to the streets laid out and adopted by them. In this case Cushing did not survey his land into lots, blocks, and streets, nor did he plat the same.

We do not think that any effect can be given to the Ryan map on the question of dedication. Ryan did not own the land represented upon the map made by him, nor is it shown that it was made with the consent or by the authority of the persons owning the land represented thereon. The appellant did not refer in his deed to Leary to the Ryan map, for a description of the premises conveyed by him, and therefore it cannot be said that he in any way adopted or recognized it. It is claimed by respondent that the evidence does show an acceptance by the public before the conveyance to the appellant, but a fair construction of the sixth finding of the court and of the evidence shows simply a casual use by the public of the land, which was open and uninclosed. This use was the same after as before the alleged dedication. People traveled over the land in controversy as a matter of convenience, but the use was merely a permissive one, apparently, which the owner had a right to end at any time. The city was not bound to accept the offer to dedicate, if such offer was made, and in the absence of a formal acceptance it should appear that the use by the public was under a claim of right, and not by a temporary license of the owner. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C. J.; FOX, J.; WORKS, J.; MCFARLAND, J.; SHARPSTEIN, J.

I dissent: THORNTON, J.

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81 Cal. 622

CADY v LEONARD. (No. 13,492.)

(*Supreme Court of California.* Dec. 4, 1889.)

INSOLVENCY—PROPERTY WITHHELD FROM SCHEDULE—ACTION BY ASSIGNEE—COMPLAINT—EVIDENCE.

1. In an action by the assignee of an insolvent debtor to recover property alleged to have belonged to the insolvent at the time of the assignment, the complaint alleged that such property was wrongfully withheld by the insolvent from the schedule of assets; that defendant wrongfully came into possession of and retained the same, though the

plaintiff, as assignee, was entitled to it, and refused to deliver possession to plaintiff upon demand. *Held*, that the complaint was sufficient without any allegation of fraud, the action not being based upon fraud.

2. It appeared from the evidence in such action that defendant was the mother of the insolvent, and that the evening before the filing of the petition of insolvency he "turned over" to her certain property "needed for his family," including that in controversy. *Held*, that the evidence did not tend to show a fraudulent transfer, but that there was no transfer at all, and such evidence is competent to prove the allegations of the complaint, that the insolvent was the owner of the property and defendant was not.

Department 1. Appeal from superior court, Lassen County; M. MARSTELLER, Judge.

Shinn & Masten, for appellant. *E. R. Dodge*, *J. D. Goodwin*, and *D. W. Jenks*, for respondent.

WORKS, J. This action was brought by the respondent, as assignee of an insolvent debtor, against the appellant, to recover certain personal property alleged to have been the property of the insolvent at the time of the assignment. The complaint alleges, in substance, that the property belonged to the insolvent; that the same was wrongfully withheld by him from the schedule of assets; that the defendant wrongfully, and without the consent of the plaintiff, came into possession of and retained the same, claiming to be the owner thereof, and that she had no title to or right to possession of said property, but that the same was the property of the insolvent, and the plaintiff, as his assignee, was the owner, and entitled to the possession, of the same; that a demand had been made for the property, but the defendant had refused to give possession of the same. It is contended by the appellant that the complaint was bad because the plaintiff's right to recover was based upon fraud, and the fraud was not alleged. But we do not understand that the cause of action depended upon a claim of fraud. The complaint was based solely upon the grounds that the plaintiff was the owner of the property in controversy, and that the defendant was wrongfully withholding the possession thereof, under a claim of ownership in her. The complaint was therefore sufficient without any allegation of fraud, specific or general.

It is further contended that certain evidence offered on the part of the plaintiff was erroneously admitted, because it tended to show a fraudulent transfer of the property by the insolvent to the defendant, and there was no allegation of fraud in the complaint. But, as we understand the evidence, it does not show, or tend to show, any transfer of the property, either fraudulently or otherwise, from the insolvent to defendant. It appears from the evidence that the defendant was the mother of the insolvent; that the evening before the petition in insolvency was filed he "turned over" to her certain of his property "needed for his family," including the property in controversy, and that she told him at the time to turn over "what was most needed for his family," and he said "he would need the stage-coach to take his family in when he went out, and the stove he needed for his pre-emption, and the tents he needed when he took his family out camping." This evidence did not tend to show a fraudulent transfer of the property, but that there was no transfer at all, and that the "turning over" of the same was a mere pretense of a transfer, to mislead. The evidence was clearly competent to prove both of the allegations of the complaint, that the insolvent was the owner of the property and that the defendant was not. Other items of evidence are objected to as incompetent and irrelevant, but all of these objections are without foundation.

It is asserted that the findings are not sustained by the evidence, but we cannot agree with counsel for appellant on this point. We think the findings are fully sustained by the evidence, and that the judgment was right. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.

81 Cal. 408

In re Jessup's Estate. (No. 12,941.)

(*Supreme Court of California.* Nov. 30, 1889.)

Illegitimate Children—Adoption.

1. *Held*, reversing the judgment of the court below: That the court had jurisdiction, in proceedings had under the article of the Code providing for partial distribution, to hear and determine a question of contested heirship; Justice Fox holding, *per contra*, that the court has no jurisdiction to hear and determine such a question, prior to the time when the estate comes up in regular course of administration for final distribution, unless it be under, and in proceedings conducted in accordance with, the provisions of section 1664, Code Civil Proc.

2. That a statement of counsel, in the course of argument, to the effect that he has no doubt the court will hold, from the rulings already made and the evidence adduced, that the fact of paternity is established, does not amount to an admission, in the cause, of the fact of paternity, binding upon the parties.

3. That letters from the mother of an illegitimate child to its nurse may be admitted in evidence for the purpose of showing her assent to the disposition that is being made of the child, and the manner in which it is being provided for, but are incompetent for the purpose of proving paternity.

4. That pictures of the putative father and of the illegitimate child, taken by photography, are not inadmissible in evidence for the purpose of showing resemblance between the two, but are entitled to but little weight, since great dissimilarity between kindred, and strong resemblance between strangers, are matter of every-day observation.

5. That the statute of 1850 and the statute of 1870, in reference to the adoption of illegitimate children, are to be strictly construed, but the provisions of the Code on that subject are to be liberally construed, when applied to acts of the putative father done since the adoption of the Codes.

6. That in the absence of written acknowledgment, attested by competent witnesses, an illegitimate child can be adopted by, and given a right of inheritance in the estate of, the father, only by the father's "publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child." That "public acknowledgment" requires that he should have held the child out to his relatives, friends, acquaintances, and the world as his child.

7. That secret and clandestine maintenance of, or contributions to the support of, an illegitimate child, kept outside the circle of his own daily association, never allowed to bear his name, never visited by the father at the place of its abode, never entertained by the father at his own place of abode, the father denying its paternity to his relatives, and concealing it from his business and daily associates, will not constitute adoption, or establish a right of inheritance in the estate of the father, even though the father may have, in the presence and hearing of the child's nurse, and of a few persons with whom he was brought in contact in connection with providing for the wants of the child, spoken of it as "my boy," or "my son."

BEATTY, C. J., and PATERSON and WORKS, JJ., dissenting.

(*Syllabus by the Court.*)

In bank. On rehearing. For former report, see 21 Pac. Rep. 976.

John Garber and *John H. Dickinson*, for appellants. *W. H. L. Barnes* and *Morris C. Baum*, (*Henry I. Kowalsky*, of counsel,) for respondent.

FOX, J. Gershom P. Jessup died in this state on the 2d day of November, 1886, leaving a last will and testament, dated August 28, 1867, and being at the time of his death a resident of the city and county of San Francisco. The will was admitted to probate November 22, 1886, and letters testamentary issued to S. O. Putnam and Isaac Jessup, the executors therein named. He was never married, and his entire estate, amounting to nearly $100,000, was devised to his brother, Isaac Jessup, and his two sisters, Mrs. Ann A. Lindsley and Mrs. Caroline O. Bogart, the two latter of whom were and are non-residents of this state. On the 11th day of April, 1887, the petitioner, respondent here, describing himself as Richard P. Jessup, but signing as Richard Jessup, and who is subsequently shown to have been usually known as Richard Miller, filed his petition in the said case in probate, in which, after setting out the preliminary facts showing the death and pendency of the probate proceedings, and showing the character and condition and amount of the estate, he avers substantially that he is a son of said Gershom P. Jessup, deceased, and of Josie Landis, deceased; that he was born in San Francisco, March 20, 1866; that said Gershom P. Jessup and Josie Landis never intermarried, nor lived together as husband and wife, but that from and after the birth of said petitioner, and for many years subsequent thereto, and up to the time of the death of said Gershom P. Jessup, he, the said Gershom P. Jessup, publicly acknowledged the petitioner as his child, and supported, maintained, and educated him as such, and otherwise and in all ways treated the petitioner as if he were a legitimate child; "and did thereby adopt your petitioner as and for his legitimate child, and thereby and thenceforth your petitioner became for all purposes the legitimate child of the said Gershom P. Jessup, from the time of your petitioner's birth." It further sets out that said Gershom P. Jessup was never married, and never had any family residence; that by an omission not appearing to be intentional he wholly omitted to provide in his will for petitioner, and claims that by reason thereof petitioner is entitled to the same distributive share in the estate of deceased as though said deceased had died intestate; and then proceeds to set out that the estate is but little indebted, and prays an order of court, after due notice and hearing, distributing the whole of the estate, or such part thereof as the court shall direct, to petitioner, upon his giving bond conditioned for the payment, whenever required, of his proportion of the debts of the estate. Under this petition, citation was issued to the executors of the will only, and served on the same day. Subsequently the executors appeared and demurred to the petition (1) for want of facts to entitle the petitioner to partial distribution; (2) repeating the same ground in another form; (3) for uncertainty, which was duly specified; (4) that the court had no jurisdiction of the subject-matters contained in the petition; (5) for defect and misjoinder of parties, in that the devisees under the will were not joined; (6) that the court had no jurisdiction of the person, or any person, interested in and necessary to the determination of the questions presented in the petition; (7) that the petitioner had no legal capacity to petition for partial or any distribution, and setting forth the reasons therefor. This demurrer was afterwards overruled and exception taken, and the ruling is assigned as one of the errors relied upon on this appeal. The executors then answered, putting in issue the question of the paternity of the petitioner and the question of his adoption. On the issue thus framed a trial was had before the court, and a large amount of testimony was taken. The court found in favor of the petitioner, and gave judgment ordering the distribution of the entire estate to him, upon his giving bond in the sum of $1,000, which was given, conditioned that he would, when required, pay any debts that might be found due from the estate. From this decision and judgment or order an appeal is taken to this court, both on questions of law and on the ground of insufficiency of the evidence to justify the decision; the evidence being brought up in a bill of exceptions.

Twenty-three specifications of errors of law are assigned, six of which go to the question of jurisdiction. Personally, I am of opinion that the court never acquired jurisdiction to hear and determine the questions involved in this appeal; that, upon petition for partial distribution, jurisdiction to determine the question of contested heirship, or right to inherit, can only be acquired by proceeding as provided in section 1664 of the Code of Civil Procedure. But in this a constitutional number of the justices of the court do not agree with me, and the ruling of the court is in favor of sustaining the ruling of the court below, in so far as relates to the question of jurisdiction.

The remaining specifications of errors of law relate mostly to certain rulings of the court upon the admission and exclusion of evidence. Counsel for respondent contends that these rulings, even if erroneous, were harmless, for the reason that most of such rulings relate to evidence tending to show that the respondent was the son of the deceased, and that this fact was admitted by counsel in the court below. By an amendment of the record, that which is claimed to have been an admission so made by counsel has been brought to this court. We do not agree with counsel that it is an admission which should be held binding upon the parties, as to the existence of the fact. At most, it was a mere expression of opinion of counsel as to what he supposed the court would find, in view of the rulings already made and given, not as an admission of the fact, but as a reason why he need not dwell longer upon that point. The fact of paternity is denied even here, and it is the first of the questions of fact which will have to be determined in any proceeding which the respondent may prosecute for the purpose of asserting his claim to inheritance.

As to the particular question put to the witness Winter and objected to, it may be said: For the avowed purpose for which the question was put, it was, to say the least, harmless to admit it. The witness had already testified to the fact that the deceased had admitted to him the paternity of a boy, and shown him the boy. The point of inquiry at the moment of the question objected to was the identity of the young man to whom his attention was then called in court with the boy so shown to him some years before, and the witness had himself spoken of marks of resemblance between the person so before him in court and the deceased, and which marks of resemblance had attracted his attention on the former occasion, and it was in reference to these marks of resemblance and reminder that the question was put; the counsel declaring that the question was not put for the purpose of proving paternity, but simply of identity.

We cannot see that it was prejudicial error to allow the question put to Mrs. Hatton as to the conversations had between herself and the deceased at any time during the last six or seven years in regard to the intentions of the deceased towards Richard's mother. The question was entirely irrelevant and incompetent for the purpose of showing adoption, but it was undoubtedly put in the hope of eliciting further evidence tending to show paternity. It was a dangerous question for the respondent to put, for paternity alone, even if admitted, would not give a right of inheritance, and, if the response proved an intention to make any other arrangement than that of marriage, (an arrangement which counsel evidently did not expect and did not prove,) its tendency was, and evidently must have been, to show that whatever the deceased had done for the boy was done for some reason other than that of an intent to adopt.

We do not perceive that it was prejudicial error to admit petitioner's Exhibits A, B, C, D, E, F, G, and H, the letters of Mrs. Landis to Mrs. Nugent. They were incompetent and inadmissible for the purpose of proving paternity, but they were not offered for such a purpose. The sole object of introducing them was to show that at that time the child's mother acquiesced in the disposition that was being made of, and the provision that was being made for, the child. For that purpose the letters were admissible, although, perhaps, not very material; it being borne in mind that this was prior to the passage of the act of 1870.

Exhibit K, the photograph of the deceased, taken 10 or 12 years ago, was entirely irrelevant and immaterial to any issue in the cause, and the objection to its introduction should have been sustained. Its admission was, however, probably a harmless error.

Exhibit L was a photograph showing the deceased and the petitioner in the same picture. It was made shortly before the trial, by bringing two negatives in juxtaposition, and from them making a third. One of them, that of the petitioner, was made from life at the time; the other was an old negative made several years before. The admitted purpose of the introduction of this picture was to show the resemblance of the two persons, as a fact tending to prove paternity. Mere opinion as to resemblance between a child and its putative father is not admissible in evidence, but the fact of resemblance is held to be some evidence tending to prove paternity, and so, when the child and the alleged father have both been present, it has been held permissible to place them side by side before the jury, for the purpose of letting them draw their own deductions as to the fact of resemblance. Gilmanton v. Ham, 38 N. H. 108. We are not prepared to say that pictures taken by the improved processes of photography may not be admissible for such a purpose; but they would be entitled to much less weight as evidence than profert of the persons themselves, and even the latter would not go far towards establishing relationship, since a marked similiarity between strangers, and great dissimilarity between kindred, are matters of almost daily observation. See 1 Whart. Ev. § 346.

We do not think the exception taken to the admission of the deposition of the clergyman Ward, as a whole, was well taken. Taken by itself, that deposition would not have been admissible as proving, or tending to prove, anything binding upon the deceased; but, taken in connection with the testimony of Mrs. Hatton, it was admissible, as corroboratory of her testimony in relation to the fact of the christening.

Errors are also assigned as to some other rulings of the court in the admission and exclusion of evidence, but we do not deem them of sufficient importance to merit special consideration here.

The only remaining point upon this appeal which it is necessary for us now to consider is that "the evidence is insufficient to justify the decision." The evidence is voluminous, and at the first reading seems conflicting. But when we have first examined the law, and ascertained and determined what facts are necessary to be established by proof in order to determine that an illegitimate child has been legitimized and given the capacity of inheritance in the estate of the father, the apparent conflict is removed; and upon some at least of the points so necessary to be established by proof we find that there is not only no conflict, but no evidence whatever, to bring the case within the requirements of the law. All the rights which are given to the petitioner in the premises are given by statute, passed in derogation of the common law. It is claimed by the respondent that in determining those rights the rule established in section 4, Code Civil Proc., is to be applied, and the statutes are to be liberally construed, with a view to effect the object and to promote justice. That is true, so far as applies to the provisions of the Code, when applied to the acts of the deceased done since the passage of the Codes. But the converse of the proposition is the rule, so far as reliance is placed upon statutes passed prior to the Codes and acts done under them. Pina v. Peck, 31 Cal. 359. And, even as to the Code, "liberal construction" does not mean enlargement or restriction of a plain provision of a written law. If a provision of the Code is plain and unambiguous, it is the duty of the court to enforce it as it is written. If it is ambiguous or doubtful, or susceptible of different constructions or interpretations, then such liberality of construction is to be indulged in as, within the fair interpretation of its language, will effect its apparent object, and promote justice. The law in force at the time of the birth of the respondent reads as follows: "Every illegitimate child shall be considered as an heir of the person who shall, in writing, signed in the presence of a competent witness, have acknowledged himself to be the father of such child." St. 1850, p. 220, § 2. This statute must be strictly construed. Pina v. Peck, supra. There is no pretense that any such written acknowledgment was ever made. It follows that under this statute neither oral admission nor proof (otherwise than by such written acknowledgment) of the fact of paternity will constitute the illegitimate child an heir. This statute continued in force until March 31, 1870, when it was repealed, and the legislature passed "An act providing for the adoption of minors, and the legitimizing of children born out of wedlock." St. 1869–70, p. 530. The third section of this act provides, among other things, that an illegitimate child cannot be adopted without the consent of the mother, and that the consent of the minor, if over 12 years, shall always be necessary. If this section is construed to apply to the adoption provided for in section 9 of the same act, it requires things which there has been no attempt to prove in this case; but we think that it cannot be fairly construed to have any application to adoptions under said section 9. The first seven sections of the act provide for the adoption of children by strangers, and, while the language of section 3, referred to, seems to be general, we think it was intended to be limited to the cases provided for in that part of the act embraced in the first seven sections. Sections 8 and 9 read as follows: "Sec. 8. A child born before wedlock shall, to all intents and purposes, become legitimate by the subsequent marriage of its parents. Sec. 9. Either or both parents of an illegitimate child, or the father with the consent of his wife, or the mother with the consent of her husband, may acknowledge such child as his or their own, by a document in writing, executed by either, if single, or both, if married, or by treating, receiving, or acknowledging him publicly as his or their own legitimate child; and such child and the one mentioned in the foregoing section shall to all intents and purposes be deemed legitimate from the time of its birth, and entitled to all the rights and privileges of legitimate offspring." This statute must also be strictly construed, for it was not until the adoption of the Codes, and is only as to the Codes, that the rule that statutes in derogation of the common law must be strictly construed was changed. This was the first statute which authorized legitimizing of an illegitimate child by any mode other than the written acknowledgment provided for in the statute of 1850, and at the time of the adoption of this statute the respondent in this case was a little over four years of age. This statute remained in force until January 1, 1873, when section 230 of the Civil Code took its place. That section, so far as relates to the legitimizing of an illegitimate child, provides: "The father of an illegitimate child, by publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child, thereby adopts it as such; and such child is thereupon deemed for all purposes legitimate from the time of its birth." This provision, being a part of the Code, is to be liberally construed, but it is not retroactive, and relates only to minor children. Estate of Pico, 52 Cal. 84, and 56 Cal. 413. Section 1387 of the same Code is a part of the chapter on succession, and provides: "Every illegitimate child is an heir of the person who, in writing, signed in the presence of a competent witness, acknowledges himself to be the father of such child, and in all cases is an heir of his mother, and inherits his or her estate, in whole or in part, as the case may be, in the same manner as if he had been born in lawful wedlock." It is contended that this provision of section 1387 is a limitation upon section 230, but we do not think that the Code should be so construed. The whole chapter on adoptions relates to the adoption of minors; and by the express provision of this section 230 an illegitimate minor, acknowledged and adopted as therein provided, "is deemed to be legitimate for all purposes." One of the objects of adoption, and of legitimizing by adoption, is to give the capacity of inheritance. It has been already determined in Estate of Pico, supra, that this section relates only to minors, who alone are subjects of adoption, and that section 1387 provides for giving to illegitimate adults the capacity of inheritance. It follows from these statutes, and the rules of law applicable to the construction thereof, that prior to 1870, when this respondent was four years of age, he, the respondent, could not have been adopted by the deceased, or given the capacity of inheritance from him, except by acknowledgment in writing, in the presence of a competent witness; that from March 31, 1870, to January 1, 1873, he could have been so adopted and given such capacity, either by acknowledgment in writing, as before, or by the deceased having "treated, received, or acknowledged him publicly as his own legitimate child." Both these statutes must be strictly construed. Pina v. Peck, supra. It is conceded there was no written acknowledgment, such as prescribed by either statute. The act of 1870 cannot be construed as retroactive, so as to give force or effect to acts done or performed before its passage which they would not have had at the time they were so done or performed. Since the 1st of January, 1873, he could have been so adopted and given such capacity of inheritance by the deceased having "publicly acknowledged him as his own, receiving him as such * * * into his family, and otherwise treating him as if he were a legitimate child;" and this provision is to be liberally construed. But liberal construction does not mean that even this provision is to be construed to be retroactive. Nothing that was said or done by the deceased prior to January 1, 1873, can be construed as proving, or tending to prove, such adoption, unless it had that effect at the time it was said or done, and under the law then in force. Liberal construction does not require or authorize the frittering away of the written law, nor are we authorized to consider the apparent justice or hardship of particular cases, for we are not appointed to decide cases alone, but to settle principles first, and, second, to decide cases according to those settled principles, as applied to the facts presented in the cases. The decision of a single case according to its apparent justice or hardship might establish a principle that would cause greater injustice or greater hardship in numerous other cases. While it is true that illegitimate children are themselves innocent of wrong, and are for that reason entitled to the sympathies of mankind, and to such reparation as the laws can give, it is equally true that courts ought not, by any extraordinary liberality in the construction of those laws, to enable wantons in silk, having children without names, to prey upon the estates of dead men, however much they may have thrived through the fears of living ones. While in this particular case no adventuress is seeking to recoup for her own wrong, it is important to see that a rule of law is not established by construction which would place a premium upon perjury in other cases, though none may be manifest here. Of the women who are mothers of nameless children there are few indeed who would hesitate at any fraud, or to whom perjury would seem a crime, if by means of it a dead father, who had left a goodly estate, could be secured for the nameless one, and this even while continuing in illicit intercourse with the actual father still living. And human nature is so weak that even men are not wanting who would aid their mistresses in palming off their own children upon the estates of dead men, if thereby a competence could be secured upon which both, with their illegitimate offspring, could continue to live in luxury and in crime. On the other hand, the court ought never, by a strained construction in the other direction, to relieve a licentious man, or his estate, of any of the obligations or burdens which the legislature has imposed as a restraint upon vice, as a reparation to those who actually suffer from his vices, or as a protection to the commonwealth from the burden of supporting the nameless offspring of his crimes. Between these two dangers, the duty of the court is fairly to interpret the laws as the legislature has framed them, without regard to how its action may affect individual cases. If, thus interpreted, they are found to be too stringent or too liberal, the remedy is through the legislature, and not the courts.

Acting upon these rules of interpretation and construction, the inquiry is whether the acts and declarations of the deceased amounted to a public acknowledgment by him of this child as his own; receiving it as such into his family, and otherwise treating it as if it were a legitimate child. As he had no home and no family, in the strict sense of "a collective body of persons who live in one house, and under one head or manager,—a household including parents, children, and servants,"—it would not be a fair or liberal construction to say that the child had not been adopted or acknowledged because he had not been received in such a home or made a member of such a family. On the other hand, since it is a fact that the deceased did have a family, in the sense of having "brothers and sisters, kindred, descendants of one common progenitor," with some of whom he was brought into frequent contact, and also business associates and friends with whom he was in daily intercourse, from all of whom he not only studiously concealed, and to his brother in express terms denied, the relationship, it would require a liberality of construction destructive of the language of the statute itself to hold that there had been an adoption within the meaning of the Code, or of the statute of 1870. And it is conceded that there was none under the statute of 1850. An analogous question was recently considered by this court at great length in the case of Sharon v. Sharon, 22 Pac. Rep. 36-38, and the sum of the conclusion there reached was that the parties must have held themselves out to their relatives, friends, acquaintances, and the world as occupying towards each other the relations claimed for them in the action. Speaking generally, the laws applicable to this case seem to require something like the same kind of public acknowledgment and recognition as was required in that case. Was there such acknowledgment and recognition? Let us consider briefly what is and what is not shown by the evidence. We assume for the purposes of this opinion that the paternity was sufficiently established. That alone, unless established by written acknowledgment, in the presence of a competent witness,—which was not done in this case,—does not establish adoption, or give a right of inheritance. It is also in evidence that when the mother of this child was about to be confined the deceased brought her to this city, and procured for her care and maintenance at the house of a reputable negro nurse during the period of her confinement and illness. One witness, a dentist, with whom the deceased had some acquaintance, and to whom he applied for some professional service for the mother before her confinement, says that at that time the deceased acknowledged to him that the child about to be born of that woman was his; that he said he would not marry the girl, but would be just with her, and pay all the expenses of her care, and would care for the child. Another, a colored woman, who had the care of the boy after the first few years of his existence, and daughter of the nurse where the child was born, testifies that, at about the time the mother was brought to the house of her mother, she overheard a conversation between the deceased and her mother, in which deceased acknowledged that he was the father of the child about to be born, and intended to provide for it. She also says that deceased then also promised that he would marry the girl. This is the only direct testimony tending to show a promise on the part of the deceased to marry the child's mother. It is given by one who was herself a child at the time when she says the promise was made. This is in direct conflict with the statement made about the same time to the dentist. The conflict, however, is of little moment, except as it shows a conflict between the two witnesses, without whose testimony the respondent has no case whatever, and tends to show that the recollection of the colored woman as to events happening and declarations made during the period of her own childhood may not in all cases be reliable. It is sufficiently shown that the mother of the child remained at the house of the nurse about seven weeks, during which the deceased called there frequently, the witness says, and Jessup paid all the expenses. After the mother left, the child was kept and cared for by the nurse, at the expense of Jessup, who called frequently to see it, and, as it got old enough to observe things, would play with it, calling it his boy, and calling himself "daddy," and at a still later period would take the child and the witness, who appears at that time to have acted the part of nurse girl to the child, to North Beach, and let it see the animals there, and buy nuts and cakes for it to feed to them. The girl says that he was very fond of the child, and that it was called "Richard" at his request. Her testimony is very full, as tending to show his interest in and apparent affection for the child while it remained at the house of the original nurse and in the city of San Francisco; she saying, among other things, that he said "he wanted to make a man of him," and "if Richard behaves himself, and does what I want him, he will not be sorry for it," and many other expressions of this kind. All this might have gone far towards proof of acknowledgment and adoption, if it had been public, and at a time when the law authorized adoption by such kind of acknowledgment. But it was never public. It was made and done only to and in the presence and hearing of the negro family in whose care he placed and continued to keep it. When he took it out it was with the negro girl, and then not to a place where he would be likely to meet members of his own family and friends. And it all occurred during the period of the child's residence in San Francisco. During all that time the law of 1850 was in force, and no kind of acknowledgment or recognition would amount to adoption, unless it was in writing, and duly witnessed. According to the testimony of this witness, she was herself about 13 years of age when the respondent was born. In May, 1868, she married and removed to Petaluma, and two months afterwards, when the respondent was less than two years old, he was removed to her residence in Petaluma, and that continued to be his residence until 1876, when he was sent away to school. It will be observed that this removal to Petaluma occurred prior to the passage of the act of 1870, and it is a significant fact that it is not shown that the deceased ever visited the boy after such removal, either in sickness or in health, and is affirmatively proved that he never did visit him while living at Petaluma. Nor is it shown that the two ever lodged, even for a single night, in the same house, or sat down at the same table, or even in the same dining-room, in their lives. It is shown, however, that deceased continued to provide for the boy's maintenance while at Petaluma, and subsequently had the colored woman take him to Washington College, where he had arranged for his board and schooling, and where he was entered and known, as he had been known at Petaluma, by the name of "Richard Miller;" the latter being the family name of the colored people with whom he had been living. The witness testifies that, when she had her own children christened by a colored clergyman at Petaluma, she, at the request of Jessup, had Richard christened by the name of "Richard Page Jessup;" and the deposition of the clergyman shows that he had some recollection of such an occurrence, but no public or church record was made of the fact, and the private record kept by the clergyman had been lost. It is not shown that Jessup had any knowledge of this fact, except that the witness says she had it done at his request, and that afterwards she informed him of the fact, and he gave her five dollars to give to the preacher. The boy was never known anywhere by the name of "Jessup," but always and everywhere by the name of "Miller." He was placed at school as a ward of Jessup, and the accounts were kept against Jessup, as guardian of "Richard Miller." Two or three witnesses testify that while at school, when he was 16 or 17 years of age, the young man himself declared that he did not know who his father was; and it is fairly deducible from the whole evidence that he never did know Jessup as his father, or call him such, although he knew that, sometimes directly and sometimes indirectly, Jessup was contributing to his support. Jessup's diary, and all the accounts and memoranda kept by him relating to the boy that could be found among his effects, were brought into court, and nowhere among them is there an entry of any kind indicating an acknowledgment of the boy as being his son. Every reference that is made to him is as "Richard" or "Dick Miller." It is patent, however, from the evidence that for 14 or 15 years he secretly provided for the maintenance of that boy; that is to say, as secretly as such a thing could reasonably be done, without sending the boy entirely out of the country; and the evidence discloses abundant reason why he was not sent away. This could not have been done without causing a *denouement* which he was constantly seeking to avoid. Necessarily, the maintenance was not entirely secret. He was compelled to act through and to deal with others in providing for the care and education of the boy. But he always acted through channels that were not within the circles of his ordinary dealing or his ordinary association, and, as far as possible, without the knowledge of his family. The fact of the boy's existence, and that Jessup was supporting him, was communicated to his brother, while yet the child remained in San Francisco, by the nurse in whose charge he was. A few days afterwards, the brother asked Jessup about it, and asked him if it was his boy, to which Jessup replied: "No, it ain't my boy." Neither of the brothers was at that time occupying such social positions that either would have been likely to deny paternity through either fear or shame. During the last year or two of his life, Jessup was in feeble health, and it is apparent that both he and his brother felt that his end was approaching. During that period the brother again asked him about the boy, and asked him: "Gus, what ever became of that boy you were taking care of?" To which Jessup replied: "The boy,—I tried to make something of him. I have taken care of him, and have tried to make something out of him; but he didn't amount to anything, and I let him go." And the brother swears that Jessup never did acknowledge to him that the boy was his.

Some six or seven witnesses are called, besides the dentist and colored woman above referred to, who testify to conversations with the deceased at different times, in which he spoke of the boy as "his boy," and among them we notice that four, besides the dentist and colored woman, sometimes used the words "my son" instead of "my boy" as having been spoken by the deceased; but with all the witnesses who are examined on the subject "my son" is the exception to the rule, the more common form being "my boy," and the still more common form being "the boy." These witnesses may all be perfectly honest, and still by mistake may have used the words "my son" in the isolated cases where they have used it, when in fact they should have used the form of expression most commonly adopted by them, "my boy," or "the boy." But it makes no difference whether they were mistaken or not. None of these witnesses were members of Jessup's family, and, with a single exception, they were not persons likely to come in contact with his family. None of them were his business associates, and such of them as could in any sense be called his companions were only so during such portions of his time as he was in hiding from society. They were not persons likely to make public what he had said to them on such a subject, but rather to accept it as a matter of confidence, to be kept secret. Most of them were persons with whom he was brought in contact in the business of providing for the wants of the boy, and to only a few of those persons did he ever make any such revelations, and in no case were they so made as to amount to public acknowledgment. To the clothier from whom he always purchased the boy's clothing, he always spoke of him as "the boy," never using any expression to indicate that it was his son for whom he was providing. To an artist, to whom he paid $100 for painting a portrait of the child when an infant, he never used any form of expression to indicate a relationship to him, or why he had the portrait painted. But the fact that he procured this portrait is urged as strong evidence tending to show his affection for, and his intentions towards, the boy. It does not so strike us. It was procured prior to 1870, and consequently proves nothing in the way of adoption. It was retained by him for some 10 or 12 years, and during a portion of the time was seen by some few persons, in his room. He then had it revarnished, and this fact is dwelt upon as another evidence in support of the theory of adoption, and one occurring after the adoption of the Code. But the evidence discloses other facts which, to our minds, militate directly against this theory. It shows that although the mother, for the protection of her own good name, had left the boy to be provided for entirely by Jessup, her heart was constantly crying out for her baby boy, and she was seeking some memento of him. Just about the time this picture was finished she was married. When afterwards it was retouched and freshened up, she had become a widow, and had removed from the neighborhood in which her kindred resided. It is not shown that she ever received the picture, but, on the other hand, it is not shown that it was retained in Jessup's possession after it had been retouched, and it is not found among his effects. It does not appear that any effort was made to find it among the effects of the mother, who had died some time before Jessup did.

S. O. Putnam is one of Jessup's executors. He was the executor of a brother of Jessup, who died about 1865, and through whom Jessup received most of his fortune. Putnam and Jessup were always on very intimate relations, ever since the distribution of the former estate; and much of the time Putnam had funds of Jessup's in his hands. He knew that Jessup was providing for a boy, and during a portion of the time such provision was sometimes made through Putnam; but Jessup never told Putnam that the boy was his. In 1881 Jessup sent the boy to San Diego to go upon a ranch. That was the only time Putnam ever saw the boy. In 1882 the boy returned of his own accord, but, instead of going to Jessup, he went direct to Mrs. Hatton, (formerly Mrs. Miller,) the colored woman, then residing at Napa, and from there communicated with Mr. Putnam, writing to him several times for money These letters were shown to Jessup, and once Jessup authorized some money to be sent to him; but after that, for the balance of his life, Jessup refused to have anything to do with the boy.

Without dwelling further upon the details of the evidence, it may be summed up as follows: It is shown that, before and at the time of the birth of this respondent, Jessup had promised the mother that he would protect her good name by providing for the care and maintenance of this child. So long as the mother lived, he was in fear of personal difficulty from her kindred if he failed to keep this promise. This is shown by the evidence of Mrs. Hatton as to the earlier years, and of Mr. Jackson, and perhaps some others, as to the later years. While the mother lived, and until the boy had reached an age when Jessup seemed to think that he ought to be self-sustaining, he kept that promise. But in keeping it he kept the boy out of the circle of his own association. To a very limited number of persons, with whom he was brought in contact in providing for the boy, he spoke of him as "my boy," and possibly to a less number he may have used the words "my son;" but he never used these expressions either to or where they were likely to come to the knowledge of his own family or kindred, or to his most intimate and confidential business acquaintances and friends. He never visited the boy after he was two years old, or after the passage of any law under which adoption could result from any line of conduct other than written acknowledgment, duly witnessed; and when the boy was brought, or in later years came, to him, as he sometimes was and did, he did not entertain him, or keep him with him, for any length of time, but made his interviews brief, provided for his wants, and sent him away. And it does not appear that he ever but once made the boy a present, and then only of a five-dollar watch. Instead of providing for him among people of his own race, he reared him, and had him brought up, in a colored family, respectable, it is true, but still a family of another race, commonly considered inferior, and to be brought up among whom is regarded by most people of the race of the putative father as degrading; sent to the public school with the colored children, forbidden to bear his name, and allowed him all his life to be known by the name of the colored family in which he was reared; when sent to college, taken there by his colored nurse, and entered there by her name; at last placed upon a farm in San Diego, and, when he returns from there, going to the only home he ever knew, the home of his colored friends, and there becoming a bootblack and waiter in a colored barber shop: and finally left to start from such surroundings and associations to make his own way in life. And, as further evidence in negation of the idea of adoption, it appears that within a year after the boy was born, and at the time when Jessup was, according to the testimony of the colored nurse, showing more evidences of affection for the boy, and of desire to provide for his future, than he ever afterwards did, he (Jessup) makes a will in which he wholly omits all mention of the child, or any provision for him, and never afterwards changed it. It is true the colored woman says he frequently told her he was going to provide for the boy, and another woman, whose relations with Jessup were, to say the least, not above suspicion, testifies that towards the close of his life Jessup told her that he had made a will in which he had provided for both herself and the boy; but no such will has ever been found, and it is not only fair to presume, but, for the purpose of this case as it stands, must be presumed, that none such was ever made. In his intercourse with his own family, he denied his relationship to the boy; and with those most intimately connected with him in his business relations, and who, by reason of such connection, acquired some knowledge of what he was doing, he never admitted or communicated that he was doing anything more than "putting up" for the boy. It is said that as Jessup was never married he was not bound to receive this child into his family, for he had none in which to receive it. But we do not so read the law. The language is: "Publicly acknowledging it as his own, receiving it as such, with the consent of his wife, if he is married, into his family, and otherwise treating it as if it were a legitimate child." If he has a wife, he can only receive it into the family with her consent, but if he has no wife he must still receive it into his family; that is to say, in such family as he has the child must be acknowledged and treated as his. At least, he must not deny to the members of such family that it is his. Under this evidence, we are forced to conclude that Gershom P. Jessup never did "publicly acknowledge this child [the respondent] as his own," or "receive it into his family," or "otherwise treat it as if it were a legitimate child." It follows that the judgment or order appealed from must be reversed, on the ground that the evidence is insufficient to justify the decision. So ordered.

We concur: SHARPSTEIN, J.; THORNTON, J.; McFARLAND, J.

I dissent: PATERSON, J.

WORKS, J. I dissent, for the reasons stated in the opinion filed on the former hearing of this case, written by me, and concurred in by a majority of the court. No new point was made on the second hearing, and nothing additional, either of law or fact, was developed. The second hearing strengthened my views as expressed in the former opinion, and the manner in which the evidence is treated in the prevailing opinion of Mr. Justice Fox has served to confirm my first convictions.

BEATTY, C. J. I dissent. Reargument and re-examination of this case have convinced me that our former decision was correct, and have not materially changed my views as to the validity of the particular grounds upon which it was based. It is conceded—it would have been impossible to deny—that the proof of respondent's paternity is complete. The only argument that can be made against his claim to inherit his father's estate rests upon a strict construction of the statutes, remedial in their nature, designed to secure to innocent unfortunates in his situation a just share of the rights to which they are by nature as fully entitled as are legitimate offspring. No doubt a strong argument can be built on this basis of strict construction against the decision of the superior court. But I adhere to the view so strongly put and so satisfactorily maintained by Justice WORKS in his opinion, that in cases of this kind the only strictness required is in proof of paternity. That being satisfactorily established by plenary proof, I think courts should lean strongly in favor of a finding that the father of an illegitimate child has done what every honest and humane man should be not only willing but eager to do, and what a just law would compel the unwilling to do. I also think it a wholly unauthorized construction of the statute to hold that the acts of recognition, acknowledgment, etc., necessary to legitimize a natural child, should be performed with the express intention on the part of the father of accomplishing that object. If the acts are in themselves such as the statute prescribes, I think they confer legitimacy, without any reference to the intent with which they are performed. There is no danger to morality in recognizing the natural rights of illegitimate children, as against their fathers, or other claimants of their estates. And there is no danger of encouraging the fabrication of spurious claims, so long as strict proof of paternity is insisted upon. From this point of view, the evidence here is amply sufficient to sustain the decision of the superior court. Between the passage of the act of March, 1870, and the adoption of the Code, Gershom P. Jessup, if the witnesses told the truth, did enough to legitimize the respondent, and no subsequent neglect could deprive him of the *status* so acquired.

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81 Cal. 540

FELTON v. MILLARD. (No. 11,696.)

(*Supreme Court of California.* Dec. 2, 1889.)

LANDLORD AND TENANT.

1. In the California statutory action of unlawful detainer, evidence of title is inadmissible, though it is offered as having some weight on the question of the existence of a lease. 21 Pac. Rep. 533, affirmed.

2. A notice to quit, purporting to be signed by the landlord by attorney, is good, where the attorney had authority to sign it; no written authority being necessary, under Civil Code Cal. § 2309. The tenant in such case questions the attorney's authority at his own risk. 21 Pac. Rep. 533, affirmed.

In bank. On rehearing. For opinion in department, see 21 Pac. Rep. 533.

PER CURIAM. Upon due consideration, after argument on rehearing, we adhere to our former opinion, (21 Pac. Rep. 533,) and for reasons therein given the judgment and order are affirmed.

(81 Cal. 289)

RAZZO v. VARNI *et al.* (No. 11,558.)

(*Supreme Court of California.* Nov. 25, 1889.)

TRESPASS—DAMAGES—WITNESS—INSTRUCTIONS.

1. Since a witness may be cross-examined in full respecting his reasons for his estimate of the amount of damages caused by defendant's alleged trespass, he may give his estimate, in his direct examination, without stating the reasons on which it is based.

2. Where plaintiff's wife, in attempting to stop defendant's trespass, was treated with derision, some of the testimony showing that she was roughly pushed about, and she testified that the fright and excitement caused by such treatment brought on a sickness continuing three months, evidence that she had a child only six or seven months old, which she was then nursing, is admissible to show that she was in a condition where fright might have affected her as she testified it did.

3. In trespass for damages caused plaintiff, a market gardener, by defendant's digging a ditch on his land, thereby diverting the waters of a spring, a verdict of $1,000, plaintiff remitting $500, will not be set aside as excessive, where plaintiff's evidence shows that, owing to the trespass, his business was injured about $4 per day; that his income from his garden since the trespass had decreased from $15, $20, and $25 per day to $6, $7, and $10 per day; that the ditch had been maintained over a year; and that the fright and excitement of plaintiff's wife, caused by defendant's treatment of her when attempting to stop the trespass, brought on a sickness continuing three months, for which a physician was employed. Fox, J., dissents.

4. Instructions relating to the rights of riparian proprietors are properly refused where the testimony shows that there was no bed or channel in which the water ran.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by Christoforo Razzo against Nicoli Varni and others for damages for an alleged trespass by digging a ditch on plaintiff's land, diverting the waters of a spring. Plaintiff, who is a market gardener, testified that owing to the trespass his business was injured about $4 per day; and that his income from his garden since the trespass had decreased from $15, $20, and $25 per day to $6, $7, and $10 per day. It appeared that the alleged trespass was committed in the latter part of December, 1883, and the trial took place in February, 1885. Plaintiff's wife testified that the fright and excitement caused by defendant's treatment of her when attempting to stop the trespass brought on a sickness continuing three months, and that a physician had been employed therefor. There was a verdict for plaintiff for $1,000, of which the court compelled him to remit $500 as a condition of refusing a new trial. From a judgment thereon, and from an order denying their motion for a new trial, defendants appeal.

M. C. Hassett, for appellants. *T. B. Coogan*, for respondent.

THORNTON, J. I have examined the record in this case carefully, and find no error in it. There is no ambiguity in the complaint. It merely sets forth in detail the circumstances attending an unauthorized and aggravated trespass on the close of plaintiff which have a material bearing on the issue of damages.

The court ruled correctly on the questions put to plaintiff as to his estimate of the amount of damage. It is to me a novel and unprecedented rule that a witness, before he can testify as to the amount of damage, must state the reasons or grounds or basis on which he estimates that amount. The lack of or defect in any reason or ground of basis of estimate can be made to appear by cross-examination. A competent witness (there is here no objection to witness' competency) may give his estimate, which can be admitted by the trial court. The party calling forth the testimony may, if he chooses, ask for the reasons or grounds on which the witness bases his estimate, but he is not bound to do so. The testimony is admissible whether the party calling out the testimony inquires as to the grounds of estimate or does not so inquire. The opposing counsel, on cross-examination, may make such inquiry, and may thus show that there is no ground or basis on which such estimate can be made or upheld, and that therefore such estimate is fallacious, and not to be relied on. Should he fail to do this, it is his own fault, and he cannot be heard to complain in this court. Here the defendant's counsel had abundant opportunity to cross-examine the witness as to the basis on which he made his estimate, and failed to do so. The aim and end of all cross-examination is to sift, explain, or modify what has been said on the examination in chief, and to discredit the witness. The evidence here might have been sifted by the cross-examiner calling out, when it became his turn to take the witness, the reasons or ground or basis on which he made his computation or estimate as to damage, and he might have shown that the estimate was based on grounds illusory and unsubstantial. A court cannot say, as a matter of law, that a witness who gives his opinion as to value, or testifies to an estimate of damage, has no criterion in his mind on which he founds his opinion or estimate. It would be inconsequential and unreasonable to assume such a vacant state of mind to exist, and would be contrary to all psychological rules. If the mind of the witness is so vacant, it can be made to appear by cross-examination. A court has no more right to assume that a witness testifies on such matters without grounds for it than it has to assume that a witness whose testimony bears the usual marks or *indicia* of truth is testifying falsely. The grounds or basis of a witness' opinion or estimate can always be sifted or examined into and tested by cross-examination, and this is the mode the law has prescribed to accomplish such end. This is the common, every-day mode, constantly resorted to in practice on trials in courts, and it is an eminently satisfactory and adequate mode. The court committed no error in its ruling on these questions. The counsel had full opportunity to sift the witness and his testimony on cross-examination, of which he failed to avail himself. See 1 Thomp. Trials, c. 17, on Cross-Examination, §§ 405, 406, 408-413. In section 413, just cited, the author correctly states: "Where a witness has, on his examination in chief, given his opinion as to value, he may be cross-examined in full respecting his reasons for such opinion; and here the rule applies that great latitude should be allowed in cross-examination," (citing Railroad Co. v. Haines, 10 Kan. 439; Railroad Co. v. Andrews, 30 Kan. 590, 2 Pac. Rep. 677; Railroad Co. v. Blackshire, 10 Kan. 477, 486; Markel v. Moudy, 13 Neb. 323, 327, 14 N. W. Rep. 409,) "the limits of which, where no rule of law is violated, are within the discretion of the presiding judge;" citing Miller v. Smith, 112 Mass. 470. "A question is proper which enables the jury to see upon what basis the witness has made his estimate of value, or which connects his general estimate of value with the thing in respect of which the injury is predicated;" citing Railroad Co. v. Blackshire, 10 Kan. 477. See, also, Thompson v. Moiles, 46 Mich. 42, 8 N. W. Rep. 577.

Nor did the court err in its ruling in admitting evidence to show that the plaintiff had a wife and a child, and that the child was only six or seven months old which his wife was then nursing. The trespass complained of was an aggravated one, and was committed with force; 13 men entering the close to dig a ditch inside of plaintiff's inclosure. One man came with a hoe, another with a shovel, and another with a gun. The gun was left outside of the inclosure. This display of force was calculated, and was no doubt intended, to intimidate, and therefore it may be said that the entry complained of was made with force. Plaintiff's wife attempted to stop them from digging the ditch. She alone, as far as the testimony shows, appeared on the ground and attempted to get the invaders to desist from digging the ditch. She was treated with derision, and there was testimony to show that she was roughly pushed about. She testified that she became sick from the fright and excitement caused by the treatment she there received, which sickness continued for three months. The evidence was admissible to show that she was in a condition where fright might have affected her as she testified it did. It was also admissible to show that the forcible entry was accompanied by circumstances of insult which had a material bearing on the question of damage.

It is said the verdict was excessive. I do not think so. The amount found by the verdict was $1,000, and the court required plaintiff, as a condition of refusing a new trial, to remit $500. This was done, and the new trial was denied. The defendants have no ground to complain of this amount. In my judgment the court might well have allowed the amount found by the jury to remain unchanged.

I find no error in refusing the request for instructions to the jury, to which the court's attention is called by defendants. The instructions requested had no pertinence to the case, but were entirely outside of it. There was no riparian ownership. The testimony showed no water-course. There was no bed or channel in which the water ran, and, consequently, there could be no *ripa* bank, and hence there could be no riparian or bank owner. The evidence, in our view, is sufficient to justify the verdict. We find no error in the record, and the judgment and order must be affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; WORKS, J.; SHARPSTEIN, J.

FOX, J., (*dissenting*.) I dissent. In my judgment, the evidence, even if competent, which I do not concede, fails to show damage to an amount equal to one-tenth the sum recovered. Whatever damages were attempted to be proved were such as grew out of loss of profits in the business, and the testimony as a whole shows, by a great preponderance, that this loss resulted from causes other than such as can be traced to the acts of defendants, and was common to all persons engaged in the business at that time. Besides, I am at a loss to see upon what principle the court can allow a recovery for damages accruing after the commencement of the suit, under a complaint not framed for the purpose; and every dollar of the damage proved or attempted to be proved in this case accrued long after the suit was brought, while the complaint was never, either originally or by amendment, framed for the recovery of such damages.

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81 Cal. 328

GREEN v. BROOKS *et al.* (No 13,180.)

(*Supreme Court of California.* Nov. 27, 1889.)

CONTRACT—CONSIDERATION—ACCOUNTING.

1. A contract by which defendant bound himself to purchase a particular tract of land, and pay plaintiff one-third of the net profits realized from its sale, is not void for want of consideration, where the contract provides that defendant is to be paid 10 per cent. on his investment out of the proceeds of sales; it also appearing that the contract had been entered into by reason of plaintiff's disclosure of certain information to defendant, which enabled him to so invest his money in the land as to realize large profits on its sale.

2. A contract founded on plaintiff's promise to disclose information as to the place where a railroad company intended to locate its depot is not void, as against public policy, where there is nothing to show that plaintiff obtained his information by reason of any relation of trust or confidence that he bore to the railroad company, or that it had any interest in the subject-matter of the contract, or that it attempted to keep the location of the depot a secret.

3. Where defendant, in consequence of information imparted to him by plaintiff, entered into a contract binding himself to purchase a particular tract of land, and to pay plaintiff one-third of the net profits realized from its sale, a trust in the land results in plaintiff's favor, and he is entitled to have the land disposed of in accordance with the terms of the contract, and, when so disposed of, to share in the profits.

4. In such a case, plaintiff is entitled to an accounting, though there is no fraud on defendant's part.

5. Since one of the objects of an accounting is to ascertain how much has been realized and expended by the accountant, plaintiff is entitled to an accounting, though no profits have been realized by defendant from sales of the land.

Department 1. Appeal from superior court, Los Angeles county; WALTER VAN DYKE, Judge.

Frederic Hall, for appellant. *Charles W. Eldridge*, (*C. C. Stephens*, of counsel,) for respondent.

Works, J. This is an action to declare a trust, and for an accounting. The parties to this action entered into the following contract: "June 27, 1887. It is agreed that J. Marion Brooks purchased what is known as the Philbin tract of land, in the city of Los Angeles, containing 31 65-100 acres. That T. J. Cuddy is to receive 25 per cent. of the net profits on said tract, and that John W. Green receive ⅓ (one-third) of the net profits on said tract, and that J. Marion Brooks is to receive ⅔ (two-thirds) of the net profits on said tract. That said Brooks be allowed ten (10) per cent. on all moneys he may advance in purchase of said lands, and it shall be charged up as expenses in purchase thereof. Said Brooks to contribute to said Cuddy 16⅔ per cent. commission, and J. W. Green contribute 8⅓ per cent., being their respective proportion to the commission, 25 per cent., allowed said Cuddy. [Signed] J. Marion Brooks. [Signed] John W. Green. [Signed] T. J. Cuddy." It is alleged in the complaint that the consideration for said contract was that plaintiff should disclose to said Brooks and Cuddy information in advance of the knowledge by defendants and others of the fact of the place in the city of Los Angeles, state of California, of the intended location of the new passenger depot of the Southern Pacific Railroad Company; that said Cuddy should, in advance of the knowledge of that fact by others in said city, use his skill in selecting a desirable tract of land in the vicinity of said intended depot, and negotiating the sale of the same to defendant Brooks; that said Brooks should thereupon purchase the tract to be by said Cuddy selected; and also in consideration of the obligations and interests assumed and arising from the terms of the agreement above set forth. It is further alleged that the plaintiff did disclose the location of said depot grounds as agreed upon, and that the same were located at the place designated; that Brooks purchased a certain tract of land near said location, as agreed in said contract, for the sum of $125,000, and received a deed therefor; that the land so purchased increased largely in value; that he subdivided the tract into blocks and lots, and sold lots to the amount of $100,000; that there remained unsold about two-thirds of the property, of the value of $200,000; that an account of his management of the trust had been demanded of said Brooks, but had been refused. It is also alleged that Cuddy had refused to join as a plaintiff, and he had, for that reason, been made a defendant. The prayer of the complaint was that Brooks be declared a trustee for the plaintiff, to the extent of one-third of the property and its proceeds, and that he be required to account. There were some pleadings on the part of some other defendants who had become purchasers of a part of the land, but they are not appealing, and their connection with the case need not be further noticed. There was a demurrer to the complaint by Brooks, which was overruled. He answered by denying his purchase and the making of a deed to him on the date alleged, averring that the same occurred at a later day; and, as an affirmative defense, alleged that after the making of the contract, and before the bringing of the action, it was agreed, by and between the plaintiff and the defendants Brooks and Cuddy, that said contract should be waived, abandoned, and rescinded, and that they then waived, abandoned, and rescinded the same accordingly. The court found in favor of the plaintiff, and entered an interlocutory order for an accounting to be taken before a court commissioner. The account was taken, showing the moneys expended in purchasing the land and for expenses, the amount realized from sales of lands, and the quantity and value of lands remaining in the hands of the defendant undisposed of. Final judgment was thereupon rendered, confirming the report of the commissioner, except as to certain expenses which were allowed the defendant not allowed in said report, and disallowing others, declaring the trust in the defendant Brooks, and decreeing that the plaintiff was entitled to an accounting from time to time at reasonable intervals. The account taken showed that the defendant had not yet realized sufficient from sales made to repay him the amount paid by him for the land and for expenses in making sales. There was no personal judgment against him, except for costs. The appeal is by Brooks alone on the judgment roll.

It is contended by the appellant that the demurrer to the complaint should have been sustained, because the writing sued on did not amount to a contract, did not bind any one, except the appellant, to do anything, and therefore his promise was without consideration. We think otherwise. The respondent was possessed of certain information which might enable the appellant to so invest his money as to realize large profits, and agreed to disclose such information for a share of such profits, and agreed, also, to pay the appellant out of the proceeds of sales 10 per cent. on the amount of money invested by him. This was a sufficient consideration to uphold the promise of the appellant, and having received the information agreed to be furnished, and realized upon it, he cannot be allowed to repudiate his promise. That he did receive the information, and that it was valuable, and enabled him to profit largely by his purchase, is not denied.

It is further contended that the contract was void, as against public policy, for the reason that it was founded on the promise of the respondent to disclose a secret of the railroad company as to the place where it intended to locate its depot. This defense, if well founded, comes with a very poor grace from the appellant, who was a party to the transaction, and agreed to pay the respondent largely for what he now claims to have been a fraudulent and wrongful act. But there is nothing in the point made. There is nothing to show that the respondent obtained his information by reason of any relation of trust or confidence he bore to the railroad company, or that the company had any interest in the land to be sold which would be affected by the disclosure, or even that the matter was kept or attempted to be kept secret by the railroad company. Therefore no confidence was violated by the respondent, nor was there any matter disclosed that was or could be against public policy. Counsel cite numerous authorities in support of this contention, but for the reasons stated none of them are in point.

It is also claimed that the respondent had no interest in the real estate, but only a right to share in the profits. In support of this position the case of Stewart v. Nevins, 50 Cal. 276, is cited as decisive of the question. The case differs materially from the one under consideration. There the party attempting to enforce the trust had sold the land in controversy to the defendant for a fixed amount and for a certain share of the profits realized over and above a certain sum. The title was conveyed, and the only right of the vendee was to recover his purchase money. The fact that a part of the consideration to be received by him was contingent upon the realization of profits by a resale could not give him any interest in the land. But here the plaintiff was, in effect, one of the purchasers of the land. Suppose he had furnished one-third of the purchase money, or had agreed to render certain services for the interest he claims, could it be claimed that he had no interest in the land? If he furnished such information as enabled the appellant to buy it for their joint benefit for one-third less than its real value, or whereby that much greater profit could be realized to both, the result to the appellant was the same in effect, and in equity the respondent must be regarded as having such an interest in the land as entitled him to see to its proper disposition in accordance with the contract, and, when so disposed of, to share in the profits. And to this extent the appellant was properly held by the judgment of the court below as a trustee. Settembre v. Putnam, 30 Cal. 490; Seymour v. Freer, 8 Wall. 202. There are a number of other authorities referred to by counsel for appellant on this point, but the facts in the cases cited are so dissimilar as to render them of no weight.

Finally, it is contended that the complaint is bad because it does not allege fraud on the part of the appellant, and because it is not shown that the appellant had received more than he had paid out. The right to an accounting in a case of this kind does not rest upon fraud, and no such allegation is necessary in the complaint. Nor was it necessary for the appellant to allege that such an amount had been realized as entitled him to a share of the profits thereof. The very object of an accounting may be, and frequently is, to ascertain how much has been realized and expended, so as to determine whether the *cestui que trust* is entitled to payment. The case of Coward v. Clanton, 79 Cal. 23, 21 Pac. Rep. 359, is not in point. There the court below rendered a judgment against the defendant for a share of the profits when no profits had been realized, and we held the judgment to be erroneous. In this case there was no personal judgment in favor of the plaintiff. The judgment simply confirmed the account taken, which showed the state of the trust at that time, and showed that he was not entitled to recover a personal judgment. But this did not affect his right to the accounting when the trustee had denied the trust. Judgment affirmed.

We concur: FOX, J.; PATERSON, J.

(81 Cal. 489)

PEOPLE *ex rel.* GRAVES v. McFADDEN *et al.* (No. 13,349.) SAME v. COUNTY OF ORANGE. (No. 13,460.) SAME v. COUNTY OF ORANGE *et al.* (No. 13,461.)

(*Supreme Court of California.* Nov. 27, 1889.)

CONSTITUTIONAL LAW — DELEGATION OF LEGISLATIVE POWERS—SPECIAL LAWS.

1. St. Cal. 1889, p. 123, entitled "An act to create the county of Orange," etc., is not void, as being a delegation of legislative powers, by reason of a clause that, on the assent of two-thirds of the qualified electors voting at an election to be held for that purpose, a new county should be formed out of a designated territory, and the other provisions of the act take effect.

2. Nor is the act void as a delegation of the power to repeal the law by reason of a provision that, if less than two-thirds of the qualified electors voted in favor of the creation of the new county, the act should cease to be of any force or effect; the law being complete and in force as soon as approved by the governor, and the result of the election being merely the condition or contingency on which depended the carrying into effect, or not, of its provisions.

3. A county is not a "corporation for municipal purposes," within the meaning of Const. Cal. art. 11, § 6, providing that corporations for municipal purposes shall not be created by special laws.

4. Under Const. Cal. art. 4, § 25, subd. 33, providing that "the legislature shall not pass local or special laws * * * where a general law can be made applicable," it is a question of fact, to be determined by the legislature, whether a general law can be made applicable to the organization of new political subdivisions of the state.

5. Under Const. Cal. art. 11, § 5, providing that the legislature may classify the counties by population, it may classify each new county, on its organization, according to the best information at its command, to remain in force until a readjustment of the classification of all the counties in the state will take place under the provisions of the general law on the subject.

In bank. Appeals from superior court, Los Angeles county; LUCIEN SHAW, Judge.

Geo. A. Johnson, Atty. Gen., and *Chapman & Hendrick*, (*Gottschalk & Luckel*, of counsel,) for appellant. *Victor Montgomery* and *Hutton & Swanwick*, for respondents.

FOX, J. All of these cases involve, so far as the merits are concerned, precisely the same questions, and are brought to accomplish the same end, and for the same relief; the three actions being brought to meet a doubtful question as to who were the proper parties defendant, under the circumstances, to an action brought for that purpose. The cases are submitted together, ably argued on both sides, and a speedy determination desired upon the merits, regardless of the question of parties. The three cases cover all the possible necessary parties, and we shall proceed to consider the merits of the case as if it were but a single case, and not attempt to discuss the question as to who were necessary or proper parties. The real question is whether the act of the legislature of the state of California, approved March 11, 1889, entitled, "An act to create the county of Orange, to define the boundaries thereof, to determine the county-seat by an election, and to provide for its organization and election of officers, and to classify said county," (St. 1889, p. 123,) is constitutional or not. In each case demurrer to the complaint on the merits was sustained, and judgment of dismissal entered, from which plaintiff appeals.

1. The first point made by appellant is that the act is a delegation of legislative authority, and is therefore void. The first section of the act provides that "upon the assent of two-thirds of the qualified electors, voting at an election to be held for that purpose, as provided in sections 4 and 5 of the act, there shall be formed out of the south-east part of Los Angeles county a new county, to be known as the 'County of Orange,' which shall rank as a county of the fifteenth class until the census of 1890 is taken, and a new apportionment is had." The second section defines the boundaries; the third provides that the county-seat shall be chosen as thereinafter provided; and the fourth provides for the appointment of commissioners, to be appointed by the governor, whose duty it should be, after qualifying, and on a day named in the section, to order a special election to be held within the boundaries so fixed for the new county, upon a day also named in the act, at which the electors should determine by ballot whether or not said territory should be organized as a new county under the act,—the act itself adopting for the purposes of that election the election precincts within the territory, as the same had been established by the board of supervisors of Los Angeles county, of which it was then a part,—the commissioners to canvass the returns, and declare the result. If two-thirds of the qualified electors voting at such election vote in favor of the creation of the proposed county, then said commissioners are to divide the county into a convenient number of judicial townships, road and school districts, define their boundaries, and designate the name of each. They are also to establish election precincts, and give 30 days' notice by publication of the precincts established, designating the names and boundaries thereof; and also to divide the county into five supervisor districts, and give a like notice of the names and boundaries thereof; and they and their president and secretary are authorized and required by law to discharge the same duties as are required of boards of supervisors and county clerks, so far as the same apply to holding elections, canvassing returns, and issuing certificates of election. Within a period not exceeding six months from the first meeting of the commissioners, they are to order an election in said county for the election of county officers, and the selection of a county-seat. They are to keep a record of all their proceedings, and of the result of both elections, transmitting a certified copy thereof to the secretary of state, and filing the original in the office of the county clerk as soon as that officer shall have been elected and qualified; and thereupon the duties of said commissioners shall cease and terminate. If, however, at said first-named election, "less than two-thirds of the qualified electors voting for and against the creation of the proposed county vote for the creation of said county, then this act shall cease to be of any force or effect." Other provisions of the act may be hereafter noted, but are not material to the point now under consideration, except, perhaps, the concluding sentence of the act, which reads: "This act shall take effect and be in force from and after the date of its passage and approval." The proposition is not disputed, that the legislature has no power to delegate its legislative authority; but the question turns upon whether this is a delegation of such authority or not. Counsel for appellant has cited several authorities in support of that contention, among them Ex parte Wall, 48 Cal. 279; but they do not strike us as being in point. In Ex parte Wall and State v. Weir, 11 Amer. Rep. 115, the real question was whether the legislature could authorize the people of a given locality to suspend the operation within such locality of a general penal statute of the state, and the court held that it could not do so. The other case cited was similar in character. While there is a wide diversity of opinion in the reported cases as to what questions the legislature may, and what it may not, submit to the arbitrament of the people, we think it will rarely be found that the submission of a question like that submitted by the act now under consideration to a vote of the people has been held to be a delegation of legislative authority. Mr. Cooley, in his work on Constitutional Limitations, in discussing this subject, (page 140 et seq., 5th Ed.,) after laying down the rule in very strong language that the power conferred upon the legislature to make laws cannot be delegated by that department to any other body or authority, and citing many cases in support of it, adds: "But it is not always essential that a legislative act should be a completed statute which must in any event take effect, as law, at the time it leaves the hands of the legislative department. A statute may be conditional, and its taking effect may be made to depend upon some subsequent event. Affirmative legislation may in some cases be adopted, of which the parties interested are at liberty to avail themselves or not, at their option." After citing as illustrations the cases of private and municipal corporations, he proceeds, (page 141:) "For the like reasons, the question whether a county or township shall be divided, and a new one formed, or two townships or school-districts formerly one be reunited, or a city charter be revised, or a county-seat located at a particular place, or, after its location, removed elsewhere, or the municipality contract particular debts, or engage in a particular improvement, is always a question which may with propriety be referred to the voters of the municipality for decision."

This principle was adopted by this court, in the case of Upham v. Supervisors, 8 Cal. 378, where it was held that, while the legislature cannot delegate its legislative powers, it can delegate the power to the voters of a county to select a county-seat therein; and also in People v. Burr, 13 Cal. 343, where the legislature had passed an act authorizing the issue of certain bonds, unless, upon petition duly filed, and at an election thereupon held, the people of San Francisco should vote against the issuance of such bonds. Of like effect is the decision in Robinson v. Bidwell, 22 Cal. 379, where the court held that the vote of the people, under an act providing therefor, upon a proposition to issue bonds, and where the bonds were to be issued or not, according as the majority of the votes should determine, was not an act of legislation, but simply an event upon the happening of which the law is to take effect. See, also, Hobart v. Supervisors, 17 Cal. 23. In the case of People v. Nally, 49 Cal. 478, this court held that an act which submits to a popular vote of the electors of a county the question whether a portion of the territory of an adjoining county shall be annexed to it, and provides that, if the majority of the votes are for annexation, then the organization of the adjoining county shall be abandoned, and its territory shall be divided and annexed in part to the county in which the vote is taken, and in part to another adjoining county, was not unconstitutional. On the authority of that case, the ruling of the court below in this case as to the point now under consideration should be affirmed. But we may add to the reasoning given in the case referred to that the act here under discussion is in its nature and effect an enabling act, and, as such, it was full and complete, as an act of legislation, when it received the approval of the governor. Its purpose was to enable the people resident within the territory described in the act to segregate themselves from the county of Los Angeles, and to erect and maintain for themselves a county government. No doubt the legislature had the power to create a new county without submitting the question to a vote of the people, as congress had the power to admit California into the Union without an enabling act; but, as the burdens of the new local government were to be mainly borne by the people within the territory, it was, in the language of Mr. Cooley, "with propriety referred to the voters for decision;" and they were permitted, and, by pursuing the course prescribed by the terms of the act, enabled, to assume the position of a county in the state, and the burdens of a county government, or not, as they should elect; just as four territories were at about the same time permitted and enabled to assume the position and burdens of states in the union, or not, as the people thereof respectively should at the polls decide.

But it is further claimed that, if the act does not delegate to the people the power to create the law, it does delegate to them the power to repeal it, by reason of the sentence: "If, at such election, less than two-thirds of the qualified electors voting for and against the creation of the proposed county vote for the creation of said county, then this act shall cease to be of any force or effect;" and that by reason thereof the whole act is void. If the effect of this sentence was, as claimed, to delegate to the people the power to repeal the act, a complete and perfect answer to the objection would be that the sentence might be stricken out entire without affecting any other portion of the act. This being so, the presence of this sentence does not render the whole act void. Robinson v. Bidwell, supra; People v. Nally, supra; Ex parte Frazer, 54 Cal. 94. But we do not think that such was the force or effect of this clause. The law was complete and in force the moment it was approved by the governor. It provided for different steps and stages of proceedings in carrying it into effect. One of its provisions was that when it had reached a certain stage in these proceedings, which stage must be reached within a time limited by the legislature, the further proceeding under it should depend upon the happening of an event which might or might not happen, to-wit, the favorable vote of the electors. If that event or contingency happened, then all the remaining provisions of the act were to be carried into effect; and this, too, was to be done within a time limited by the act. If the event did not happen, then, by its own terms, no further provisions of the act were to be carried into effect. Not only had the legislature the power to provide upon what condition or contingency the provisions of the act might be carried into effect, but also to provide within what time it must be done, if done at all; and it may have been a wise provision, in view of the rapid changes taking place in the conditions of the surrounding country and the numbers of its people, to say to them, "If you do not choose to accept the permission granted by the provisions of this act within the time herein named, it shall not remain an open permit, to be accepted at any future time." It may very well be that the legislature was willing to create a new county, located and bounded as proposed in the act, at that time, and not be willing, or deem it wise, to create one in the same locality, or with the same boundaries, two or four years hence. Conditions may so change that in the early future two or more new counties may be needed in that part of the state; or, on the other hand, it may not be desirable then to make any change. Whatever may have been the reason which moved the legislature thereto, it did not delegate to the people the power to repeal the act, but itself said that if the provisions of the act were not accepted within the period named they should not thereafter be carried into effect.

2. Another point made is that the act is in violation of section 6, art. 11, of the constitution, which provides that corporations for municipal purposes shall not be created by special laws. This point does not seem to be very seriously insisted upon in argument, but it is proper to notice it. It is sufficient to say of it that it is easily deducible from the constitution itself that a county is not a "corporation for municipal purposes" within the meaning of the section referred to. Article 11 is on the subject of "Cities, Counties, and Towns." The first five sections relate entirely to the organization and management of county governments, the first section giving to them a designation different from that of "munic-

ipal corporations." It reads: "The several counties, as they now exist, are hereby recognized as legal subdivisions of this state." With the sixth section commence the provisions in reference to municipal corporations, and it and the two following sections are devoted exclusively to that subject, having nothing in them relating to counties or county government. So, also, with section 19. Sections 9 to 14, inclusive, and sections 16, 17, and 18 relate to subjects which are common to both counties and cities and towns; and every time that either is mentioned the three are mentioned by name, and not as organizations of a single class, as "municipalities" or "municipal corporations." Section 15 clearly defines the distinction between the two as classes. It reads: "Private property shall not be taken or sold for the payment of the corporate debt of any political or municipal corporation." It is clear, therefore, that the constitution does not hold counties to be municipal corporations, or "corporations for municipal purposes;" but, so far as they are to be regarded as corporations at all, they are "political corporations." And this is in harmony with the common acceptation of the terms "municipality" or "municipal corporation," as used in the common and written law of both England and America, time out of mind. This view is also in harmony with those provisions of the statutes and codes which define counties to be "bodies politic and corporate," and also with the decision of this court, made before the adoption of the constitution, when it declared that a county is not a municipal corporation, within the meaning of that term, as used in the Political Code. People v. Sacramento Co., 45 Cal. 695. It was also so understood by the framers of the constitution as shown by the debates in convention. See volume 2, p. 1050, and volume 3, pp. 1482, 1483, 1502, and 1509.

3. It is also claimed that the act is void because it is in conflict with, or passed in violation of, article 4, § 25, subd. 33, of the constitution, where it is provided that "the legislature shall not pass local or special laws * * * in cases where a general law can be made applicable." This point is not well taken. While it may be found practicable to, and the legislature has already endeavored, by a single act, to provide a uniform system of county government, we can hardly conceive it possible, in view of the varied conditions of the different localities in this state, if, indeed, it could be done in any state, to frame a single law which should meet the necessities of each attempt to organize a new "political subdivision of the state." In any event, whether such a law could "be made applicable" depends upon questions of fact which this court has no means of investigating, and upon the solution of which it would not attempt to substitute its judgment in place of that of the legislature. The policy of adding to the number of the "political subdivisions of the state" is one to be determined by the legislative department of the government, in each instance when the proposition to do so is made; and, if the determination be favorable, then the legislative department alone must fix and determine the boundaries of such subdivision.

4. Appellant claims that several distinct and separate provisions of the act are in conflict with distinct and separate subdivisions of section 25, art. 4, of the constitution, prohibiting local and special legislation on specific subjects, and that as to each of those provisions it is unconstitutional and void; as in the provision defining the duties of the commissioners, giving them the power to create supervisor, school, and road districts, and election precincts, and to exercise the powers conferred upon boards of supervisors in the matter of calling elections, canvassing the returns, and the like; the provision classifying the county; the one consolidating certain offices; the one providing for the transfer to the new county, when organized, of certain causes which may be then pending in the courts of the county of Los Angeles; and perhaps some others. It would extend this opinion beyond any limit of necessity to discuss each of these objections separately. By the very terms of the act, these provisions relate to the mere incidents of the organization of the county, and provide for acts which must be done in order to complete the organization and preserve the orderly and harmonious administration of the government and the laws. None of them extend in their operation beyond the time when the organization shall have become complete, and the subject-matters of its jurisdiction under the general laws shall have been brought and placed under its control, except, it may be, the single one of the classification of the county, and that extends, as does the classification already made of all the other counties, only until the taking of the next census, and the readjustment of representation. It was and is the duty of the legislature to classify all the counties, and for this purpose it may classify them by population. Article 11, § 5, Const. It had done this as to all the other counties, and it must necessarily classify every new county, as it is organized, according to the best information at its command, until such time as the new county can fall into the line of classification prescribed by the general law. It did so classify this one; the classification to remain in force until, and only until, a readjustment of the classification of all the counties will take place under the provisions of the general law on that subject. We have no doubt of the authority of the legislature to do this; and, as to the objections of a like character made to other separate provisions of the act, we may say, the legislature, having the power to create and organize a new county, had power and authority to adopt the measures necessary to its complete organization, and to the bringing and placing of the subject-matters of the jurisdiction of its courts or officers under their control; and all this might be done by the same act. These things were germane to the main object of the bill. Unless the validity of the whole act depends upon the constitutionality of one or more of these provisions of detail for the organization, the court ought not in this action to express an opinion as to the constitutionality of these separate provisions. It will be time enough to pass upon those provisions when some

right dependent upon the disputed provision is brought before the court for adjudication. Brooks v. Fischer, 79 Cal. 173, 21 Pac. Rep. 652. No one of them that is now questioned seems to be so blended with the general scope and purpose of the act as a whole as to affect the validity of the whole act, or any other of its provisions; therefore, its invalidity, if it should be invalid, would not defeat the general scope and purpose of the act. As to the objection made to the provisions in regard to the holding of the elections, the manner of conducting them, and designating the places of voting, the constitution itself expressly excepts the case of the organization of new counties from the inhibition against local and special legislation. Article 4, § 25, subd. 11. And here it may be remarked that this very exception shows that the framers of the constitution recognized the probable necessity of legislation which might be denominated local or special, in cases of the organization of new counties.

But it is contended that the court ought now to determine the question of the constitutionality of these separate provisions to which attention is called, and of each of them, even if they do not go to the merits of the whole act, and, if any of them be found to be unconstitutional, then to consider and determine the question of whether or not the people would have been likely to have accepted the provisions of the act as a whole, and perfected an organization under it, if the provisions so found to be unconstitutional had been omitted from it. This is inviting the court to enter a field of pure conjecture, and upon a speculation as to probabilities in which we cannot indulge. All that we need to say here is, and that we do say, that the vote of the people was not an act of legislation, and that the act for the organization of the county of Orange is not, as a whole, or in any matter which affects its general scope and purpose, in conflict with the constitution. The judgment appealed from is affirmed in each case.

We concur: BEATTY, C. J.; McFARLAND, J.; SHARPSTEIN, J.; WORKS, J.; PATERSON, J.; THORNTON, J.

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81 Cal. 265

BARTON v. McDONALD. (No. 12,424.)

(*Supreme Court of California.* Nov. 22, 1889.)

CONTRACTORS—NEGLIGENCE—HIGHWAYS.

1. Where a contractor, in violation of a city ordinance, leaves a hole unguarded by light or barriers in a public street which he is repairing, he is responsible to one injured thereby without contributory negligence.

2. A street is none the less a highway because the duty of keeping half of it in repair is imposed on some one other than the public.

3. The contractor's liability does not depend on the authority of his employer to have the street repaired, or whether the employer would be responsible for the injury.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

J. C. Bates, for appellant. *L. Quint*, for respondent.

HAYNE, C. Action against a contractor for negligence in repairing a street. Verdict and judgment for plaintiff for $300. Defendant appeals from the judgment without any bill of exceptions or statement.

It must be taken as established by the verdict that the allegations of the complaint are true. Therefore the fact must be taken to be that the defendant was a contractor, "to repair and replank East street, in said city and county of San Francisco, state of California, from the intersection of Market street with said East street, southerly to and beyond the intersection of Howard street with said East street;" that he entered upon the performance of the work, and on the 20th of January, 1887, he "was engaged in laying plank upon said East street;" that on said day "and on East street, he, the said defendant, carelessly and negligently left a space or hole uncovered, and carelessly and negligently left the same so open and uncovered, without any guard or other protection around the same, or notice to warn persons who might be traveling along or upon said East street of danger, or that they were approaching danger, as they came near or in proximity to said opening or hole, so left open, unguarded, and unprotected as aforesaid; nor did he, the said defendant, keep or have any light or lights about or near said opening or hole, that persons passing along said East street could see said opening or hole, or the danger they were in as they approached the same;" that on said 20th day of January the plaintiff was traveling along said East street, between the streets mentioned, "when, without any notice or warning of approaching danger, and without any fault or negligence on his part, he fell through said opening or hole, so left open and unguarded and unprotected by said defendant as aforesaid," and was injured. The complaint is perhaps not a model of pleading, but we think that it was sufficient, and that the demurrer was properly overruled. If a contractor leaves an unguarded hole in a public street which he is repairing, it is negligence for which he is responsible to those injured thereby without contributory negligence. It appears from the appellant's brief that there is an ordinance of the board of supervisors which contains, among other things, the following provisions: "Any person by whom, or under whose immediate direction, or by whose immediate authority, as principal or as contractor or as employe, any portion of a public street may be made dangerous, shall erect, and, so long as the danger may continue, maintain, around the portion of the street or highway so made dangerous a good and substantial barrier, and shall cause to be maintained during every night, from sunset until daylight, a lighted lantern at the ends of the portion of the street so made dangerous, and every side of a street crossing so made dangerous." The defendant did not comply with the requirements of this ordinance.

East street is a public street. Schulte v. Transportation Co., 50 Cal. 593. And it is conceded by the counsel for the appellant that the court will take judicial notice of the streets. It is none the less a public street because the board of harbor commissioners are charged with the duty of keeping one-half of it in repair. As was said in the case above cited: "Nor is it material by whom the street was improved so as to fit it for travel. By whomsoever the work was done, the plaintiff, in common with the public, is entitled to use the street as a highway." Nor is the question as to who had the authority to cause the street to be repaired important. If the defendant is guilty of negligence in repairing a street under contract with the proper authorities, he is a wrong-doer. If he was guilty of negligence in repairing the street without any competent authority, he is, *a fortiori*, a wrong-doer. It is enough that he left an unguarded hole in the street which he was planking, and that the plaintiff fell into it without any fault on his part, and this sufficiently appears.

The doctrine of *respondeat superior* invoked by the appellant has no application, if for no other reason, because he was not a servant, but an independent contractor. Boswell v. Laird, 8 Cal. 469; O'Hale v. Sacramento, 48 Cal. 214; Du Pratt v. Lick, 38 Cal. 691; King v. Railroad Co., 66 N. Y. 184; Hilliard v. Richardson, 3 Gray, 349; Reed v. Alleghany City, 79 Pa. St. 302. We therefore advise that the judgment be affirmed.

We concur: Belcher, C. C.; Foote, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment is affirmed.

Thornton, J., (*concurring*.) I believe the above conclusion is correct. But I think it is so, notwithstanding the ordinance referred to in the opinion. The defendant was guilty of negligence, independent of the ordinance and its provisions. His negligence was patent to every one, and was pronounced and clear, though the ordinance had never been passed.

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81 Cal. 650

PEOPLE v. SAVERCOOL. (No. 20,456.)

(*Supreme Court of California.* Dec. 5, 1889.)

ASSAULT WITH DEADLY WEAPON—INFORMATION.

An information charging that defendant, at a time and place named therein, "did commit an assault with a deadly weapon, to-wit, a revolver, upon the person of one N.," sufficiently describes the weapon and charges the felonious intent, within Pen. Code Cal. § 245, providing for the punishment of "every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury."

Commissioners' decision. In bank. Appeal from superior court, Plumas county; G. G. Clough, Judge.

C. E. McLaughlin, Dist. Atty., for appellant. *Chipman & Garter* and *W. W. Kellogg*, for respndent.

Foote, C. This is an appeal from a judgment sustaining a demurrer to an information and discharging the defendant. The part of the information material to this controversy is as follows: "William W. Savercool is accused by the district attorney of the said Plumas county, by this information, of the crime of assault with a deadly weapon, committed as follows: The said William W. Savercool, on the 21st day of January, A. D. 1889, at the said county of Plumas, did commit an assault with a deadly weapon, to-wit, a revolver, upon the person of one Elijah Nicholson, contrary to the form, force, and effect of the statute in such case made and provided, and against the peace and dignity of the people of the state of California." The points made in favor of the judgment are: That the information did not charge the defendant with "any criminal or felonious intent;" that it did not sufficiently describe the weapon alleged to have been used in making the assault. Section 245 of the Penal Code, under which the information was drawn, is: "Every person who commits an assault upon the person of another with a deadly weapon or instrument, or by any means or force likely to produce great bodily injury, is punishable," etc. Examining the information, we find that it follows the language of that section. This is all that is necessary. The ultimate or issuable facts which the statute declares to constitute the offense are to be pleaded substantially in the language of the law, while probative facts, such as the intent with which an assault is made, and the "present ability" to do it, must be proved, but need not be alleged in the information or indictment. People v. White, 34 Cal. 183–188; People v. Cronin, Id. 210; People v. Turner, 65 Cal. 540–542, 4 Pac. Rep. 553. It being charged that the assault was made with a "deadly weapon," as the statute prescribes, it was unnecessary to have described it further as "to-wit, a revolver," as was done. The kind of weapon was a matter of proof only. People v. Congleton, 44 Cal. 92–94. We think the information was sufficient, and that the judgment should be reversed, and so advise.

We concur: Belcher, C. C.; Vanclief, C.

Per Curiam. For the reasons given in the foregoing opinion, the judgment is reversed.

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81 Cal. 286

HARRIS *et al.* v. FRANK. (No. 11,422.)

(*Supreme Court of California.* Nov. 23, 1889.)

FRAUDS, STATUTE OF—PROMISE TO ANSWER FOR DEBT OF ANOTHER—PLEADING.

1. In an action for goods sold and delivered, and money advanced to defendant on his alleged promise to pay for them, where the evidence shows that the goods were delivered and the money advanced to another, and so charged by plaintiffs, the defendant cannot be held as an original contractor, he being, at most, but a guarantor.

2. The guaranty of defendant, being only a verbal one, was within the statute of frauds; Civil Code Cal. § 1624, providing that a contract to answer for the debt of another is void, where the same, or some note or memorandum thereof, is not in writing, and signed by the party, unless within certain exceptions named in section 2794, which are not applicable to defendant's promise.

3. As the declaration contained only the common counts, a contract of guaranty not being pleaded, defendant was not required to plead the statute of frauds, but had a right to avail himself of it under his general denial.

Works and Paterson, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Civil Code Cal. § 1624: "The following contracts are invalid, unless the same, or some note or memorandum thereof, be in writing, and subscribed by the party to be charged, or his agent: * * * A special promise to answer for the debt, default, or miscarriage of another, except in the cases provided for in section 2794 of this Code."

P. Reddy, (*W. H. Metson*, of counsel,) for appellants. *Manuel Eyre*, (*M. S. Eisner* of counsel,) for respondent.

FOX, J. Since the trial in the court below the defendant, Frank, has died, and the case is prosecuted here against his executors. The action is *indebitatus assumpsit.* Complaint in two counts,—one for goods, wares, and merchandise sold and delivered; and the other for moneys advanced, paid out, and expended,—both alleged to be for and at the special instance and request of defendant. Answer, specific denial of each allegation of the complaint, and a plea that the plaintiffs, who sue as partners in business, have not complied with the requirements of sections 2466 and 2468 of the Civil Code. On the latter plea no point is made on this appeal. Judgment went for defendant, motion for new trial made and denied, and plaintiffs appeal. The appeal is based entirely on the ground that the evidence is insufficient to support the findings.

The pleadings in this case give no intimation as to what is the real character of the action. The leading facts, as developed upon the trial, are: The plaintiffs were partners, carrying on a general merchandise business at Independence, in Inyo county. The defendant was an aged and retired man, of some means, residing at San Francisco. His sons and son-in-law were the owners of most of the capital stock and the principal officers of the Kearsarge Mill & Mining Company, a corporation owning and operating a mill and mine near Independence. This corporation had for a year or more an account at plaintiffs', from whom they purchased supplies used in its mining operations, and upon whom it had also drawn, from time to time, for moneys in the payment of its current expenses, making payments from time to time, as stocks were sold or moneys were otherwise realized by the company. In May, 1879, the balance against the company was something over $2,000, when plaintiffs notified Gray, the superintendent, that the credit of the company was stopped, and they could not give it further accommodation. Gray told them that the defendant, his father-in-law, was coming up in a few days, and that the company would arrange with him to secure them for such accommodation as it might need, and it would be all right; whereupon they consented to let him have such further supplies as might be absolutely necessary for the time being, and they did so. In the latter part of May, 1879, the defendant did go up and visit the mine. He had never been there before, and had no personal interest in the property or in the stock of the company. After visiting the mine in company with an expert, he went to the store of plaintiffs, and made some trifling purchase, and then had a conversation with the plaintiffs on the subject of the company's account and dealings with plaintiffs. Just what that conversation was, and the legal effect of it, is the whole subject-matter of dispute in this case.

It is conceded on all hands that no writing was made by or between the parties. But plaintiffs contend, with great earnestness, that the conversation was such as amounted in law to an original contract on the part of the defendant, giving to plaintiffs *carte blanche* to furnish the company with goods and money to any extent that the officers might call for, charge the same to the company as before, adding or including the present balance due, render monthly statements to the officers, and that he (defendant) would pay the bills; payments to be received through the company as theretofore. On the other hand, it is contended, on behalf of the defense, that nothing which transpired in that conversation was such as can be held in law to be an original contract on the part of the defendant to pay for goods or money furnished to or for the company, or thereafter to be so furnished, or even such as to make the defendant a guarantor for the company. The evidence is conflicting as to what was said or done at that conference. According to that on behalf of plaintiffs, the conversation was principally between the plaintiff Rhine and the defendant, but the plaintiff Harris and one Seeley were also present at the time. The two latter do not fully corroborate the former, but both of them disclaim having heard all the conversation which occurred between Rhine and the defendant. If the case rested, however, upon the oral testimony alone of these three, there would be much ground for argument that the contract was an original one on the part of the defendant, under which he would be liable for the goods and money furnished after the date of the contract. But the case does not rest upon their oral testimony alone. The defendant flatly contradicts the testimony of plaintiffs as to what occurred at that time. According to his evidence, all that he said at that time amounted to a mere expression of opinion as to the merits of the mine, and as to the fact that the plaintiffs would not ultimately "lose anything by the boys." It is contended that no weight should be given to his evidence, for when called to testify he was old and feeble, and his memory impaired. Taken by itself, we should not feel disposed to give his testimony much weight. But there is much evidence besides his which is in conflict with that portion of plaintiffs' testimony which tends to show an original contract. A conversation between the two partners, immediately after the defendant had left their store, tends to show that neither of them at the time understood his agreement to be an original contract, but a mere guaranty, and Harris told Rhine at the time that he was a fool, or words to that effect, for not having it in writing. Statements subsequently made by them to others are to the same effect. The testimony of witnesses called on both sides, and examined as to what the old gentleman said he was going to do, and as to what he was requested by the superintendent to do, also goes to show that his purpose, and all that was requested or expected of him, was not to open for himself an account, in his own or any other name, but simply to establish the credit of the company, so that it could continue to receive its accustomed accommodation at plaintiffs' store.

The subsequent course of business also furnishes strong circumstantial evidence in conflict with the theory of original contract. The fact that the charges were thereafter made to the company and the monthly statements rendered to its officers would not of itself have any weight in that direction, for, according to the testimony of plaintiffs, this was in accordance with their instructions. But the law is clear that if any credit was in fact given to the company, or it was in any degree liable for the indebtedness, then the defendant cannot be held as an original contractor, but at most as a mere guarantor. Brown v. Bradshaw, 1 Duer, 199; Rogers v. Kneeland, 13 Wend. 114; Welch v. Marvin, 36 Mich. 59; Bugbee v. Kendricken, 130 Mass. 437; Langdon v. Richardson, 58 Iowa, 610, 12 N. W. Rep. 622; Cole v. Hutchinson, 34 Minn. 410, 26 N. W. Rep. 319; Noyes v. Humphreys, 11 Grat. 643; Robertson v. Hunter, 6 S E. Rep. 850. Many other cases could be cited to the same effect. And the question whether the contract was one of original promise, or of guaranty merely, is always one for the jury (or in this case for the trial court) to determine from the surrounding circumstances of the case. Dean v. Tallman, 105 Mass. 443; Glenn v. Lehnen, 54 Mo. 45; Cowdin v. Gottgetreu, 55 N. Y. 650; Bloom v. McGrath, 53 Miss. 249; Eshleman v. Harnish, 76 Pa. St. 97; Moshier v. Kitchell, 87 Ill. 18; Pettit v. Braden, 55 Ind. 201. The fact, as shown conclusively by the evidence, and uncontradicted, that the plaintiffs continued to furnish the company with money and goods as they required the same, until the mine closed down in December, 1879; that neither during that time, nor ever until November, 1880, did they make any report to or demand on the defendant, or even intimate to him the state of the account; that during all that time they were at different times calling upon the officers of the company for money; that all the money they ever did receive was from the officers of the company; that shortly before the mine closed down they made advances to the amount of $1,200 in money at the special and personal request of the president, and on his assurance that the company would place a goodly amount to their credit in San Francisco,—all these are circumstances tending strongly to show that the plaintiffs regarded the company as their original debtor, and not the defendant. There is also a sharp and substantial conflict in the evidence as to what occurred at the house of defendant when plaintiff called upon him in November, 1880, in reference to the account. The plaintiff Rhine, who made the call, testifies substantially that he then told defendant that he had been unable to collect the bill from the company, and demanded that he should pay it as he had contracted to do; and that defendant told him that he had no money, but proposed to assign to him certain mortgage securities in satisfaction of the bill. Defendant denies that he made any such offer, or that Rhine claimed that he (the defendant) was the debtor; but in the same connection he says he was sick and got excited, and does not remember exactly what Rhine did say. Daniel Harris testifies that he was present at that interview, and that what transpired was as follows: "Rhine commenced to say, 'I have got no money from the boys yet;' and Mr. Frank said, 'Well, I have not got anything to do with the boys.' 'Well,' Mr. Rhine says, 'I would like to have the money.' 'Well,' he said, [Frank,] 'Do I owe you anything?' and Mr. Rhine said, 'No; you don't owe me anything, but you could see the boys, you know, so they could pay me along, even if it is not all at once.' And later on Frank said, 'Did I promise you anything?' and he said, 'No.' 'Do I owe you anything?' He said, 'No; * * * but you go down to the boys and tell them, so that I can get something out of them;' and he says he has nothing to do with it, nor will he have anything to do with it whatever." There are several other instances in the record where Mr. Rhine is directly contradicted by other witnesses as to what he has himself said about this transaction at different times. The court below has, as it was its duty to do, found upon the question of whether or not the defendant became an original promisor for the payment of this debt; and in view of the substantial conflict which we find in the evidence, oral and circumstantial, bearing upon the question, we cannot disturb that finding.

As we have said, there is also a conflict as to whether or not he became a guarantor; but that conflict is evidently not so marked or substantial. If there was such a contract, however, not being in writing, it was void, under sections 1624 and 2794 of the Civil Code. Plaintiff contends that it was not void under those sections, but simply voidable, and that defendant has waived any defense under the statute by failing to plead it, and because "it does not appear from the record" that the evidence was objected to. The complaint being upon common counts only, with no intimation that plaintiff relied upon a contract of guarantee, the defendant was not called upon to, and could not, plead the statute of frauds, but had a right to avail himself of it under his general denial. Duck Co. v. Dewey, 6 Gray, 446; Durant v. Rogers, 71 Ill. 124; Taylor v. Merrill, 55 Ill. 52; Hunter v. Randall, 62 Me. 425. It is true that the record does not show that the evidence was objected to; nor would it do so, even if such were the fact. The appeal is by plaintiffs, and the objections and exceptions of defendant have no place in the record. The presumptions are in favor of the rulings and findings of the court below, and we see nothing in the record to overcome such presumption. These being the only points made upon the appeal, it follows that the judgment and order appealed from must be affirmed. So ordered.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; MCFARLAND, J.; THORNTON, J.

We dissent: WORKS, J.; PATERSON, J.

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81 Cal. 296

BARRETT *v.* MARKET-ST. C. RY. Co.

(No. 12,506.)

(*Supreme Court of California.* Nov. 26, 1889.)

CARRIERS—STREET-CARS—TENDER OF FARE.

It is not necessary that a passenger on a street-car should tender the exact amount of his fare, but he must tender a reasonable amount, and the carrier must furnish change, and five dollars is such a reasonable amount.

Department 1. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

W. H. L. Barnes, for appellant. *Stanly, Stoney & Hayes*, for respondent.

PATERSON, J. Action for damages for the forcible ejection of plaintiff from one of defendant's cars. The defense was that the plaintiff had refused to pay his fare, and that, therefore, the defendant was justified in ejecting him. The trial court gave judgment for the plaintiff, and the defendant appeals upon the findings. The material portions of the findings are as follows: "That while in said car, as such passenger, and when said car was near the corner of Second and Market streets, the conductor in charge of said car, on behalf of the defendant, did, in the course of his employment as such conductor, demand of the plaintiff the payment of the sum of 5 cents; being the legal fare and cost of transportation on said car. That said plaintiff did not have in his possession any coin or currency of the exact value of 5 cents, or any coin of any smaller denomination than a $5 gold-piece, lawful money of the United States, and plaintiff, in response to said demand of said conductor, offered said conductor a $5 gold-piece, and told said conductor to take his (plaintiff's) fare out of said sum of $5. That the conductor refused to accept said $5 gold-piece, informing the plaintiff that he was unable to make change for said $5 gold-piece, and insisted upon the payment to him by the plaintiff of the exact sum of 5 cents, at the same time directing plaintiff if he did not produce and pay said sum of 5 cents to leave the car. That the plaintiff informed the conductor that the $5 gold-piece was the smallest coin he had; that he was willing to pay his fare, but could not furnish the exact amount; and refused to leave the car upon the demand of the conductor. That thereupon the conductor stopped said car, and called the driver to his assistance, and both of them thereupon seized the plaintiff, and, against his protest, opposition, and struggles, forcibly ejected him from said car at the corner of said Second and Market streets and in so doing inflicted upon plaintiff various bruises and injuries. * * * And the court finds from the foregoing facts alone that the plaintiff did not refuse to pay fare for his transportation on said car, and did not insist upon any right, or supposed right, to be transported free of charge, under any circumstances or upon any condition, and that plaintiff was not ejected or put out of said car for a refusal to pay his fare. And as a conclusion of law, from the foregoing facts, the court finds that the plaintiff is entitled to judgment," etc. It is stipulated by counsel "that, if plaintiff were entitled to damages, $500 was a fair and just estimate thereof."

The question on the merits to which counsel have mainly directed their arguments is whether the passenger was bound to tender the exact fare. It is argued for the appellant that the rule in relation to the performance of contracts applies, and that the exact sum must be tendered. But we do not think so. The fare can be demanded in advance as well as at a subsequent time. Civil Code, § 2187. And, so far as this question is concerned, we see no difference in principle where the fare is demanded in advance and where it is demanded subsequently. If it be demanded in advance, there is no contract. The carrier simply refuses to make a contract. Consequently the rule in relation to the performance of contracts, whatever it be, has no necessary application. The obligation of the carrier in such case would be that which the law imposes on every common carrier, viz., that he must, "if able to do so, accept and carry whatever is offered to him, at a reasonable time and place, of a kind that he undertakes or is accustomed to carry." Id. § 2169. This duty, like every other which the law imposes, must have a reasonable performance; and we do not think it would in all cases be reasonable for the carrier to demand the exact fare as a condition of carriage. Suppose that on entering a street-car a person should tender the sum of 10 cents? Would it be reasonable for the carrier to refuse it? Prior to the act of 1878, the usual fare was 6¼ cents. In such a case it would be unreasonable for the carrier to demand the exact fare; for there is no coin in the country which would enable the passenger to answer such a demand. It would be impossible for the passenger to furnish such a sum. Consequently, to allow the carrier to maintain such a demand would be to allow him to refuse to perform the duty which the law imposes upon him. The fare which he is now allowed to charge is no longer the sum mentioned. The act of 1878 forbids him to "charge or collect a higher rate than 5 cents." But there is nothing to prevent a lower rate from being charged. The carrier might fix it at 4¼ cents, and in such a case it would be equally impossible for the passenger to comply with such a demand as in the case above put. Consequently, it will not do to lay down the rule that the passenger is obliged to tender the exact fare.

But it does not follow that the passenger may tender any sum, however large. If he should tender a $100 bill, for example, it would be clear that the carrier would not be bound to furnish change. The true rule must be, not that the passenger must tender the exact fare, but that he must tender a reasonable sum, and that the carrier must accept such tender, and must furnish change to a reasonable amount. The obligation to furnish a reasonable amount of change must be considered as one which the law imposes from the nature of the business. Section 2188 of the Civil Code provides that "a passenger who refuses to pay his fare, or to conform to any lawful regulation of the carrier, may be ejected from the vehicle by the carrier." The question is whether the findings show a refusal to pay,—whether the tender of a $5 gold-piece was sufficient.

It is claimed by appellant that the establishment of the rule contended for by the respondent would lead to great inconvenience, and make it the duty of the carrier of persons for hire in street-cars to provide its conductors with sufficient small coin to do a general exchange business with all passengers; thus requiring the company to intrust, to a class of employes who are usually of no pecuniary responsibility, large sums of money. It is further said that if the tender of a $5 gold-piece is a tender of the amount actually due, and the conductor is bound to receive it and return $4.95 to the passenger, the same principle would apply to the offer by the passenger of $10 or $20 in gold or currency. With the question of convenience, however, we have nothing to do, except in so far as it bears upon the question whether the amount tendered was a reasonable sum,—such as the carrier was bound to accept. It does not follow, if it be established as a rule, that $5 is a reasonable amount to be tendered to a conductor, that $20 or $50 is also a reasonable amount, and must be accepted. The fears of the appellant are based upon the assumption that passengers generally will contumaciously, to avoid the payment of fare, and require the companies to carry them free, offer coin of a large denomination. But these fears, we think, can safely be set aside upon the theory that a question like this will, as is usual, settle itself by a spirit of mutual accommodation between carrier and passenger. It is a well-known fact that the $5 gold-piece is practically the lowest gold coin in use in this section of the country.

The case upon which the appellant relies (Fulton v. Railroad Co., 17 U. C. Q. B. 428,) is not quite in point. In that case the plaintiff had boarded a train of cars without a ticket, and when asked for his fare declined paying it, as he said he had not made up his mind how far he should go. The conductor told him that he must decide, and afterwards, on his declining again on the same ground, stopped the train and put him off. The plaintiff then tendered the conductor a $20 gold-piece, telling him to take his fare, $1.35, out of it. Under these circumstances the court very properly held that the plaintiff had refused to pay his fare, within the meaning of a statute very much like our own, and that the conductor was justified in refusing to carry him further. The court said: "The general practice is for the passengers to pay at the office, and get tickets, * * * and a person rushing into a car without a ticket has no reason to expect that he will find the conductor prepared to change a twenty-dollar gold-piece, for he relies upon receiving tickets from the parties, or, if money is to be paid to him instead, that it will be paid with reasonable regard to what is convenient under the circumstances." A distinction ought to be made, we think, between passengers traveling on steam railroads and those traveling on street railroads. Passengers of the former class are expected to prepare themselves with tickets procured at the regular office established at the station where the trains regularly stop. Horse-cars and cable-cars stop at all points along the road at the beck of those desiring to ride, and the conductors do not, as a general thing, expect to receive tickets for the passage. Judgment and order affirmed.

We concur: Fox, J.; Works, J.

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81 Cal. 641

Davies-Henderson Lumber Co. v. Gottschalk *et al.* (No. 13,081.)

(*Supreme Court of California.* Dec. 4, 1889.)

Mechanics' Liens — Material-Men—Appeal—Parties.

1. Code Civil Proc. Cal. § 1183, providing liens for contractors, laborers, and material-men, requires the construction contract, where the amount exceeds $1,000, to be in writing, and to be filed in the recorder's office of the county where the property is situated; otherwise it shall be void; "and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." *Held* that, as the contract is void when not recorded, the material-men are entitled to a lien without regard to the amount due on such contract. Following Kellogg v. Howes, ante, 509.

2. As the contract is void, and nothing due or to become due to the contractor, it is not necessary for the material-men to give notice to the owner of the amount they are entitled to, as provided for by section 1184, in cases where there is a recorded contract. Following Kellogg v. Howes, ante, 509.

3. Section 1187 provides that the claim of lien must contain a statement of the demand, with the name of the owner, and also the name of the party by whom he was employed, or to whom he furnished the materials. *Held*, that it was unnecessary for a material-man to state in such claim the relation of the party to whom he furnished the material to the owner, and that, the construction contract being void, he was deemed by the law to have furnished to the owner, for the purpose of the lien.

4. If it is necessary that there be some one personally liable in order to support a lien, such liability is found in the person of the subcontractor to whom the materials are furnished, but it is not necessary that the owner be personally liable.

5. Though, under a valid construction contract, the lien of one furnishing material to a subcontractor might not attach until notice is given the owner, under a contract void for want of record, the material-man being deemed by the statute to have contracted with the owner, his lien relates to the time of furnishing the material, and is not defeated by the subsequent filing of a declaration of homestead on the property.

6. A statute which subjects a homestead to a lien for materials furnished in its construction is not unconstitutional as impairing the obligation of a contract, but is a mere change of remedy.

7. On an appeal by material-men from a judgment denying a lien, it appeared that a subcontractor, against whom a personal judgment had been had in the same action, in favor of the material-men, and from which no appeal had been taken, had died since the rendering of the judg-

ment. *Held*, that it was not necessary that he should be represented, as his interests were in no way involved in the appeal.

McFarland, J., dissenting.

In bank. Appeal from superior court, Los Angeles county; H. K. S. O'Melveny, Judge.

Chapman & Hendrick, for appellant. *Louis Gottschalk*, for respondents.

Works, J. The respondent Ann Twohey, being the owner of certain real estate, attempted to contract with the respondents Strange and Gottschalk for the construction of a dwelling-house thereon. The contract price for constructing the house was more than $1,000, and the contract was not in writing or filed in the recorder's office. For these reasons it was wholly void. Code Civil Proc. §§ 1183, 1184. Strange and Gottschalk subcontracted the construction of the house to one Tittle, who was a party defendant in the court below, but whose death has been suggested in this court. The appellant furnished material for the construction of the building to the subcontractor, Tittle. It did not give any personal notice to the owner of the building that it had furnished the material. Tittle was paid in full before the appellant's claim of lien was filed. The appellant filed its claim of lien against the building in proper time, and in due form, in which it was stated that Strange and Gottschalk were the original contractors for the construction of the building, and Tittle the subcontractor, and that it had furnished the material to said Tittle, the same to be furnished "from time to time, as ordered, for so much as the same was worth." The complaint alleges the making of the contract between the owner and original contractor, and between the latter and the subcontractor, and the contract between the subcontractor and the plaintiff for the materials, substantially as stated in the claim of lien, and also alleges the facts above stated, showing that the original contract was void. The court below found the facts substantially as alleged, and rendered a personal judgment against the contractor and subcontractor for the amount of plaintiff's claim, but found against the plaintiff as to its claim of lien against the owner, and rendered judgment accordingly. The plaintiff appeals on the judgment roll from the judgment against it and in favor of the defendant Twohey.

The respondent contends that the action cannot proceed in this court until some one is substituted to represent the defendant Tittle, whose death has been suggested. There is nothing in this point. Tittle's rights are not involved in the appeal. There was a personal judgment against him in the court below, from which neither party has appealed; and he is in no way interested in the present appeal, nor is his presence, or that of his representative, necessary to a full determination of the matters before us.

It is further contended by the respondent that the complaint was insufficient, (1) because it alleged and proceeded on the theory that the original contract was void, while, as she insists, the contract was not void as between the owner and material-man, as held in Powder Co. v. Flume Co., 78 Cal. 193, 20 Pac. Rep. 419; (2) because it failed to show that anything was due from the owner to the contractor. These questions were fully considered in Kellogg v. Howes, ante, 509, (opinion filed November 7, 1889,) and decided adversely to the contention of the respondent.

It is further claimed by the respondent that the judgment of the court below was right because it found that the personal notice provided for in section 1184 of the Code of Civil Procedure was not given. The notice referred to was not necessary in this case. Its only object and purpose, as indicated by the statute, is to compel the owner to withhold payments due the contractor, for the better security of the material-man. In this case there was no contract, and no payments to stop. Not only so, but the statute provides that, where the contract is not made as required and filed in the recorder's office, "the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." Code Civil Proc. § 1183; Kellogg v. Howes, supra; Lumber Co. v. Schmitt, 74 Cal. 625, 16 Pac. Rep. 516. If the owner was in contemplation of law the purchaser from the plaintiff, the latter was entitled to its lien for the value of the material furnished, without reference to any payments to the contractor. In other words, she stood in precisely the same position, as to the right of the appellant to enforce its lien, as if she had purchased the material directly from it. It must be apparent from this view of the case that she could not pay the contractor, to whom she was not liable, and thereby avoid the demand of the appellant, to whom she was liable, and that the service of the personal notice provided for in section 1184 would have been useless. The only effect of such notice, as provided by the statute, is that "it shall be the duty of the owner to, and he shall, withhold from his contractor * * * all money due or that may become due, to such contractor, * * * or sufficient of such money to answer such claim, and any lien that may be filed therefor for record, * * * and all money paid thereafter by the owner to the contractor * * * shall, for the purposes of all liens of all persons except that of the contractor, be deemed a payment prior to the time the same was due within the meaning of, and subject to the provisions of, this section." Code Civil Proc. § 1184. Other provisions of the section make this clear. The contract must be so made as to require payments to be made in installments, 25 per cent. of which must be payable at least 35 days after final completion of the work and contract. When such a contract is filed for record, it is notice that payments are to be made as therein provided for. If the 25 per cent. which must be withheld until after the claim of lien is filed is sufficient to pay his claim, the material-man need not give the personal notice provided for, and thereby stop the other payments. If such last installment will not be sufficient, he may give the necessary notice, which compels the owner to withhold other payments. But, if the contract is not filed in the recorder's office, it is not only void by the express terms of the statute, but he has no notice of the amount of payments to be made, or when they will fall due, or at what time he is required to give the personal notice. As a penalty for not affording him this means of knowledge, by filing such a contract as is required by the statute, the owner is deemed to have contracted for the material, so far as the right to a lien is concerned, and his property is bound for the value of such material. It seems to us that the language of the statute, and its object and purpose in this respect, are too plain to need construction. Besides, it appears in this case that the whole amount due, conceding the contract to have been valid, was paid before the 35 days after the completion of the contract had expired; and, in any view of the case, the appellant was entitled to its lien, to the extent of the 25 per cent. which was paid before it was due.

The respondent makes the further point that the appellant showed no cause of action for the enforcement of the lien, for the reason that the claim of lien was for material furnished to a contractor, and the action is for the enforcement of a claim of lien based upon the theory that there was no contract or contractor, and that the material was furnished to the owner. The claim of lien must contain a "statement of the demand after deducting all just credits and offsets, with the name of the owner and reputed owner, if known, and also the name of the person by whom he was employed, or to whom he furnished the materials, with a statement of the terms, time given, and conditions of his contract, and a description of the property to be charged with the lien." Id. § 1187. There is nothing in the section, or any other, that requires the material-man to state in his claim of lien what relation the person to whom he furnished the material bore to the owner, —whether contractor or agent; nor does the burden of determining whether any contract made, or attempted to be made, between the owner and contractor was valid or not rest on him when he comes to file his lien. He must state the facts required by the statute. Whether the person to whom he furnished the material had authority to bind the owner, and entitle the material-man to a lien, is a matter of pleading and proof at the trial. The complaint did not vary from the claim of lien in any material respect. It alleged the facts as stated in the claim of lien, and, in addition, alleged the facts showing that by virtue of what was stated in such claim, and other facts alleged, the property of the defendant was liable for the lien. The plaintiff could not have stated in its sworn claim that it had furnished the material to the owner, because such a statement would have been false. But the statute steps in, and provides that, the material having been furnished to the subcontractor, under the circumstances alleged in the complaint, the same should be deemed to have been furnished to the owner for the purposes of the lien. The facts stated in the claim of lien, and the provisions of the statute applied thereto, entitled the plaintiff to the lien; and there was no variance between the claim filed and the one attempted to be enforced. The case of Goss v. Strelitz, 54 Cal. 640, relied upon by the respondent, is not in point. There the attempt was made to recover for material not included in the claim of lien.

Again, it is urged by the respondent, in support of the judgment, that, in order to support the lien, there must have been some personal liability on the part of some one. This may be so, though we do not so hold. But here there was a personal liability. The subcontractor, who purchased the material from the plaintiff, was personally liable therefor, and a personal judgment was rendered against him by the court below. There need be no personal liability on the part of the owner. The owner is not made personally liable to the material-man, but his property is made liable for the material he has actually received, and retains in his building. This, it seems to us, is eminently just and right.

The respondent, after her contract with the contractor, and after the plaintiff had furnished the material, and it had gone into the building, filed a declaration of homestead on the property; and it is claimed that this defeated the lien. This is based on the ground that, as the law stood at the time the material was furnished, a claim for material could not attach to a homestead. A complete answer to this contention is that the lien must be held to relate to the time of furnishing the material, and at that time the homestead did not exist. In some of the earlier cases a distinction was made, in this respect, between contractors with the owner and subcontractors. As to the former, it was held that their liens attached at the commencement of the work, and as to the latter, that their liens were in the nature of attachments, and attached at the time notice was given to the owner. Cahoon v. Levy, 6 Cal. 295. But this distinction does not exist under the present statute, where the original contract is void. In such case the contract is, by the terms of the statute, deemed to be the contract of the owner, and the lien must be held to attach as in case of such a direct contract. Any other construction would relieve the owner from any liability, under the circumstances of this case. He could get his house completed, declare his homestead, and say to the original contractor: "Your contract is void, and I am not personally liable to you, nor is my property subject to any lien in your favor;" and to the material-man he could say: "After getting the full benefit of your material, and just before you could file your lien under the statute, I filed my declaration of homestead, and your lien comes too late." We do not wish to be understood as agreeing to the doctrine declared in the early decision cited, that the lien of a material-man did not attach at the time of furnishing the material, even under the former statute, (Association v. Wagner, 61 Cal. 349;) but, conceding it to have been so under the then existing statute, it is clearly not so now, where the contract is void for any of the reasons stated in the statute. Another conclusive answer to this claim of a homestead is that two days before the homestead was declared the law was so changed that a homestead, if properly declared, and in time, became subject to a lien for material. St. 1887, p. 81; Deer. Codes, Supl. p. 279, § 1241. Therefore, conceding that the lien did not attach until the claim was filed, the homestead was then subject to the lien, and the declaration filed did not affect it. The respondent contends that the amendment of the statute could not affect her rights, because it affected an existing contract. Counsel seems to forget his claim, so strenuously urged upon us, that there was no contract relation between the plaintiff and his client. But, conceding there was, the statute did not in any way affect the contract. It only took away the right of the respondent to defeat a just claim against her property, conceding counsel's position that the lien did not attach until notice was given. The judgment in favor of the defendant Twohey, and against the plaintiff, is reversed, with instructions to the court below to render judgment on the findings in favor of the plaintiff, foreclosing its lien.

We concur: BEATTY, C. J.; FOX, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.

I dissent: MCFARLAND, J.

(81 Cal. 634)

BRANDT v. CLARK *et al.* (No. 13,444.)

(*Supreme Court of California.* Dec. 4, 1889.)

TENDER—INTEREST.

There being conflicting evidence as to whether tender of the purchase price was made at the proper time, the allowance of interest to the vendors to the time of the trial should not be disturbed, especially where the vendees have been in possession, and had the use of the property.

Department 1. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

F. K. Clark and *R. L. Horton*, for appellants. *J. D. Bicknell*, for respondent.

WORKS, J. There is a motion in this case to strike out the statement. As is usually the case, the motion is the result of inattention to the simple provisions of the Code by the attorneys for the appellants. The appeal is from the judgment. The point made is that the paper containing the evidence and the exceptions of the appellants is a statement of the case made in support of a motion for a new trial; that no motion for a new trial was made; and that under section 950 of the Code of Civil Procedure such a statement can only be used, on an appeal from the judgment, where it has been used in support of a motion for a new trial. This is the language of the section referred to. But counsel for the appellants say the paper relied upon may be treated either as a statement of the case or as a bill of exceptions. This is strictly true. It is entitled "Statement and Exceptions," and might with equal propriety be treated as a statement of the case, a bill of exceptions, or neither the one nor the other. We have never been able to understand why a statement was provided for in the Code, and having been provided for, we are equally at a loss to know why it should ever be resorted to in practice. A bill of exceptions has always been a well-known means of preserving exceptions and bringing up the evidence on appeal. It is a simple and convenient method of accomplishing these results, and is equally applicable to any and all kinds of appeals provided for by the Code. Code Civil Proc. §§ 646, 653, 661, 950. If attorneys could be induced to abandon entirely the practice of using, or attempting to use, a statement of the case, and resort exclusively to a bill of exceptions, much of the uncertainty and confusion that has crept into the practice on appeals to this court might in time be removed, and some degree of order and system in the practice in this respect be reasonably hoped for. As it is, a great portion of the time of this court, that should be devoted to the decision of cases on their merits, is taken up with these petty questions of practice.

As to the question presented by the motion in this case, we have not been able to satisfy our own minds whether the point made is well taken or not. If the language of the section is to be construed literally, a statement prepared on a motion for a new trial cannot be used on an appeal from the judgment, unless it has been used in support of the motion. But there is no reason apparent to us why this should be so. We are inclined to the belief that the section should not receive this strict and literal construction; but the conclusion we have reached on the merits of the case renders it unnecessary to decide the point, and we prefer to leave it open for further consideration, if it should ever become necessary.

This action was brought by the respondent, as the vendor of real estate, to correct a mistake in an agreement made by her to one of the appellants to convey certain property, and to recover the purchase money. The defendants denied the mistake alleged by the plaintiff, but in their answer, and by way of cross-complaint, averred another and different mistake, and further alleged that they had tendered payment of the purchase money, as provided in the contract, upon receiving a deed for the real estate actually purchased by them. The court found the mistake substantially as alleged by the defendants, that a small portion of the property agreed to be conveyed was not the property of the plaintiff; that the piece not owned by her was of the value of $100; that no tender of the purchase money had been made; allowed the defendants $100 deduction from the contract price for the tract of land for which they could get no title; decreed a conveyance of the balance; and rendered judgment against the defendants for the purchase money, with interest, and one-half the costs. The defendants appeal from part of the judgment.

It is contended that the court below erred (1) in allowing the defendants a right of way or easement of a certain road-way or street, instead of a fee in the land over which the road passed; (2) in allowing the plaintiff interest on the deferred payment of the purchase money from the time it fell due, by the terms of the contract, until the trial; (3) in allowing but $100 for the strip of land for which plaintiff had no title; (4) in decreeing a certain lot in controversy by reference to a map instead of by metes and bounds, whereby the fee of a certain private road-way is cut off, and a certain "drive" inserted, by reason of which the premises are cut in two; (5) the omission in the description of a certain other roadway; (6) the allowance of a less amount of water stock than the defendants were entitled to; (7) in compelling the defendants to pay one-half of the costs. Some of these questions depend upon the construction to be placed upon the agreement to convey, and others upon the evidence given at the trial. Upon a careful examination of the agreement and of the evidence, we are of the opinion that the court below did not err in any of the matters complained of.

It is claimed that the court erred in excluding certain evidence offered by the defendants; but we think otherwise. There is nothing in any of these objections that makes it necessary or expedient for us to notice or pass upon them, except in this general way. As to the allowance of interest on the purchase money, whether it should be allowed or not depended upon whether a tender of the purchase price had been made at the proper time. Upon this question the evidence was conflicting; and the findings should not be disturbed, for that reason. But there was no injustice in requiring the defendants to pay interest, as they had been in possession and had the use of the property during all of the time the interest was allowed. Judgment affirmed.

We concur: Fox, J.; Paterson, J.

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81 Cal. 340

MILLARD v. SUPREME COUNCIL AMERICAN LEGION OF HONOR. (No. 11,716.)

(*Supreme Court of California.* Nov. 29, 1889.)

MUTUAL BENEFIT INSURANCE—FINDINGS OF FACT.

1. In an action by the beneficiary, on a certificate of mutual benefit insurance, the court found that at the time when the certificate was issued to decedent he had become a member of the association, and had complied with all its requirements; that members could only know of the levy of an assessment by notice served on them; that decedent, on the day he was notified of his suspension for non-payment of a delinquent assessment, of which he had had no notice, paid the same, and all prior assessments due, and a subsequent one which had not yet become delinquent; that thereafter, when all assessments had been paid, and accepted by the association, decedent gave notice of the substitution of plaintiff for the original beneficiary, in the regular manner; that only one meeting having taken place since decedent's suspension, at which no action was taken in reference thereto, he was not reinstated into full membership until shortly after this notice and shortly before his death. *Held*, that there was a sufficient finding that decedent was a "member in good standing" at the time of his notice.

2. Such finding is immaterial, as the association had waived any right of forfeiture it may have had, by receiving and retaining the amounts of the assessments paid by decedent after his suspension.

3. Such facts are a sufficient finding as to the denials of the answer regarding the several suspensions of decedent, as there was no allegation that he was suspended at any other time, or for any other reason than delinquency in paying his assessments.

4. Such findings of fact, together with a finding that at the time of his death decedent was a member in good standing and had complied with all requirements of the association and of his certificate, are sufficient to avoid an objection that there was no finding on that issue, though the latter finding was classed under "conclusions of law."

5. The beneficiary was not required to furnish proof of death by the certificate or by-laws, the former merely requiring "satisfactory evidence of the death of said companion," and proof of death was required to be furnished to the supreme council only by the council of which decedent was a member. *Held*, that a finding of satisfactory proof of death by the beneficiary was immaterial, and had been waived by defendant in denying all liability on the certificate.

6. Code Civil Proc. Cal. §§ 632, 633, provide that, "upon the trial of a question of fact by the court, its decision must be given in writing," and the findings of fact and conclusions of law separately stated. *Held* that, though findings are required on all the material issues raised by the pleadings and evidence, it is not necessary that they should be in the exact language of the pleadings, or in any particular form. PATERSON and THORNTON, JJ., dissenting.

On rehearing. In bank. For opinion on hearing in department, see 21 Pac. Rep. 825.

R. B. Mitchell, for appellant. *Manuel Eyre*, for respondent.

McFARLAND, J. This is an action brought by the plaintiff, surviving wife of Eugene Alphonse Millard, deceased, to recover, as beneficiary, the amount of insurance or benefit certificate issued by defendant upon the life of the said Millard, deceased. The case was tried without a jury, and the court pronounced judgment in favor of plaintiff, and instructed her counsel to prepare findings. These were prepared accordingly, and adopted and signed by the presiding judge. A motion for a new trial was made by defendant, and was granted by the court, and from the order granting the new trial plaintiff appeals. The deceased was a member of Golden Council No. 118, a subordinate council of respondent. From the opinion of the court below, inserted in the brief of respondent, it appears that the court granted a new trial for the reason that the findings were defective; that is to say, although the judgment was apparently right, and although there is nothing to show that the court below thought it wrong, yet it was set aside because the findings (prepared after the court had reached its conclusions, and having nothing whatever to do with the legal merits of the case) did not, in the opinion of the court, sufficiently state the grounds upon which the judgment rested. And, under the numerous decisions on the subject, the court might well have been in doubt as to the sufficiency of the findings in the case at bar, and is not to be criticised for its action. When the findings are inconsistent and contradictory, or when they show affirmatively that the judgment is wrong, then the question presented is usually a very simple one; but when the findings all tend to support the judgment, and the point raised is whether or not there is enough of them, then a question of great difficulty often arises.

What the Code says about findings is very brief. Section 632, Code Civil Proc., provides that, "upon the trial of a question of fact by the court, its decision must be given in writing;" and section 633 provides that "in giving the decision the facts found and the conclusions of law must be separately stated." This is practically all there is of it; and upon this little apex there has been built up (necessarily, no doubt) an inverted pyramid of legal decisions which over tops nearly every other monument of the law. Perhaps the very conciseness of the Code has been the cause of some of the difficulties which the subject has presented. It will be observed that the Code does not prescribe what or how many facts the findings must contain. Indeed, in the sections above quoted, the word "findings" is not used at all. The language is that the "decision" must be in writing, and that in the decision the facts and conclusions of law must be separately stated. One main object of the provision seems to have been to prevent a court from summarily ordering judgment without giving any reasons for it,—without stating any facts or legal conclusions upon which it is based. There was also, no doubt, some intent to facilitate the review of a judgment on appeal. But surely the main object was not to afford a cover under which a losing party might successfully set a trap to capture a just judgment. The findings come after the case has been tried, considered, and determined, and after the character of the judgment, whether it is right or wrong, has been fixed. They are merely incidental to the main thing,—the judgment; and to test their sufficiency by a standard which exacts the extreme of accurate statement and minute detail is to put the incident in the place of the principal. Of course, there ought to be findings on the material issues raised by the pleadings and evidence, but if it appear that there are, in substance, such findings, it is not necessary that they should be in the exact language of the pleadings, or in any particular form. Moreover, it is often difficult to determine whether a certain conclusion from specific facts found should be classified as a finding of "fact," or of "law;" and, as the court said in Burton v. Burton, 21 Pac. Rep. 847, "the mere fact that one finding was placed under the wrong heading would be a very feeble reason for the reversal of a judgment." In our opinion, applying the views above expressed, the findings in the case at bar were sufficiently full. There are four reasons given by the court below why the findings were insufficient, and we will examine them in the order in which they are stated.

1. When the benefit certificate was issued by respondent to said Millard, now deceased, one Sarah Alexandrina Millard, who was then his wife, was the beneficiary named therein. Afterwards he notified and directed the respondent, as he had a right to do under the rules of the order, to change the name of the beneficiary from said Sarah Alexandrina to "Nellie C. Millard," the appellant herein, who was then his wife. It is averred in the complaint, and denied in the answer, that at the time of said notification the deceased was a "member in good standing" in the order, and it is contended that there is no finding on this issue. There is no finding in those very words,—that is, that he was at the time "a member in good standing;" but, assuming for the present that the issue was material, there were facts found which showed him to be in such standing. There is no pretense that the deceased lost his standing in any way other than by delay in paying certain assessments. The findings show that the benefit certificate was issued to him on June 2, 1881, he then "having become a member of said order, and having complied with all its rules and regulations." Assessments were not levied at stated times, but irregularly, upon the death of a member; so that members could know of the levy of an assessment only by notice served on them. Deceased paid all assessments levied from June, 1881, to July 7, 1883, on which last-named day assessment No. 39 became delinquent. This and other subsequent assessments remained unpaid down to assessment No. 46, which became delinquent December 20, 1883; but no notice of such assessments was given to deceased until January 10, 1884. On the last-named date deceased was notified of said last assessment, No. 46; that he was suspended for not paying it; "and that he could be reinstated upon paying said assessment No. 46, in 30 days from said date, and that if not paid within that time he would have to be re-examined." Nothing was said about former assessments. Upon receiving said notice deceased, on the same day, (January 10, 1884,) paid said assessment No. 46, and all prior assessments due, and also assessment No. 47, which had been levied, but was not yet delinquent. The amounts of these assessments were received by respondent, and placed in its benefit fund. "On January 26, 1884, said Millard paid all dues to said Golden Council No. 118, to March 3, 1884, the amount being received by said council and duly placed in its treasury." On February 8, 1884, all assessments and dues having been paid, said deceased gave the notice of the change of beneficiary. "Said notice was in writing, signed by said Millard, attested by the secretary of said Golden Council No. 118, the seal of said council affixed, and was upon a blank furnished by defendant, and is in all respects in accordance with its laws, rules, and regulations." On February 13, 1884, the deceased also paid assessment No. 48, which was then levied, but not delinquent, and the amount paid was received by defendant and paid into its benefit fund. On February 22d plaintiff also paid assessment No. 49, levied before the death of said Millard, but not delinquent until March 17, 1884. There was only one meeting of the council in January, 1884, after deceased had paid assessment No. 46, and the previous assessments, at which meeting no action was taken in the matter of his reinstatement; but on February 13, 1884, the date of the next meeting, "at a meeting of said Council No. 118, the said Millard was duly and regularly reinstated in full membership in said council." On February 23, 1884, the said Millard died. All the above facts are found.

We think these findings sufficiently show that when the notice of change of beneficiary was given the deceased had complied with all the requirements of the order, and had such standing as entitled him to his rights, notwithstanding the fact that the council did not act on the case at the meeting in January, and did not make the formal order of reinstatement until February 13th. Moreover, the court expressly finds "that the notice of change in beneficiary in said benefit certificate was in all respects in accordance with the laws, rules, and regulations of said defendant;" and we do not think that the virtue of this latter finding is destroyed because it is placed under the heading, "Conclusions of Law." But, really, the question whether or not the deceased, in a strict literal sense, was in good standing at the time mentioned, was immaterial; because by levying the assessments Nos. 46, 47, 48, and 49, and by receiving the amounts of those assessments, as well as the amounts of the prior assessments then remaining unpaid, and retaining the moneys paid thereon, and placing them in its treasury and benefit fund, the respondent waived any forfeiture that might have been insisted on, and became liable for the amount of the certificate. In Erdmann v. Insurance Co., 44 Wis. 376, a case very similar to the case at bar, the court says (we quote from the syllabus, which is a correct condensation of the decision) as follows: "(1) There is nothing in the charter or constitution of the defendant which renders inapplicable to it the doctrine of waiver applicable to other insurance companies. (2) Forfeitures are not favored in the law; and the benevolent object of the order for whose benefit the defendant company was organized, with the provisions of defendant's constitution and by-laws indicating a purpose to mitigate forfeitures, require the court to lay hold of any act showing an intention of defendant to waive the forfeiture in this case. (3) The right to payment of a certain sum by defendant as insurance on a life was forfeited in case the assured, at his death, had not paid all assessments; but after his death all assessments against him were paid for him in pursuance of authority granted and a request made during his life-time, and were by his lodge (which was defendant's agent for that purpose) received and forwarded to defendant, and by it accepted and retained until after commencement of this suit, with knowledge of the death of the assured on the part of the lodge and the defendant at the times of such receipt and acceptance. Held, that the forfeiture was waived." In Bailey v. Association, 27 N. W. Rep. 771, the supreme court of Iowa say: "(2) As to whether there was a default by the deceased in the payment of an assessment we need not determine. There was evidence tending to show that before the death of the deceased the company received the amount of the assessment. The court below, we may presume, so found, and the evidence was sufficient to sustain the finding. It is, to be sure, insisted by the defendant that the money was demanded and received by mistake, the real intention being to regard the certificate as forfeited. But we do not think that such mistake, if made, could be regarded as material. The defendant received and held the money until after the death of the deceased, and he had a right to regard the contract as in force, regardless of any intention of the defendant to the contrary." See, also, Tobin v. Society, 33 N. W. Rep. 663; Osterloh v. Insurance Co., 60 Wis. 126, 18 N. W. Rep. 749; Stylow v. Insurance Co., 34 N. W. Rep. 151; McDonald v. Supreme Council, 20 Pac. Rep. 41.

2. The second reason given is that "the findings are furthermore defective in omitting to respond to the denials contained in the answer in reference to the several suspensions by the order of the membership of the deceased." But the real facts about that matter are found. It is not averred in the answer, or pretended by respondent, that the deceased was ever suspended in any way, except so far as his delay in paying certain assessments (hereinbefore referred to) operated, *ipso facto*, to suspend him. And all the facts as to the delay in paying said assessments, and their subsequent payment and receipt by respondent, are specifically found. There is no averment or claim that the council of deceased ever suspended him, or took any steps in that direction, until the notice of January 10, 1884, when all assessments levied were immediately paid. From an examination of such parts of the constitution and regulations of the respondent as appear in the transcript, we are disposed to think that here, as in McDonald v. Supreme Council, supra, a legal suspension could be effected only by action taken in open council; but, however that may be, it is clear, from the authorities above cited, that any effect which such delay in payment might have had was waived by the subsequent conduct of respondent, as hereinbefore stated. We think, therefore, that all that was material on the point was found.

3. The third objection seems to be the want of a finding that deceased at the time of his death was "a member in good standing in said order." But all the facts showing such standing were found; and, moreover, there is a finding in these words: "That at the time of the death of said Millard he was a member in good standing in said order, had complied with all the rules, regulations, laws, and requirements of said order, and all conditions of said benefit certificate." If this finding had been placed a few sentences above the place it occupies, it would probably have been considered full enough for all purposes. It is placed, however, in the category of "conclusions of law." But the character of a thing does not depend upon the name given it.

4. A fourth objection to the sufficiency of the findings is suggested, rather than positively stated, and that is that there is no finding as to the satisfactory proof of Millard's death. The finding on this subject is: "That at the first meeting of Golden Council No. 118, subsequent to the death of the said Millard, to-wit, February 27, 1884, said council was notified of the death of said Millard." This is an extremely technical point, for there is no doubt intimated as to the death of Millard. It is averred, is not denied, and is found by the court; and there is no qualification in the

certificate as to the manner of death,—no reservation against even suicide. There should, therefore, be no leaning towards this defense; it should be clear and certain. But, in the first place, there is no provision, either in the certificate, or in the by-laws of the order, that the beneficiary shall furnish proof of the death. The supreme council seems to act almost entirely through the subordinate councils. The certificate recites that Millard is "a member of Golden Council No. 118, A. L. H., located at San Francisco, Cal.," and that it is issued "upon evidence received from said council that said companion is a sixth degree contributor," etc.; and a main condition is that "said companion complies in the future with the laws, rules, and regulations now governing said council;" and the condition as to death is, simply, "upon satisfactory evidence of the death of said companion." And section 3 of law 1 is as follows: "On the death of a member who at the time of his death shall not be under suspension for non-payment of benefit assessments the council shall appoint a committee to ascertain the cause of death, and the circumstances attending the same. The report of said committee, and the proof of the death, shall be forwarded to the supreme secretary by the commander and secretary, under the seal of the council, together with an official notice of such death, in accordance with a form furnished by the supreme secretary. Such notice must state the name, age at the date of initiation, the date and cause of death, and the amount paid into benefit fund, and number of degree. Further proof of such death may be required, if deemed necessary by the supreme commander." It is evident, therefore, that the evidence of death was to be furnished to the supreme council by the council of which deceased was a member, and a finding that the plaintiff did or did not furnish such proof to respondent would have been immaterial. And, again, respondent denied all liability upon the certificate, and in such a case the general rule is that the preliminary proof is waived. We think, therefore, that a new trial should not have been granted for the alleged defect in the findings on this point.

We have thus reviewed the grounds upon which, as respondent shows, the court below granted the new trial. Under the circumstances we do not feel called upon to notice, in detail, other points made by respondent. We will say, however, that we have carefully examined the record, and think that the evidence supports the findings, and that the transcript shows no material errors. The order granting a new trial is reversed.

We concur: BEATTY, C. J.; FOX, J.; WORKS, J.; SHARPSTEIN, J.

PATERSON, J. I concur in the judgment, on the ground that the findings are sufficient to support the judgment, and the evidence is without conflict; but I do not think that we can look at the opinion of the learned judge of the court below. It is no part of the record in this case. Even if it had been made a part of the transcript, it would be stricken out on motion. We have so decided in a recent case.

THORNTON, J. I concur in the judgment, but differ *toto cœlo* as to the *dicta* in relation to findings of facts. I consider the provision in the Code of Civil Procedure as to the finding of facts one of the most valuable in our practice, and one which should be enforced as other laws. They are binding on this and all other courts, as are all other statutes, and their enforcement cannot be evaded.

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81 Cal. 350

In re HARRIS. (No. 11,490.)

(*Supreme Court of California.* Nov. 29, 1889.)

INSOLVENCY—DISCHARGE.

1. An application by an insolvent for a discharge from his debts was opposed by certain creditors on the ground of a fraudulent preference of one creditor to the extent of $1,000. The insolvent denied having paid him anything but $500, which he alleged was paid in good faith, on a debt which he had owed him, and introduced in evidence, and rested on, the pleadings in the proceeding adjudging him to be an insolvent. The petition therein alleged that the insolvent, by making a payment of $1,000 to a creditor, had committed an act of insolvency, but did not allege fraud; and the answer denied having made a payment of $1,000, or any greater sum than $500, to such creditor, and was supported by affidavit, as required by the Insolvent Act Cal. § 49, that respondent had not done, suffered, or been privy to anything specified in the act as ground for withholding or invalidating his discharge. *Held*, that a direction of a verdict against the insolvent was unwarranted, as the burden of proving such fraud as would bar the insolvent's discharge was on the contestants.

2. The affidavit made by the insolvent in the proceedings to adjudge him insolvent is admissible to show compliance with the insolvent act.

3. Under section 48, which authorizes the insolvent to apply for a discharge at any time after the expiration of three months from the adjudication of insolvency, his discharge will not be delayed by the failure of an assignee to qualify, where the creditors failed to appear at the time designated by the court for choosing one.

4. As the answers denied all the allegations of fraud, it was proper to refuse to instruct that the insolvent, under the pleadings, had admitted that when he was insolvent, and in contemplation thereof, he paid a certain creditor $500; and that if he did so to prevent the money from reaching the assignee, or from being distributed under the insolvent act, he is not entitled to a discharge.

THORNTON, J., dissenting.

Commissioners' decision. In bank. Appeal from superior court, Monterey county; JOHN K. ALEXANDER, Judge.

N. A. Dorn and *William M. R. Parker*, for appellants. *Geil & Morehouse*, for respondent.

BELCHER, C. C. The material facts of this case are as follows: On the 18th day of May, 1883, certain creditors of James H. Harris filed in the superior court of Monterey county a petition asking that he be adjudged an insolvent. The petition alleged, among other things, "that the respondent has committed an act of insolvency, in that he did heretofore, to-wit, on or about the 30th day of March, 1883, being insolvent, and in contemplation of insolvency, * * * make a payment and transfer of property, consisting of money, to the amount of about $1,000, then and there belonging to said respondent, unto one Charles Harris, brother to said respondent." Harris filed an answer to the petition, in which he denied "that on the

30th day of March, 1883, or at any other time, he, the said Harris, made a payment of $1,000, or any greater sum than $500, to Charles Harris." The court made an order adjudging Harris to be an insolvent debtor, and directing the sheriff of the county to take possession of all his estate, real and personal, except such as was by law exempt from execution, and of all his deeds, vouchers, books of account, and papers, and to keep the same safely until the appointment of an assignee. The court also by its order appointed a time and place for the creditors to meet and prove their debts, and choose one or more assignees of the estate. Due notice of this order was published, but at the time and place appointed none of the creditors appeared. Thereupon the court made an order appointing one Graves assignee of the estate, and fixing the amount of his bond; but he never accepted the place or qualified, and no assignee was ever thereafter appointed. Subsequently, and more than three months after the adjudication of insolvency, Harris applied to the court for a discharge from his debts. Three of his creditors opposed his discharge, and filed specifications, in writing, of the grounds of their opposition. One of these specifications was, in substance, that on or about the 30th of March, 1883, Harris made a fraudulent payment of $1,000 to one Charles Harris, who was then his creditor, and that Harris was then insolvent, and in contemplation of insolvency, and made the payment for the purpose of preferring Charles Harris, and preventing the money from going into the hands of an assignee, and being distributed, under the insolvent act, in satisfaction of his debts. By his answer, Harris denied that he paid Charles Harris the sum of $1,000, or any sum of money whatever, on the 30th day of March, 1883, or that he ever made any payment to him fraudulently, or in contemplation of insolvency, or for the purpose of preferring him as a creditor, or for the purpose of preventing his property from going into the hands of an assignee, and being distributed, under the insolvent act, in satisfaction of his debts, but averred that on the 10th day of March, 1883, Charles Harris was his creditor for the sum of $500, and no more, and was about to leave the state; that on that day he paid him the said sum of $500 in satisfaction of his debt, and that the payment was made in good faith, and in the ordinary course of business, and without any view of preferring him as a creditor, or with any design of, view of, or contemplation of, insolvency. Upon the issues raised by these pleadings the matter was tried before a jury; and, under the order of the court, Harris commenced the trial by offering in evidence the petition of the creditors that he be adjudged insolvent, his answer thereto, and all the orders and papers made and filed in the case up to that time. Among the papers so offered was the affidavit of the insolvent, required by section 49 of the insolvent act, that he had not done, suffered, or been privy to any act, matter, or thing specified in the act, as ground for withholding his discharge, or as invalidating such discharge, if granted. The opposing creditors objected to this oath being received in evidence, on the ground that it had been prematurely filed, and was incompetent, and immaterial to show compliance with the insolvent law. The objection was overruled, and an exception reserved. Harris then rested his case, and the creditors moved the court that the jury be instructed to find against him, and that his discharge be denied, on the ground—*First*, that the petition of the creditors alleged that on or about the 30th of March, 1883, Harris, being insolvent and in contemplation of insolvency, made a fraudulent payment of $1,000 to Charles Harris, and the answer to the petition admitted the allegation to be true; *second*, that no assignee of the estate had ever qualified. The court denied the motion, and the creditors excepted to the ruling. The creditors then called Harris as a witness, and he testified, in effect, among other things, that he never knew that he was insolvent, or contemplated insolvency, until some time in April, 1883. At the conclusion of the testimony, the court instructed the jury very fully, and, as we think, correctly, upon the law of the case, but refused to give an instruction asked for by the creditors, which reads as follows: "The said James H. Harris has, under and by the pleadings in this case, admitted that on or about the 30th day of March, 1883, he, then being insolvent, and in contemplation of insolvency, did pay to one Charles Harris, his brother, the sum of $500. Now, if you find from the evidence in this case that he made said payment to his said brother as a creditor, or for the purpose of preventing the said $500 from coming into the hands of his assignee, or being distributed, under the insolvent act of this state, in satisfaction of his debts, then I charge you that the said James H. Harris is not entitled to a discharge under said act, and your verdict should be for contestants." By their verdict the jury found that Harris had not been guilty of fraud, and that he was entitled to be discharged from his debts; and thereupon the court entered judgment in his favor. The contesting creditors moved for a new trial, which was denied, and have appealed from the judgment and order.

1. We see no error in the admission in evidence of the insolvent's oath. The statute makes the taking and subscribing of such an oath by an insolvent debtor a condition precedent to his discharge, (Insolvent Act, § 49,) and the evident purpose of the requirement is to show to the court that the insolvent has not been guilty of any act which would prevent his obtaining a discharge, or render it invalid, if obtained. It must be proper, therefore, for an insolvent debtor to make the required oath when he applies for his discharge, and to introduce it in evidence to show the facts which it was intended to show.

2. The court properly denied the motion made by the creditors when Harris rested his case. They, in effect, asked that he be nonsuited; and yet they were the actors, and the burden was upon them to show that he had been guilty of some fraudulent act or omission which the statute made a barrier to his discharge. The original pe-

tition and answer thereto were intended only to put the respondent into involuntary insolvency, and they had served their purpose when that end was accomplished. Besides, the petition did not charge that the payment was made fraudulently, or for the purpose of preferring the payee, or of preventing the money from coming into the hands of the assignee, or of being distributed in satisfaction of the insolvent's debts; and the oath of the insolvent, which was in evidence, tended directly to negative these assumed facts.

The point that the application for a discharge was premature, because no assignee had qualified, is without merit. The appointment of an assignee rests with the court and creditors. The debtor has nothing to do with it. The creditors failed to appear at the time fixed for the appointment of an assignee; but this was not the fault of the respondent, and his discharge could not be hindered or delayed thereby The statute authorizes the debtor to apply to the court for a discharge from his debts at any time after the expiration of three months from the adjudication of insolvency, and there are no limitations or restrictions on his doing so. Insolvent Law, § 48.

3. The instruction which was asked by the creditors and refused by the court was misleading and erroneous. The statement that "the said James H. Harris has, under and by the pleadings in this case, admitted," etc., was not true. The pleadings in the case consisted of the specifications by the creditors of the grounds of their opposition to the discharge, and the answer of the respondent thereto; and this answer, as we have seen, fully denied all of the averments of fraud made in the specifications. The refusal to give the instruction was therefore proper.

4. There was testimony which, if believed, justified the verdict of the jury. It tended to show that the settlement with Carr was made before the respondent knew that he was insolvent, or contemplated insolvency. It also tended to show that the value of the accounts which were assigned by respondent to his attorney for the purpose of paying the expenses of the insolvency proceedings was not unreasonably large; and if this be so, it is admitted that the assignment was properly made, and that the creditors have no cause of complaint on account of it.

Looking, then, at the whole case, we see no prejudicial error, and therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J., dissents.

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81 Cal. 364

In re CALIFORNIA MUT. LIFE INS. CO. (No. 12,929.)

(*Supreme Court of California.* Nov. 30, 1889.)

MUTUAL INSURANCE COMPANIES—INSOLVENCY—STOCKHOLDERS.

1. Act Cal. April 2, 1866, relating to the incorporation of mutual insurance companies, provides (sections 8 and 9) that no company organized under the act shall transact business until it shall have obtained a guaranty fund of at least $250,000, which shall consist of the notes of solvent parties, payable to the company as prescribed by its directors, for the better security of the company's dealers, and shall be assets, liable for all its debts, next after the assets arising from premiums and other sources, exclusive of the capital stock, until the profits, together with the capital stock, shall equal the aggregate of the original guaranty fund, and the capital stock. Section 17 provides that each stockholder shall be personally liable for the debts of the company in the proportion which the stock owned by him bears to the whole amount. *Held*, that the claims of the stockholders of an insolvent company, organized under the act, for moneys paid by them as stockholders on matured policies, are payable out of the general assets, and not out of such guaranty fund.

2. The stockholders may join in an appeal from an adjudication on such claims.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Vincent Neale and *Cope & Boyd*, for appellants. *Doyle, Galpin & Scripture* and *John H. Brewer*, for respondents.

WORKS, J. Insolvent proceedings under the insolvent act of 1880. The California Mutual Life Insurance Company was organized under the act of April 2, 1866, entitled "An act to provide for the incorporation of mutual insurance companies, for the insurance of life and health and against accident." St. 1866, p. 752. In March, 1885, the corporation was regularly adjudged to be an insolvent debtor by the superior court of San Francisco; and in April following S. Prentiss Smith was elected and appointed assignee. Pursuant to notice, given as required by law, a large number of claims against the company were presented to the assignee, and among them the claim of Charles Baum and 15 others, who are the appellants here. These claims, amounting to over $5,000, were disputed by the insolvent and by the assignee, on the ground that they were for moneys paid by the appellants, as stockholders of the corporation, on account of matured policies of insurance, and as original debtors, and not as guarantors. On the trial the alleged ground of the objection to these claims was found to be true; yet the court found and adjudged the claims to be valid claims against the insolvent, but payable only out of what the court denominated the "general assets," as distinguished from and exclusive of the "guaranty fund," consisting of the "guaranty notes," made to the company as required by said act. Sections 8 and 9. What were thus called the "general assets" consisted only of a claim of the insolvent against the Republic Life Insurance Company of Illinois, which claim was unavailable, and of no apparent value, by reason of the insolvency of the last-named company. The "guaranty fund" consisted of promissory notes of solvent persons, made payable to the order of the insolvent five days after demand, according to section 9 of said act, amounting to about $140,000, and immediately available for more than $100,000, while the allowed debts of the insolvent, including those due the appellants, were found not to exceed $35,000. If, therefore, the "guaranty fund" was properly applicable to the payment of all the debts allowed by the court, the corporation would appear to have been solvent. But no objection is made to the adjudication of insolvency; and it is admitted by appellants that the petition states facts sufficient to give the court jurisdiction of the matter.

It is contended by counsel for the respondents, the assignee and note makers, in their brief, that the appeal should be dismissed on the ground that the appellants, "having no joint interest or right," joined in their notice of appeal. It is manifest, however, that the appellants have a common interest in having the decree modified in all respects prayed for by them, in the same manner, and to the same extent. Their rights and claims are of the same kind, and they are all aggrieved in the same way, and by the same portions of the decree appealed from. It would be a matter of great inconvenience and additional expense, without any corresponding compensation, to require 16 separate appeals in this case; and it seems to us that they are not required by the Code of Civil Procedure or by the insolvent act.

The counsel for appellants further contend that the guaranty fund was lawfully applicable to the payment of their claims which had been allowed by the court, and that the court erred in refusing to so apply it. Counsel for respondents deny this, and contend that the guaranty fund was not designed for the benefit of the corporation or its shareholders, but only for the benefit of the public dealing with the corporation. The eighth section of the act under which this corporation was organized, among other things, provides that "every company formed under this act shall have a capital stock of not less than $100,000. It shall not make any insurance upon any risk, or transact any other business in section 1 mentioned, until its capital stock shall have been fully paid up in cash, and until it shall have also obtained a fund, to be known as a 'guaranty fund,' of not less than $250,000, as is hereinafter provided." Section 9 provides that "the guaranty fund mentioned in section 8 shall consist of promissory notes of solvent parties, approved of by the board of directors and by each other. Such notes shall be payable to the company, or its order, and at such time or times, in such modes, and such sums, with or without interest, and shall be in all other respects, as the board of directors shall prescribe; but the amount of the note or notes given by any one person shall not exceed in the whole the sum of $5,000, exclusive of interest. Such notes shall be payable absolutely, and at all events, at the company's option, shall be negotiable, and may be indorsed and transferred or converted into cash, or otherwise dealt with by the company, at its discretion, without reference to any contingency of losses, expenses, or otherwise. Such notes, or the proceeds thereof, shall remain with the company, as a fund for the better security of its dealers, and shall be assets of the company, liable for all its debts, obligations, and indebtedness, next after its assets from premiums and other sources, exclusive of capital stock, until the net earnings of the company, over and above its expenses, losses, and liabilities, shall have accumulated in cash or securities in which the net earnings have been invested to a sum which, with the capital stock, shall be equal to the aggregate of the original amounts of the guaranty fund and of the capital stock; and thereupon the said sum, with the capital stock, shall become and remain the fixed capital of the company, not subject to division among the stockholders or parties dealing with the company, or to be expended in any manner otherwise, except when required in payment of the company's debts and actual expenses, until the business of the company shall have been closed, its debts paid, and its outstanding policies and obligations of every kind canceled or provided for; and if, from any cause, a deficiency shall at any time occur in such fixed capital, no further division of profits shall take place until such deficiency shall have been made up." The seventeenth section of the act provides: "Each stockholder of the company shall be individually and personally liable for such proportion of all its debts and liabilities as the amount of its capital stock owned by him bears to the whole of such capital stock." It does not appear that the amount of fixed capital stock, as provided in section 9, was ever obtained or declared as provided in section 10, so as to discharge the guaranty fund, or to allow the guaranty notes to be withdrawn; and the court finds that all of said 50 notes except 5 have come into the hands of the assignee; and as a conclusion of law finds "that the aforesaid guaranty notes are assets of the said insolvent, liable to be called in, so far as necessary, for the payment of debts to holders of policies, but not so liable for payment to its stockholders for moneys contributed or paid by them on account of debts due by the said company, by reason of their liabilities as such stockholders;" and further finds as a conclusion of law that the claims of the appellants for moneys paid by them as stockholders, "and because of their liability as such, are valid, * * * and are established and allowed against it, so far forth, however, only as to be payable out of the aforesaid general assets of said company, and not out of any moneys derived from the said guaranty notes, or the proceeds or the makers thereof." The judgment of the court below was clearly right. The corporation and its stockholders are primarily liable for the company's debts. Morrow v. Superior Court, 64 Cal. 383, 1 Pac. Rep. 354. The parties who executed the guaranty notes are the sureties of the company and its stockholders for the payment of these debts, and cannot be held liable, as between them and the stockholders, for the amounts paid by the latter on their own debts. To hold otherwise would be to allow a principal to pay his own debt, and then recover it back from his surety. Section 9 of the statute referred to contains a general provision that this guaranty fund shall be liable for all of the debts of the company; but this must be construed to apply to debts due from the company to parties dealing with it, and not to the right of a stockholder to recover from the corporation moneys advanced by him for the debts of the corporation. This is apparent from the fact that the provision referred to was for the protection of persons dealing with the company, and not for the protection of its stockholders, who are expressly made personally and individually liable for such proportion of the debts of the company as the amount of its capital stock owned by them bears to the whole of such capital stock. The guaranty fund provided for by the statute is an additional security to parties, over and above the liability of the company and its stockholders; and, as between the makers of these notes and the company and its stockholders, the money paid by the stockholders cannot be made a charge upon such guarantors. Judgment affirmed.

We concur: Fox, J.; Paterson, J.

81 Cal. 398

Scott v. Wood. (No. 11,894.)

(*Supreme Court of California.* Nov. 30, 1889.)

CONTRACTS—EVIDENCE—BURDEN OF PROOF—INSTRUCTIONS—APPEAL.

1. In an action for several years' wages at $250 a month, the answer averred affirmatively that some time after plaintiff commenced work there was an agreement with him for $200 a month; the court instructed the jury that as defendant had admitted the length of plaintiff's employment, and that it commenced at $250 a month, "the burden of proof is on defendant to show" an agreement to change the amount of compensation; and that, unless such agreement was established "by a preponderance of testimony," the verdict must be for plaintiff. *Held*, that the instruction was error, as the issue raised by the pleadings was whether the contract was, for a part of the time, at $200 or $250, and the burden of proving his claim was on plaintiff; the most that could be required of defendant being that he meet any *prima facie* case made by plaintiff, for which purpose a preponderance of testimony was not necessary. BEATTY, C. J., and PATERSON, J., dissenting.

2. Instruction that "when a fact is once shown to exist the law presumes it to continue until the contrary is shown" is error, as it is presumed to continue only "as long as is usual with things of that nature."

3. Where there is no error in an instruction, but it is not as specific as desired by one of the parties, a request for more specific instruction should be made.

4. Counsel should not be permitted to argue to a jury that an offer to pay a certain sum in settlement of a demand is an admission that something is due, as Code Civil Proc. Cal. § 2078, expressly provides that "an offer to compromise is not an admission that anything is due."

5. Notice of intention to move for a new trial need not be made part of the record on appeal. Pico v. Cohn, 20 Pac. Rep. 706.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Horace W. Philbrook, for appellant. *G. E. Harpman*, for respondent.

HAYNE, C. This action was brought to recover under a contract between the plaintiff and the firm of Hobart, Wood & Co., for services as salesman. Pending the action Hobart died, and the case was continued against Wood as surviving partner. The plaintiff had a verdict, and the defendant Wood appeals from the judgment, and from an order denying a new trial.

The respondent makes a preliminary objection to the record on appeal from the order denying a new trial, upon the ground that it does not show a notice of intention. This objection must be disallowed, upon the authority of Pico v. Cohn, 20 Pac. Rep. 706, which overrules the cases relied upon. Besides this, the points made can be considered on appeal from the judgment, and the statement used on the motion for a new trial is a record on appeal from the judgment. Code Civil Proc. § 950; Craig v. Fry, 68 Cal. 364, 9 Pac. Rep. 550. There are several errors which require a reversal of the judgment.

1. The recovery sought was for services which continued for several years. The complaint alleges that "on or about the 3d day of July, 1869, at the city and county of San Francisco, said defendants employed plaintiff as a salesman, and agreed to pay plaintiff for such services the sum of $250 per month; that under said employment and agreement the plaintiff entered into the services of the defendants on said 3d day of July, 1869, and from that time forward continued in their service under said employment, without intermission, until the 1st of April, 1885; that during all of said time the plaintiff was actively and continuously performing services for the defendants, as their salesman, under said contract of employment." The complaint further alleged that there was a balance due to plaintiff on account of said services of $755.78, which remained unpaid. The answer averred affirmatively that about the beginning of 1870 it was agreed that the salary should be $200 a month, and denied "that at any time subsequent to the agreement last herein aforesaid there was or existed any agreement of defendants to pay plaintiff for said services any greater sum than $200 per month," and denied that anything remained unpaid. The case turned upon the question whether during a portion of the period in which the defendant rendered services, his salary was $200 or $250 per month. Upon this question the evidence was conflicting. The defendant testified that the salary had been fixed at $200 a month, in the beginning of 1870, and the plaintiff testified that it had not. The court instructed the jury in relation to the matter as follows: "The jury are instructed that the defendants admit employing the plaintiff on July 3, 1869, at the rate of $250 per month, and that he worked for them continuously until the 1st day of April, 1885; and that the burden of proof is upon the defendants to show that plaintiff's compensation was changed; that, unless the defendants establish by a preponderance of testimony that plaintiff in 1870, or at some other time, agreed to work for the defendants during the years 1870 and 1871 at the monthly compensation of $200, then they must find for the plaintiff." This was excepted to, and is specified as error. We think that the court erred in telling the jury that the defendant was required to have a preponderance of testimony upon the question mentioned. The term "burden of proof" is used in different senses. Sometimes it is used to signify the burden of making or meeting a *prima facie* case, and sometimes the burden of producing a preponderance of evidence. These burdens are often on the same party. But this is not neces-

sarily or always the case. And it is by no means safe to infer that because a party has the burden of meeting a *prima facie* case, therefore he must have a preponderance of evidence. It may be sufficient for him to produce just enough evidence to counter-balance the evidence adduced against him. This is illustrated by a very common case. Suppose that, upon an issue as to the performance of a contract sued upon, the plaintiff should testify to facts showing non-performance. "In such case, if the defendant produced no evidence, the plaintiff must prevail. This is often expressed by saying that the burden has shifted to the defendant. And so it has, in one sense. But suppose that the defendant should take the stand and deny the truth of the facts testified to by the plaintiff, oath being opposed against oath." Would it be correct to say that the defendant must have a preponderance of evidence? It most certainly would not; and this though the burden of proof had been transferred to him. Nor would it be correct to say that the burden had "shifted back" to the plaintiff, if the burden of producing a preponderance of evidence was meant; for that never was on the defendant. The two burdens are distinct things. One may shift back and forth with the ebb and flow of the testimony. The other remains with the party upon whom it is cast by the pleadings; that is to say, with the party who has the affirmative of the issue.

The distinction is illustrated by the case of People v. Bushton, 22 Pac. Rep. 127. There it was held that while, if the prosecution proved a *prima facie* case, the burden is upon the defendant to produce evidence tending to show a defense, yet that when this was done the rule that guilt must be proved beyond a reasonable doubt applied to every part of the case, and consequently that if the evidence of the defendant raised a reasonable doubt he was entitled to an acquittal. And the distinction has been expressly recognized in other states. In Bridge Corp. v. Butler, the supreme court of Massachusetts, per BIGELOW, J., said: "The burden of proof and the weight of evidence are two very different things. The former remains on the party affirming a fact in support of his case, and does not change in any aspect of the cause; the latter shifts from side to side in the progress of a trial, according to the nature and strength of the proofs offered in support or denial of the main fact to be established." 2 Gray, 132. So, in Heinemann v. Heard, the court of appeals of New York, per CHURCH, C. J., said: "During the progress of a trial, it often happens that a party gives evidence tending to establish his allegation,—sufficient, it may be, to establish it *prima facie;* and it is sometimes said the burden of proof is then shifted. All that is meant by this is that there is a necessity of evidence to answer the *prima facie* case, or it will prevail; but the burden of maintaining the affirmative of the issue involved in the action is upon the party alleging the fact which constitutes the issue, and this burden remains throughout the trial." 62 N Y. 455. And so in other cases. See Clark v. Hills, 67 Tex. 141, 2 S. W. Rep. 356; Atkinson v. Transportation Co., 69 Wis. 13 et seq., 31 N. W. Rep. 164; Powers v. Russell, 13 Pick. 76; Morgan v. Morse, 13 Gray, 152; Nichols v. Munsel, 115 Mass. 567; Tarbox v. Steamboat Co., 50 Me. 345; Small v Clewley, 62 Me. 157; Shepardson v. Perkins, 60 N. H. 77; Blodgett v. Cummings, Id. 116; Bank v. Doyle, 9 R. I. 78; Bank v. Seymour, 64 Mich. 72, 31 N. W. Rep. 140. In the present case, we think that the learned judge of the trial court fell into error from overlooking the distinction above pointed out. Why was the defendant required to have a preponderance of evidence? Did he have the affirmative of the issue? We think not. The plaintiff had received money sufficient to discharge his claim, if the rate of wages was $200 a month. His position was that the rate was $250 a month. It was necessary to his case that the continuance of the latter rate through the period claimed, or some part of it, should be established. If that rate did not so continue, he could not recover. The continuance of the higher rate being an essential fact in his case, the rules of pleading required him to allege it in his complaint. If he had alleged it categorically, and the defendant had denied it explicitly, it would have been entirely clear that the plaintiff had the affirmative of the issue. If anything further than the mere statement of such pleadings be required to show this, it is found in the test ordinarily used, and said to be conclusive, and embodied in our statute, viz., which side would be successful, if no evidence at all were introduced? See 1 Best, Ev. (Morgan's Ed.) § 268; 1 Phil. Ev. (4th Amer. Ed.) 812; Code Civil Proc. § 1981. Now the pleadings here are in substance the same as above stated; and it is the substance which must control on this question and not the mere form. 1 Greenl. Ev. (13th Ed.) § 74; 1 Best, Ev. (Morgan's Ed.) § 272. If the complaint be defective, the defects may, in view of the absence of a special demurrer, be overlooked. But the plaintiff is in no better position than he would be in had the pleading been free from defect. The complaint was not drawn with absolute precision. It alleged that the defendants employed the plaintiff at $250 per month, and that plaintiff "continued in their service under said employment" for a certain time, and rendered services "under said contract of employment." But it does not allege that it was agreed that the rate of wages at which the services commenced was to continue throughout the whole period, and it does not state categorically that said rate did so continue. And it might, perhaps, be argued that the phrase "under said employment" was somewhat uncertain in meaning. But we treat the complaint as sufficiently alleging that the rate did in fact continue as it commenced. This essential allegation was put in issue by the answer. It averred affirmatively a different agreement, made shortly after the one stated in the complaint, and denied that there was any subsequent agreement. This was sufficient to raise an issue as to the continuance of the rate alleged. The fact that the traverse was affirmative, and not purely negative, in form did not destroy its force nor change its essential nature.

Frisch v. Caler, 21 Cal. 75; Murphy v. Napa Co., 20 Cal. 497; Woodworth v. Knowlton, 22 Cal. 168; Gilman v. Bootz, 63 Cal. 120. The issue, though lamely made up, was the same, in substance, as if it had been made up with absolute precision. The only possible theory upon which it could be claimed that the pleadings cast the affirmative upon the defendants is that the answer admits that the rate commenced at $250, and that it must be inferred that it continued unchanged. But, as above shown, its continuance is put in issue. As a matter of evidence, it may be true that the continuance of the rate was to be inferred, in the absence of any evidence to the contrary. But when evidence to the contrary was adduced, there was no reason for saying that the defendant must have a preponderance of testimony. So to say is to overlook the distinction between the burden of meeting a *prima facie* case and the burden of producing a preponderance of evidence.

2. The court instructed the jury that "when a fact is once shown to exist the law presumes it to continue until the contrary is shown." This was excepted to, and was specified as error. We think that it was error. There is no such presumption, regardless of the nature of the fact. Suppose that a man was shown to be living at a certain time. Would it be presumed that he continued to live for 100 years? Or suppose that a man was shown to be insolvent at a particular time. Would it be presumed that the insolvency continued through several years? In Coghill v. Boring, 15 Cal. 219, the court, per BALDWIN, J., said: "It does not follow, because a man is insolvent on one day, that he was insolvent at any subsequent or antecedent period." The true rule, and the one established by the Code, is that the presumption is that "a thing once proved to exist continues as long as is usual with things of that nature." Code Civil Proc. § 1963, subd. 32; and compare Lux v. Haggin, 69 Cal. 418, 10 Pac. Rep. 674. In view of the evidence, the effect of the instruction was that the court told the jury that they must find that the rate of wages continued through several years at $250 per month, unless there was evidence to the contrary. But we do not think that the employment of a salesman at $250 per month is a thing of such a nature that the court can say, as a matter of law, that it continued for several years unless the contrary was proved. The continuance of the employment at the rate mentioned might be inferred as a fact by the jury, under the circumstances, but under our system the court is not allowed to instruct the jury as to what inference of fact they are to draw. Stone v. Mining Co., 52 Cal. 318; McNeil v. Barney, 51 Cal. 604; People v. Walden, Id. 589.

3. As the case must go back for a retrial on account of the errors above noticed, there are several observations which we think should be made. It was probably error for the court to allow the plaintiff's counsel to argue to the jury, against the protest of the defendant, that the offer of one of the then partners to pay a certain sum and counsel fees in settlement of the claim was an admission that something was due. It is true that the testimony as to the offer came in without objection; but the statute expressly says that "an offer to compromise is not an admission that anything is due." Code Civil Proc. § 2078. The failure to object to the admission of evidence can hardly make that an admission which the law expressly declares is not so; and our impression is that the court ought not to have allowed counsel for plaintiff, against the protest of defendant, to argue that the offer was an admission. And it did not improve matters that the court told the jury, in substance, that they must disregard the offer, if they thought it was an offer to compromise, for that was a question for the determination of the court itself. But, as the question will probably not again arise, it is unnecessary to express a positive opinion in regard to it, further than to say that in our opinion the offer was an offer to compromise.

The instruction at folios 66, 67, requested by defendant, was not quite accurate. The conversation there detailed would not of itself have effected a change in the rate of wages. But if, after the conversation, the plaintiff remained in the employment, his remaining would be taken as an assent to the change of wages. This was probably the idea of the court in adding a clause to the instruction requested. The language of the modification, however, is perhaps not sufficiently clear, when taken in connection with what preceded it.

The instruction at folio 73 was correct. It might have been more specific as to what constituted an appropriation, (Civil Code, § 1479, subd. 1,) but, if the defendant desired to have it more specific, he should have requested an instruction on that point. We advise that the judgment and order appealed from be reversed, and the cause remanded for a new trial.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are reversed, and the cause remanded for a new trial.

THORNTON, J., (*concurring.*) I concur in the judgment of reversal, but on the sole ground that the court erred in refusing to permit testimony of the witness Wood as to Hobart's state of mind on the days just previous to and just preceding the day of the conversation with Scott. See Estate of Toomes, 54 Cal. 516, and cases there cited. The above is the only error I can find in the record.

BEATTY, C. J., and PATERSON, J., (*dissenting.*) We dissent. The two instructions quoted by Commissioner HAYNE may have been technically inaccurate; but, as applied to the point in controversy in this case, and as they must have been understood by the jury, they were scarcely erroneous,—certainly not injurious. It was agreed that plaintiff commenced work at $250 per month, and that he continued in his employment right along. In the absence of any evidence to the contrary, the presumption certainly would be that the rate of wages continued as it began; and, if the evidence as to a reduction of the rate while the employment continued was exactly *in equilibrio*, the finding should have been against such change. This was all the instructions could have been understood to mean, and in this sense they were not erroneous. The judgment and order appealed from should be affirmed.

81 Cal. 195

MOORE v. MOORE. (No. 13,205.)

(*Supreme Court of California.* Dec. 10, 1889.)

On rehearing. In bank. For opinion, on hearing in department, see ante, 589.

Rehearing denied December 9, 1889. No opinion.

BEATTY, C. J., (*dissenting*.) I think that the evidence in this case is wholly insufficient to sustain the findings of the superior court as to the defense of the statute of limitations, and therefore I dissent from the order denying a rehearing in bank.

82 Cal. 72

MCCORMACK *et al.* v. SILSBY *et al.* (No. 13,212.)

(*Supreme Court of California.* Dec. 11, 1889.)

QUIETING TITLE—ADVERSE POSSESSION—HOMESTEAD.

1. Where a purchaser of land, believing he has a good title, tells one who is in possession that he has bought the land, and demands possession, which is given without protest, and he thereafter continues in peaceable possession for more than five years, such possession is adverse, and he thereby acquires a title which he may have quieted in an action against the party in possession at the time of his purchase.

2. A homestead is extinguished by peaceable adverse possession for more than five years.

Commissioners' decision. In bank. Appeal from superior court, Butte county; PHIL. W. KEYSER, Judge.

Gray & Sexton, for appellants. *Park Henshaw*, for respndents.

HAYNE, C. Suit to quiet title. Judgment for plaintiffs. Defendants appeal. The paper title of the parties is in a sufficiently mangled condition. On December 27, 1877, W. H. Silsby and E. D. Silsby were tenants in common of the property. On that day W. H. Silsby made a deed to Carroll and Miller, in trust to secure certain indebtedness to the Pacific Mutual Life Insurance Company. It cannot be ascertained from the record whether this deed purported to be of the whole title, or only of the grantor's interest therein, nor can the terms and conditions of the trust be ascertained further than is above stated. In April, 1878, the trustees sold the property to the insurance company. It cannot be ascertained whether this sale was properly made by the trustees or not. It is found that "a deed was subsequently, on the 19th day of April, 1879, executed to said insurance company by said trustees, and they became the owners and succeeded to the interest of said W. H. Silsby in and to said lands." In October, 1879, the insurance company made a deed of all its right, title, and interest in the property to the plaintiffs. In September, 1878, (which was after the making of the trust-deed above mentioned,) W. H. and E. D. Silsby made a deed of the property to Falkner, Morehead, and Davis, as trustees for the benefit of creditors. In December, 1878, (which was after the last-mentioned deed,) E. D. Silsby, who was then residing with his family on the property, declared a homestead thereon. In June, 1887, E. D. Silsby died, and in December of the same year the surviving trustees, for the benefit of creditors, executed a reconveyance of the property to W. H. and E. D. Silsby, (which latter person was then dead,) reciting that the deed to them was inefficient by reason of the prior deed of trust to Carroll and Miller, and that the reconveyance was made "for the purpose of clearing the title." The action was commenced in 1888 against the widow and children of E. D. Silsby.

We do not deem it necessary to consider the effect of this paper title, for the reason that, in our opinion, the plaintiffs acquired a title by adverse possession. The court finds in this regard as follows: "That on the —— day of November, 1879, said plaintiffs ousted the said E. D. Silsby from said premises, and entered into the actual possession of all of said lands, claiming all interest therein, as their own and in their own right, exclusive, and they have, ever since said date last aforesaid, continuously, notoriousy, and openly occupied, used, and cultivated the said land, under a claim of title, as their own, exclusive of any other right or interest, and hostile to the said E. D. Silsby and all the world, and have paid all the taxes, state, county, and municipal, assessed against said land and premises since said date of October, 1879; and that they had and held said land, as just stated, for more than five years continuously, to-wit, from November, 1879, to June 10, 1887, prior to the death of the said E. D. Silsby."

We think that this finding is sustained by the evidence. It appears that the plaintiffs took their deed from the insurance company without any examination of the title, and supposed that they acquired the whole title. One of them says: "I do not know that I bought only half the ranch,—bought 320 acres, more or less. I did not examine the records, or have them examined. Took it upon their say so. When I got the deed from the insurance company I did not know that I was purchasing only one-half;" and the court finds this to be the fact. Acting under this beief, they went to E. D. Silsby, who was in possession of the property, "told Silsby we had bought the land," and demanded possession. The latter seems to have been in equal ignorance of the true state of the title. He made no assertion of any right to the property. Said "he was sorry he had not been able to keep the place for a home," delivered up the keys, asked for a short time in which to move off, and actually moved away within two weeks. It is not disputed that for eight years subsequent to this occurrence the plaintiffs were in the actual possession, claiming the property as their own, and that during all this time Silsby knew that they were so in possession, but asserted no claim on his part. That such a misapprehension occurred is conceded by the counsel for the appellants, who say: "Each party appears to have been laboring under a mistaken idea of his rights. Probably a like mistake all around never took place before and never will occur again." But such mistake does not prevent the possession of the plaintiffs from being adverse. It is not material to consider what was the character of the deed under which the plaintiffs entered. That could only be material upon the question of the nature of the claim asserted by plaintiffs, and of notice to Silsby of such claim. The plaintiffs informed the occupant, in so many words, that they had bought the whole property, and that he must go. He acquiesced in the claim, and went. It matters not whether the claim asserted by the plaintiffs was well or ill founded, or whether the occupant might have made successful resistance if he had attempted to do so. The intent of the plaintiffs to claim the land as their own, and to dispute the right of the occupant, was clearly manifested, (Bath v. Valdez, 70 Cal. 359, 11 Pac. Rep. 724;) and, this being so, knowledge of the actual state of the title was immaterial. There was certainly an ouster, and the subsequent possession was clearly adverse. Sneed v. Osborn, 25 Cal. 626; Grimm v. Curley, 43 Cal. 250. This adverse possession gave the plaintiffs a title which they were entitled to have quieted.

The question to which the learned counsel have addressed the main portion of their argument is as to the validity of the homestead, it being urged on one side, and denied on the other, that under the Code a homestead can be declared upon an undivided interest. But we do not think it necessary to express an opinion upon this question. Assuming that the homestead was valid at its inception, it was extinguished, not by abandonment, but by the adverse possession of plaintiffs. Mauldin v. Cox, 67 Cal. 387, 7 Pac. Rep. 804. We therefore advise that the judgment and order appealed from be affirmed.

We concur: FOOTE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion judgment and order affirmed.

81 Cal. 502

MOORE *et al.* v. LENT *et al.* (No. 12,095.)

(*Supreme Court of California.* Dec. 2, 1889.)

CORPORATIONS—CAPITAL STOCK.

Civil Code Cal. § 309, prohibiting the directors of a corporation from creating debts "beyond their subscribed capital stock," under penalty of being individually liable therefor, applies to all the subscribed capital stock, whether paid in or not, and regardless of the disposition made of it; and the debts do not include capital stock paid for corporate property.

Department 1. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action by C. W. Moore and others against W. M. Lent and others. Judgment for defendants. Plaintiffs' motion for a new trial denied, and they appeal.

James A. Waymire, for appellants. *McAllister & Bergin*, for respondents.

PATERSON, J. This action is based upon the following provision of the Code: "The directors of corporations must not * * * create debts beyond their subscribed capital stock. * * * For a violation of the provisions of this section, the directors under whose administration the same may have happened, except those who may have caused their dissent therefrom to be entered at large on the minutes of the directors at the time, or were not present when the same did happen, are, in their individual and private capacity, jointly and severally liable to the corporation, and to the creditors thereof, in the event of its dissolution, to the full amount of the * * * debt contracted."[1] The defendants were members of the board of directors of the South Mountain Consolidated Mining Company, a corporation organized under the laws of this state, and having a subscribed capital stock of $10,000,000, divided into 100,000 shares, all of which were issued as full-paid stock, in part payment of the mines and other property of the corporation. The officers of the corporation borrowed large sums of money from the plaintiffs, who were partners in a banking business at Silver City, Idaho. All of the moneys borrowed by the corporation were repaid to plaintiffs, except the sum of $46,953.50. In February, 1876, and while this amount remained unpaid, the corporation became insolvent. A petition in bankruptcy was filed in the United States district court at San Francisco, the usual assignment was made, and the plaintiffs duly proved and filed their claim, but never received any dividends; the receipts from sales having been consumed in the payment of dividends to preferred creditors. During the months of July and August, 1875, when the indebtedness to plaintiffs was created, the corporation was in debt about $200,000. The defendants were present at all meetings of the directors when the indebtedness was incurred, and none of them caused any dissent to be spread upon the minutes. The court found that "the debt alleged in the complaint was not, nor was any debt created by said corporation, beyond its subscribed capital stock." The court held that the defendants were not liable to the plaintiffs in any amount, and, judgment having been entered in their favor, plaintiffs moved for a new trial, which was denied. The appeal is from the order and from the judgment.

The principal controversy here is as to the proper construction of the words, "beyond the subscribed capital stock." Appellants contend that when the directors purchased the mines for $10,000,000, to be paid in stock, they created a debt of $10,000,000, and when they issued all the subscribed capital stock in payment of that debt they no longer had any subscribed capital stock, and every dollar of indebtedness subsequently created was a debt created "beyond the subscribed capital stock." It is conceded that both the property of a corporation and its subscribed capital stock are trust funds for the benefit of the creditors; but it is claimed that the legislature made, or intended to make, a distinction between capital, which may consist of property of an uncertain, speculative value, and subscribed capital stock, which is payable only in money, and has a fixed, definite value; that the directors can create debts so long as there is any subscribed capital stock, but, when that is once exhausted, all debts created are at the risk of the directors. It is urged that so long as the subscribed capital stock is not fully paid up the directors and the creditors know just how much the stockholders may be compelled to contribute for the payment of debts that may be created. It is contended by respondents that, under the provisions of the section quoted above, the directors cannot be made liable until after they have created a debt of $10,000,000; that when the mines were purchased and paid for the property took the place of the subscribed capital stock, at a valuation of $10,000,000. While such laws are to be commended, as in the interest of creditors and fair dealing, they are penal in their nature, and should be strictly construed,—at least, the liability should clearly appear. The language of the statute does not, we think, indicate an intention on the part of the legislature to make the distinction contended for by appellants, and stated above. The prohibition applies to all the subscribed capital stock, whether it has all been paid in, or only part of it, and regardless of the disposition which may have been made of it Thompson, in his Liability of Stockholders, (section 11,) says: "The capital stock of a corporation, which is subject to the operation of this rule, consists of all the stock for which the members have subscribed. Treating this stock as money, it is capable of subdivision into three funds: (1) Money which has been subscribed as a part of the capital stock, and paid in; (2) money thus subscribed, but not paid in; (3) money thus subscribed and paid in, but afterwards divided among the members before all the debts of the corporation are paid. The reason why the capital stock of a corporation is deemed to embrace all the stock for which the members have subscribed, whether paid in or not, is that, since the members are not in general personally liable for the debts of the corporation, this fund is the stake held out to the public, upon the faith of which the company obtains credit." The provision under consideration was designed to operate as a check upon directors, and protect creditors from the effects of corporate recklessness and extravagance. The subscribed capital stock is the fund upon which the transactions of the corporation are to be made. It is a guaranty to creditors that all obligations up to that amount will be met, and the intention of the legislature seems to have been to control the corporate power of the directors to contract beyond that amount, and to render them individually liable to creditors when they exceed it in the amount of debts. All of the acts prohibited by the statute are voluntary acts of the members of the board of directors. The debts referred to are manifestly debts created by voluntary act of the directors; and the capital stock of the company is not such a debt, because such stock must exist before corporate debts can be created. The prohibited debts are debts beyond the subscribed capital stock. They are ordinary, subsisting debts, in excess of the subscribed capital stock, and not the aggregate of the debts of the company, created during its entire corporate existence. It may be admitted that the true construction of the phrase under consideration is not very clear or satisfactory. As said in Irvine v. McKeon, 23 Cal. 474: "This statute provides for making one person individually liable for the debts of another, and prescribes how, and under what circumstances, he shall be held thus liable. Like other statutes which create a forfeiture or impose a penalty, it is to be strictly construed; and every intendment and presumption is in favor of the defendant in such cases." Although the rule of strict construction does not apply under the Code, as we feel bound to construe the statute, to render the defendants individually liable the corporation must have been indebted in an amount in excess of $10,000,000. It is not claimed here that such an indebtedness exists. It is claimed by appellants that the defendants are liable on their own theory, because the property—the mines and mills—must be taken at its actual value, which is less than $100,000. It is sufficient to say in answer to this that we have been unable to find anything in the record to show the value of the mine at the time it was taken, except the amount that was paid for it. The court found that the indebtedness alleged in the complaint was not beyond its subscribed capital stock. This finding is conclusive, considering the contention of the appellants to be sound,—a matter which we do not decide. Our construction of the language of the section quoted above renders it unnecessary for us to notice other points made by appellants. Judgment and order affirmed.

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[1] Civil Code, § 309.

We concur: Works, J.; McFarland, J.

Shea *et al.* v. Lent *et al.* (No. 12,096.)

(*Supreme Court of California.* Dec. 2, 1889.)

Department 1. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

Action by Cornelius Shea and Herbert B. Bell against William M. Lent and others. Judgment for defendants. Plaintiffs' motion for new trial denied, and they appeal.

James A. Waymire, for appellant. *McAllister & Bergin*, for respondents.

Per Curiam. On the authority of Moore v. Lent, ante, 875, (No. 12,095,) this day filed, the judgment and order are affirmed.

(81 Cal. 631)

O'Neil v. Magner. (No. 13,090.)

(*Supreme Court of California.* Dec. 5, 1889.)

Demand Notes—Statute of Limitations.

A promissory note payable "on demand, after date," is due at once, without an actual demand, and the statute of limitations begins to run against it immediately.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. Lawler, Judge.

Action by John O'Neil, administrator of the estate of Margaret Mahoney, deceased, against Denis Magner. Judgment for defendant, and plaintiff appeals.

P. F. Dunne, for appellant. *Sullivan & Sullivan*, (*Matt. I. Sullivan*, of counsel,) for respondent.

Works, J. Action on the following promissory note: "$12,000. San Francisco, May

1, 1887. On demand, after date, for value received, I promise to pay Margaret Mahoney, or order, the sum of twelve thousand dollars, in United States gold coin. DENIS MAGNER." Defense, the statute of limitations. The action was commenced more than nine years after the date of the note. The only question in the case is as to the time when the note matured and the statute commenced to run. The court below held that the action was barred, and rendered judgment for the defendant. The appellant concedes that, if this is a note payable "on demand," the same matured immediately, and the statute had run. But it is contended that, as the note was made payable "on demand after date," it could not have matured at once, and that therefore an actual demand was necessary to put the statute in motion. The general rule is that a note payable on demand is due immediately, without an actual demand, and that the statute commences to run at once. Brummagim v. Tallant, 29 Cal. 506; Cousins v. Partridge, 79 Cal. 228, 21 Pac. Rep. 745; Story, Prom. Notes, § 29; Ang. Lim. § 59; Wood, Lim. § 124. The language used in the note under consideration does not take it out of this rule. In Hitchings v. Edmands, 132 Mass. 338, the court said: "The words 'on demand, after date' are more nearly analogous to such an expression as 'with interest after date.' If a promissory note, payable on demand, with interest after date, is paid the next day after it is given, one day's interest is due and payable. In the case at bar, the intention of the parties to the note was apparently that it should be payable immediately, and no intention appears on the face of the note that the parties intended to stipulate for at least one day's time before a demand could be made." So it was held that the note was "an ordinary demand note, payable at once, on demand, on which an action could have been brought immediately after it was given." Fenno v. Gay, 146 Mass. 118, 15 N. E. Rep. 87. These views apply to the note we are considering, and meet with our approval. Judgment affirmed.

We concur: PATERSON, J.; FOX, J.

(81 Cal. 618)

ARNOLD v. CITY OF SAN JOSE. (No. 12,-277.)

(*Supreme Court of California.* Dec. 5, 1889.)

MUNICIPAL CORPORATIONS—DEFECTIVE STREETS.

A municipal corporation is not liable, in the absence of an express statutory provision imposing a liability, for personal injuries caused by its negligence in leaving a street out of repair, and there is no distinction between cases arising under charters making it the duty of the city, as such, to keep streets in repair, and those making it the duty of the city council to do so. Chope v. City of Eureka, 21 Pac. Rep. 364, followed.

Department 1. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Action for personal injuries by James W. Arnold against the city of San Jose. A judgment was rendered on a verdict for plaintiff. Defendant was granted a new trial, and plaintiff appeals.

Crandall & Biddle and *J. C. Black*, for appellant. *Wm. B. Hardy* and *D. W. Herrington*, for respondent.

PATERSON, J. This is an action to recover damages for personal injuries sustained by plaintiff by falling into a ditch which defendant had excavated in one of its streets, and negligently left open during the night, without guards or lights to warn travelers of the danger. The cause of action is of the same nature as that which was set up in Chope v. City of Eureka, 78 Cal. 588, 21 Pac. Rep. 364, in which a majority of the court, in bank, held that the corporation, in the absence of a statutory provision imposing a liability, is not liable. In that case, as pointed out by Mr. Justice WORKS, "the obstruction of the street was the direct act of the city," yet the corporation was held not liable. A distinction is made by appellant between cases arising under charters making it the duty of the city, as such, to keep streets open and in repair, and those which make it the duty of the city council to do so. We are unable to perceive any merit in the point. The corporation can act only through its agents; and what they do, within the scope of their authority, is "the direct act of the city." If the city, through its agents, in attempting to perform a lawful act, perform it in such a negligent manner that injury results to a citizen, its responsibility does not rest upon the question whether the charter, by mandatory provision, required the act to be done, or simply left it permissive. The act is lawful in both cases. It is the negligence and injury which render it liable, if at all. The distinction contended for was not approved in Winbigler v. Los Angeles, 45 Cal. 36, as claimed by appellant. The court simply said that, according to the argument of counsel, the liability would devolve upon members of the city council, as the statute imposed the duty upon them, and not upon the corporation as such. The court did not hold that the position taken by counsel was correct. The question was not involved in the case, as the work was done by a private person, for his own benefit. The cases all hold that where the work is done by a contractor or abutting owner the city is not acting through its own agents, and therefore it is not liable. That is all that could be decided in Winbigler v. Los Angeles. It results that the complaint does not state any cause of action, and it becomes unnecessary to consider other questions raised. The court below properly set aside the judgment. The order is affirmed.

WORKS, J. I concur on the sole ground that the department is bound by the decision of a majority of the court in Chope v. City of Eureka, 78 Cal. 588, 21 Pac. Rep. 364, from which decision I dissented.

FOX, J. I concur solely on the ground that the court in department is bound by the decision in Chope v. City of Eureka.

81 Cal. 621

ARNOLD v. CITY OF SAN JOSE. (No. 12,026.)

(*Supreme Court of California.* Dec. 5, 1889.)

NEW TRIAL.

Denial of plaintiff's motion to disregard defendant's statement, served on his motion for a new trial after judgment for plaintiff, is not prejudicial to the latter, as his objections to the statement can be considered on the hearing of defendant's motion.

Department 1. Appeal from superior court, Santa Clara county; D. BELDEN, Judge.

Action for personal injuries by James W. Arnold against the city of San Jose. Judgment for plaintiff. Defendant served notice of intention to move for a new trial. Plaintiff moved to disregard the statement filed by defendant. His motion was denied, and he appeals.

Crandall & Biddle and *J. C. Black*, for appellant. *Wm. B. Hardy* and *D. W. Herrington*, for respondent.

PATERSON, J. Plaintiff had judgment in the court below. Defendant served a notice of intention to move for a new trial, and in due time thereafter prepared and served a statement. Plaintiff served certain amendments, which the defendant did not adopt. On November 10, 1886, the statement and proposed amendments were left with the clerk. Plaintiff, believing that the statement and amendments had not been presented within the time allowed by law, orders of the court, and stipulations of counsel, asked the court to disregard defendant's statement and deny its motion for a new trial. The order appealed from reads as follows: "Motion of plaintiff to disregard defendant's statement denied, and cause ordered on the law calendar for settlement of statement, and amendments thereto."

We are unable to see how the plaintiff could be prejudiced by this order. It determines nothing against him. The objections made by him can be preserved in the statement before settlement, and the presumption is that, if they are well taken, the court below will give him the benefit of them by denying the defendant's motion for a new trial, without regard to or consideration of such motion on its merits.

No question is raised as to whether the order is an appealable one. Order affirmed.

We concur: FOX, J.; WORKS, J.

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82 Cal. 32

JONES v. NICHOLL. (No. 12,308.)

(*Supreme Court of California.* Dec. 12, 1889.)

DEMAND NOTES—MATURITY—STATUTE OF LIMITATIONS.

Under Civil Code Cal. § 3130, providing that "it is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him," suit may be brought against the maker, on a note payable on demand, with interest, at any time, without previous actual demand, and the statute of limitations runs against the maker from the execution and delivery of the note; and this rule is not changed by section 3131 et seq., concerning presentment of negotiable instruments for payment, and providing for the apparent maturity of demand paper, as these sections relate to the indorser only, and not to the maker.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; E. M. GIBSON, Judge.

Action by Thomas Jones against John Nicholl. From a judgment of nonsuit plaintiff appeals.

Chapman & Slack, for appellant. *Flournoy & Mhoon*, for respondent.

BELCHER, C. C. On the 17th day of January, 1880, the defendant executed to the plaintiff his promissory note for $1,000, payable on demand, with interest at the rate of 8 per cent. per annum. In the latter part of October, or the beginning of November, 1884, plaintiff demanded payment of the note from defendant for the first time, and, it not being paid, he commenced this action on the 1st day of April, 1885, to recover the amount due thereon. The defendant pleaded payment, and that the action was barred by the provisions of section 337 of the Code of Civil Procedure. At the trial the plaintiff was nonsuited, on the ground that his cause of action was barred by the statute of limitations, and he thereupon appealed from the judgment entered against him.

It is argued for appellant that a note payable on demand, with interest, is a continuing security, and that the statute of limitations does not begin to run against it until demand for its payment has been actually made. The argument is based upon the supposed provisions of our Civil Code. Section 3131 et seq.

The argument is not sound. "It has always been the rule that suit may be brought on a note payable on demand at any time, without any previous demand; the suit itself being all the demand necessary. The rule has been occasionally criticised by judges as illogical; but it has been universally followed by courts, and is as well settled as any other rule of law that could possibly be suggested." Cousins v. Partridge, 79 Cal. 228, 21 Pac. Rep. 745. This rule applies to the maker, and not the indorser, of a note, and it is declared in the Civil Code as follows: "Sec. 3130. It is not necessary to make a demand of payment upon the principal debtor in a negotiable instrument in order to charge him," etc. It is also a well-settled rule of law that the statute of limitations begins to run when a right of action accrues. This is a general rule, and applies to all actions. Brummagim v. Tallant, 29 Cal. 504; Bell v. Sackett, 38 Cal. 407; Collins v. Driscoll, 69 Cal. 552, 11 Pac. Rep. 244. The sections of the Code invoked by the appellant apply to the indorser, and not to the maker, of a note. Section 3131 provides: "Presentment of a negotiable instrument for payment, when necessary, must be made as follows," etc.; and section 3135 provides for the apparent maturity of notes payable on demand, with or without interest. Prior to the adoption of the Codes, the law as to when notes spoken of in this section must be presented, in order to fix the liability of an indorser, was somewhat uncertain, and the section was intended to remove this uncertainty. It relates, however, only to presentment to charge the indorser, and not to the statute of limitations. Machado v. Fernandez, 74 Cal. 362, 16 Pac. Rep. 19.

It is clear that the plaintiff's cause of action was barred when he filed his complaint, and the judgment should therefore be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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82 Cal. 35

DAVIS *et al.* v. DONNER *et al.* (No. 12,561.)

(*Supreme Court of California.* Dec. 12, 1889.)

APPEALABLE ORDERS.

An order refusing to set aside an appealable order is not appealable.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

A. H. Griffith, for appellants. *W. S. Tinning*, (*Aylett R. Cotton* and *W. H. Hart*, of counsel,) for respondents.

PER CURIAM. This is an appeal from an order refusing to set aside an order for a writ of assistance. The order that a writ of assistance issue was a special order, made after final judgment, and therefore an appeal might have been taken from it. Code Civil Proc. § 963. "But defendants do not appeal from that order. They made a motion to set aside that order, and then appeal from the refusal to grant their motion. This is certainly not revisable. It is the mere negative action of the court, declining to disturb its first decision. It is the decision which is the proper subject of complaint, and the refusal to alter it any number of times would not make it less so." Henly v. Hastings, 3 Cal. 341; Railroad Co. v. Railroad Co., 65 Cal. 295, 4 Pac. Rep. 13. Appeal dismissed.

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82 Cal. 64

BAKER v. BROWN.

(*Supreme Court of California.* Dec. 13, 1889.)

FRAUD—PRINCIPAL AND AGENT.

1. Defendant, a broker, sold to plaintiff, for P., lot 5, for the sum of $2,400, informing her, when offering it, that it was the same property he had sold for B. to P. for $1,800, but concealing from her the fact that lot 5 did not embrace all the property he sold to P. for said sum, and also concealing from her the fact that, in consideration of his selling lot 5 to her for $2,400, P. was to give him the balance of the property which he had bought from B., and which was worth $600. At the time of the sale to plaintiff, lot 5 was worth $2,400. The usual commission for a sale of that amount was $100. The court having found that he occupied a position of trust towards plaintiff, that he had been the agent of her husband, and since his death her agent; and that she never purchased except on his advice,—decreed that defendant pay plaintiff $2,400 on the conveyance to him by her of lot 5. *Held* error, as it did not appear that she had been deceived as to the quantity or quality of the land, and, besides, defendant had never agreed to purchase lot 5, nor had he received the $2,400.

2. The facts that defendant had been the agent of plaintiff's husband in his life-time, and since then had been her general agent, and that she had made purchases and sales through him, and had not made any purchases or sales except through him or on his advice, do not show that defendant was plaintiff's agent in this transaction, or that she had any right to rely on him except as a broker, she knowing that he was to receive his commission from P., though she did not know the amount of it.

Department 1. Appeal from superior court, Los Angeles county; A. W. HUTTON, Judge.

Anderson, Fitzgerald & Anderson, for appellant. *Haynes & Mitchell*, for respondent.

PATERSON, J. B. was the owner of lot 5 and a fractional part of lot 2, block 6, of the city of Pasadena, and through the agency of the defendant sold the same to P. for the sum of $1,800. Thereafter the defendant applied to P. to purchase said fractional portion of lot 2, but P. declined to sell any portion of the property unless he could sell the whole, but then and there proposed to the defendant that if he would find a purchaser for lot 5, for the sum of $2,400, he would give to the defendant the remaining portion of the premises, to-wit, said fractional portion of lot 2. The court finds that the defendant went to the plaintiff, and offered to sell her lot 5 for the sum of $2,400, informing her at the time that it was the same property he had sold for B. to P. for $1,800, but concealed from the plaintiff the fact that lot 5 did not embrace all the property he so sold to P. for said sum, and also concealed from her the personal interest he had in effecting the sale of lot 5. The court further found that "at this time, and for a long time prior thereto, the defendant occupied towards the plaintiff a position of trust and confidence; that he had been the agent of her husband in his life-time, and since the latter's decease had been the general agent of the plaintiff; that she placed the utmost confidence in him and relied upon him as a confidential friend and adviser in her business affairs; that she had made purchases and sales of real estate, through him and upon his advice, in Los Angeles county, and had not made any purchases or sales except through him, or upon his advice, in said county, and the defendant knew that the plaintiff thus relied upon him, and placed confidence in him;" that in the purchase of the property plaintiff relied exclusively upon the advice of the defendant, and that she would not have made the purchase except for his advice; that she had no knowledge or information that defendant had received a deed or acquired a fractional portion of lot 2 until about a month before the commencement of this action. The court found, also, that the value of lot 5 at the time of the purchase by plaintiff was $2,400, the amount paid for it; that the value of the fractional portion of lot 2 was $600; that the usual commission allowed agents for the sale of real estate was 5 per cent. on the first $1,000, and 2½ per cent. on the excess over that sum. Judgment was entered in favor of plaintiff, adjudging and declaring that the sale of lot 5 was fraudulent and void, and ordering the defendant to pay the plaintiff the sum of $2,400, with interest thereon, from the 28th of November, 1887, together with costs of suit, upon the plaintiff conveying to the defendant the said lot 5.

We are not aware of any principle or authority upon which the decision can be supported. It is not pretended that the plaintiff was deceived as to the actual quantity or quality of the land she purchased. It nowhere appears that she knew anything about the extent of the property purchased by P. from B. It is found that the property was worth all that she paid for it. She knew she was purchasing lot 5. That is what was offered, and what she bought. Assuming the relation of the defendant towards the plaintiff to have been, as claimed by respondent, a position of trust, in which he had concealed from her the fact that he had a personal interest in making the sale, and made certain representations which were not true, in fact, as to the value of the land sold, the decree of the court is not supported by the findings. The court could not create a contract which never existed. It could not compel the defendant to accept a conveyance of property which he had never purchased. Nor could it require him to pay over money which he had never received. The court appears to have considered it a case in which it might follow the property acquired by an agent as held in trust by him for his principal; but such is not the case here. Defendant never acquired, or attempted to acquire, the title to lot 5, and never received any portion of the $2,400 which the court requires him to refund. If the plaintiff can recover anything from the defendant, it is the fractional portion of lot 2, or the value thereof, although it is unnecessary to decide the matter in this case; but we do not think that plaintiff is entitled to anything. The property she purchased was worth all she paid for it. The court attempted to find, apparently, that the relation of principal and agent existed between the plaintiff and defendant at the time of the purchase; that confidence was reposed in defendant by plaintiff, and by him abused. A fair construction of the finding, however, we think fails to show such a relation of trust and confidence. The facts found were that he had been the agent of her husband in his life-time, and since the latter's decease had been the general agent of the plaintiff; that she had made purchases and sales of real estate through him, and upon his advice, in Los Angeles county, and had not made any purchases or sales except through him or upon his advice. The facts found do not, we think, show the existence of an agency as to this property, or any right in the plaintiff to rely upon defendant as her agent, except as a broker or middleman between the parties. Defendant received no compensation from the plaintiff. His commissions were paid by Pierce. Plaintiff knew that defendant was acting as the agent of Pierce. But, as stated before, even if she had been damaged through the misrepresentations of the defendant, the relief granted would be improper.

We do not consider it as important that the defendant's compensation for making the sale was $600, which was a larger compensation than was usually paid for such services. Pierce had a right to pay the defendant any amount he saw fit for perfecting the trade; and, unless the plaintiff was deceived to her injury, we see no ground upon which she can complain. Judgment reversed, with directions to the court below to enter judgment in favor of defendant for his costs.

We concur: Works, J.; Fox., J.

(81 Cal. 370)

Gardner v. Tatum *et al.* (No. 11,902.)

(*Supreme Court of California.* Nov. 30. 1889.)

Excessive Verdict—Remittitur—Physicians—Compensation.

1. A motion by defendants for a new trial because of an excessive verdict was granted, unless plaintiff elected to remit a certain sum, and defendants would accept it as modified. Defendants refused to accept the offer, and the motion was denied; the order reciting that the verdict was sustained by a preponderance of evidence, "unless as to the amount of the verdict." *Held* that, as the language of the trial judge clearly showed his belief that the verdict was excessive, which belief was warranted by the evidence, the defendants were entitled to have the verdict reduced without the imposition of terms, and that a new trial should be granted.

2. Under St. Cal. 1875–76, p. 792, § 13, and St. 1877–78, p. 918, § 7, making it a misdemeanor for a person to practice medicine without having first procured a certificate from a medical board, a physician cannot recover for services rendered before the issuance of his certificate by the board, though he made application therefor before his employment began; Civil Code Cal. § 1667, making that unlawful which is "contrary to the policy of express law, though not expressly prohibited."

3. But where the services are not rendered under an express contract, and as the law implies a promise to pay for each visit as made, he may recover for services rendered the patient after the issuance of his certificate.

4. In an action to recover compensation for services rendered by a physician, plaintiff's testimony as to what discoveries he considered that he had made in skin-grafting while treating the patient, defendants' employe, is not admissible, as defendants are not liable for extraordinary services in the way of experiments; the question being also objectionable because calling for the opinion of the witness.

5. Evidence as to the result of the treatment by a physician subsequently employed is inadmissible, as his treatment could not alter the value of plaintiff's services.

Fox and Thornton, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; T. H. Reardon, Judge.

Action by H. H. Gardner against Henry L. Tatum and another to recover for services rendered as a physician in treating Frederick Cook, defendant's employe. On the trial it was not disputed that plaintiff had made 194 visits; but the evidence as to the value of his services was conflicting. The medical witnesses called by him estimated that his services were worth all the way from $2,500 to $5,000; while those called by defendants considered $2.50 per visit a fair compensation. During his examination in chief, plaintiff was asked: "What improvements and discoveries in skin-grafting do you consider you made in treating Cook?" An objection to this question was overruled. There was a verdict for plaintiff; and from a judgment thereon, and an order denying their motion for a new trial, defendants appeal.

Langhorne & Miller, for appellants. *J. F. Wendell* and *S. G. Hilborn*, for respondent.

PATERSON, J. Plaintiff, who is a physician and surgeon, was called in by defendants, and began to treat their employe Cook, on March 3, 1883. He continued to visit the patient until October 2, 1883. On September 24th he made a demand upon defendants for the sum of $2,386. Thereupon defendants notified him that they considered his charges exorbitant, and that they would not be responsible for any further services in behalf of Cook. He then brought this action to recover the sum of $2,406, alleged to be the reasonable value of his services. The jury found a verdict in his behalf for the sum of $1,800, and judgment was entered for that amount, and $318, costs and disbursements. The defendants moved for a new trial, specifying several errors of law, and claiming that the verdict was excessive. The defendants convinced the learned judge who heard and decided the motion that the verdict was excessive, and not warranted by the evidence, and he thereupon caused to be entered a conditional minute order, of which the followng is a copy: "The motion for a new trial herein will be denied, provided that plaintiff, within thirty days from this date, offer to remit the sum of $800 from the amount of the verdict herein; provided, also, that the defendants shall agree to accept said verdict and judgment so modified as a finality; said offer to remit not to be binding upon the plaintiff unless accepted by defendants as a finality. Said motion for a new trial to be granted unless said offer to remit by plaintiff be so made." In accordance with the order, plaintiff filed an offer to remit the sum of $800 from the amount of the verdict, provided the defendants should accept the verdict and judgment so modified as a finality. The defendants elected not to accept the terms of the order; whereupon the court made an order denying the motion, in the following language: "It appearing that plaintiff has offered to remit said sum as directed, and within the time directed, and no error appearing in the record, and the verdict as rendered being sustained by a preponderance of evidence, unless as to the amount of the verdict, it is hereby ordered that the motion for a new trial be, and the same is hereby, denied."

We are of opinion that the court erred in denying the motion. If the verdict was for an excessive amount, and it is made clear by the language of both orders that the court believed it was,—and the evidence, we think, fully sustains the court in such belief,—defendants were entitled to have it reduced without the imposition of any terms upon them, and without being deprived of the right to correct any errors leading to a judgment which, although supported by the evidence admitted, is nevertheless erroneous. It was not the fault of defendants that the jury found the value of plaintiff's services to be nearly double what the court thought the evidence showed it to be, and they ought not to be punished because the jury erred. The court was of opinion that no errors had been committed during the trial, but that the verdict was for $800 in excess of what the defendants justly owed the plaintiff. Hence its order, in effect, is a penalty of $800 against the defendants, if they fail to accept the rulings of the court, made during the trial, as just and final. Further along we shall find a practical illustration of the injustice which would result if this could be done.

The court admitted evidence as to the value of services for which plaintiff was not under any circumstances entitled to recover. At the time plaintiff was employed by defendants he had not procured the certificate required by the laws of this state regulating the practice of medicine,—"An act to regulate the practice of medicine," (St. 1875-76, p. 792;) and an act supplemental thereto, (St. 1877-78, p. 918.) By section 13 of the first act it is provided that "any person practicing medicine or surgery in this state, without complying with the provisions of this act, shall be punished by a fine of not less than fifty dollars, nor more than five hundred dollars, or by imprisonment in the county jail for a period of not less than thirty days, nor more than three hundred and sixty-five days, or by both such fine and imprisonment, for each and every offense." And by section 7 of the amendatory act of 1878 a person practicing medicine, without having first procured a certificate from one of the medical boards, is guilty of a misdemeanor, and subject to the penalties provided in section 13 of the act of 1876. By the terms of section 6, he is required to have his certificate recorded in the office of the clerk of the county in which he resides. The plaintiff's application was not granted by the board of examiners until March 12th, and his certificate was not received by him until March 21st. It was recorded March 29th. Under the law referred to, and the facts, we think the court erred in refusing the first instruction of defendant, to the effect that plaintiff was not entitled to recover from defendants any compensation for medical services rendered between March 3 and March 12, 1888. "The general principle is well established that a contract founded on an illegal consideration, or which is made for the purpose of furthering any matter or thing prohibited by statute, or to aid or assist any party therein, is void. This rule applies to every contract which is founded on a transaction *malum in se*, or which is prohibited by statute on the ground of public policy." Swanger v. Mayberry, 59 Cal. 91; Ladda v. Hawley, 57 Cal. 51. This principle is in accord with the express provision of our Civil Code, which makes that unlawful which is either contrary to the express provision of law or "contrary to the policy of express law, though not expressly prohibited." Civil Code, § 1667. In construing the acts above referred to, this court said, in Ex parte Frazer, 54 Cal. 94: "The title of the act sufficiently indicates its main purpose and design. Its general framework shows that it was intended to require, of those alone authorized to practice the profession, that knowledge of pathology, anatomy, and physiology recognized as necessary by every school of the science of medicine." And, this being the main object of the law, it must follow that it is the policy of the law to protect the public health and prevent imposition upon those in need of medical advice and care. A contract made, therefore, to render medical services with one who has not obtained a certificate showing that he possesses the necessary qualifications—who has not complied with the law—is contrary to such policy, and is therefore void. It is claimed on behalf of appellant that the contract was an entire contract, and, if void in part, was void *in toto*. This contention, we think, cannot be sustained. The contract was an implied one. The law implied a promise to pay for each visit as it was made. The most that can be said in support of the contention is that the law will not imply a promise to pay for services which have been illegally rendered. This objection can apply only to such services as were rendered prior to March 12th, when plaintiff obtained his certificate. There was no violation of the law in any services rendered by the plaintiff subsequent to that date, and there is no reason why the law should not imply a promise to pay for them. It is claimed by respondent that the court, under this view, should order the amount recovered for services prior to March 12th to be remitted, and sustain the judgment for the remainder. Instruction No. 1, offered by defendant and refused, shows that the case was tried in the court below upon the theory that the plaintiff could recover for services rendered during the entire period of his employment; and it does not appear with sufficient clearness, we think, what was the value of the services rendered from March 3d to March 12th. Respondent claims that the issuance to the plaintiff of a certificate on March 12th related back to the time when he made his application, which was prior to the date of his employment, and that this relation rendered the services valid. This contention, we think, cannot be sustained. Ladda v. Hawley, supra.

We think that the court erred in allowing the plaintiff to testify as to discoveries he made in skin-grafting while caring for the patient, Cook. We are unable to see what bearing upon the question of the liability of the defendants this testimony would have. They certainly could not be made liable for any extraordinary services performed in experimenting upon the patient for the purpose of discovering new and improved methods of treatment in skin grafting. The question was, furthermore, objectionable on the ground that it called for the opinion of the witness as to the discoveries made, not as to what he had actually done.

It was error, also, we think, to allow the witness Cook to state what was the result of Dr. Worth's treatment. The value of the plaintiff's services in no way depended upon the nature or value of Dr. Worth's treatment. If Dr. Worth's treatment was bad, that fact did not make Dr. Gardner's any better. Judgment and order reversed, and cause remanded for a new trial.

We concur: BEATTY, C J.; SHARPSTEIN, J.; MCFARLAND, J.; WORKS, J.

FOX, J. I dissent. I do not think that there is anything in the record to justify the conclusion that the court below thought the verdict excessive. The order recited in the leading opinion was an unusual one; but, taking the whole record together, the broadest construction that, to my mind, can be given to it is that the court below thought that, under the circumstances of the case, the verdict was a hardship to the defendants, and, on the other hand, the delays of a new trial and possible appeal would also work a hardship to the plaintiff, and that it would be better for both parties to settle the matter on the basis of the order, which it gave them an opportunity of doing. But the very terms of the order imply that the court did not consider the defendants entitled to that reduction as a matter of right or of law, and the weight of the evidence is against any such implication. On the contrary, the preponderance of the evidence is in favor of a much larger amount than that allowed by the verdict. If the amount of the bill was a surprise to the defendants, it was in a large degree their own fault, in utterly neglecting to ascertain the character of the case which they had committed to plaintiff's care, and to make some arrangement as to the extent of the charge to be made. The evidence shows that the case was one attended with great difficulty, requiring great skill and constant care, and that it was attended with such success as had made it phenomenal in that class of surgical cases. As to the point made on the requirements of the "Act to regulate the practice of medicine," and the act supplementary thereto, the inhibition of the statute ran against the person, and not against the business. As was said by the court in Aiken v. Blaisdell, 41 Vt. 666: "If a man engage in the kind of business referred to, he is engaged in a legal business, whether he has a license or not. If he has no license, he has no legal right to do it, and subjects himself to the penalty. The law, we think, was intended to operate upon the person, and not upon the business." In this case the plaintiff possessed every qualification required by the law, and not only proved it to the entire satisfaction of the board of examiners, but also paid his license fee, before entering upon this employment, and only failed to receive the license at the time because of a failure of the board to hold a meeting in time to grant it earlier. It was not his fault that the license was not in his possession. The cases of Ladda v. Hawley and Swanger v. Mayberry, cited in the leading opinion, are both cases of contract for stealing timber from the government of the United States,—a business unlawful *per se*,—and the judgments of the court refusing to enforce the contracts have no bearing in this case. I do not, therefore, think the court erred in refusing the instruction asked by defendants. Neither does it appear to me that the defendants were injured by the rulings of the court in the admission of evidence. In my opinion, the judgment should be affirmed; but, if it be determined that it should be reduced by disallowing for the service rendered before the plaintiff received his license, it is better to make that modification than to reverse the judgment and remand the case for a new trial. The record shows the number of visits made and operations performed, and the charge made for each; and it seems to me that there is no substantial difficulty in the way of making a deduction for the first nine days of that service, which shall conform to the justice of the case, if it shall be determined that such deduction ought to be made; it being understood and apparent that the jury have allowed just about 75 per cent. of the whole charge, and that the evidence of every surgeon called in the case puts the value at more than was charged.

I dissent: THORNTON, J.

(81 Cal. 507)

JONES *et al.* v HANNA *et al.* (No. 11,654.)

(*Supreme Court of California.* Dec. 2, 1889.)

CONTRACTS—CONSIDERATION—EXECUTORS —ACCOMMODATION INDORSER.

1. Plaintiffs agreed with defendant executrix to purchase at public sale the personal property of her testator "for her account and risk," they to receive certain compensation for purchasing and selling the same, she to give security against loss. For this purpose, she gave her note. The property was resold at a loss, and she then gave her note for the amount of the loss in place of the prior note. *Held* that, under Code Civil Proc. Cal. § 1576, providing that "no executor or administrator must directly or indirectly purchase any property of the estate he represents, nor must he be interested in any sale," and, Civil Code, § 1667, providing that "that is not lawful which is contrary to an express provision of law, or contrary to the policy of express law," the contract was unlawful and void, and recovery could not be had on the note.

2. An accommodation indorser of such note, who had full knowledge of all the facts, is not estopped by Civil Code, § 3116, providing that an indorser of a note warrants to every subsequent holder thereof that it is in all respects what it purports to be; that the signatures of all prior parties are binding upon them; and that if it is dishonored he will pay the same,—from setting up its illegality against the payees, as they took with notice, and were not *bona fide* holders.

THORNTON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Wm. M. Pierson, for appellant. *H. A. Powell*, for respondents.

PATERSON, J. The findings show that the defendant Hanna, while acting as executrix of the last will of Peter N. Hanna, deceased, procured an order of sale of personal property belonging to the estate. On the day of the sale she entered into an agreement with the plaintiffs that they should buy the property offered for sale "for her account and risk," and advance the purchase price; that she would pay them 2½ per cent. commission on the amount of the purchase, and 5 per cent. on the amount of sales they might thereafter make. She further agreed to "guaranty them against loss or damage," give them possession of the goods until other security was furnished, and pay them interest on the amount advanced at the rate of 9 per cent. per annum. In pursuance of this agreement the plaintiffs purchased the goods for her benefit, using the name of one Haynes as purchaser. Plaintiffs thereupon removed the property from the place of sale of deefndant Hanna's store, and began to sell the same for her benefit. On the 13th day of September, 1883, and while the greater portion of the personal property so purchased was at the Clay-Street store, undisposed of, plaintiffs required of the defendant Mary L. Hanna security under the agreement of September 6, 1883; and thereupon she made and executed her promissory note for $10,000, and procured the defendant William Bihler to indorse it, and thereafter to deliver it to the plaintiffs. Finding 11. After adding to the figures $29,957—the amount paid for the goods and advanced by plaintiffs—the commissions of plaintiffs in purchasing and selling the property, and interest on the advances, and deducting therefrom the proceeds, less the expenses of making the sales, a balance remained due the plaintiffs of $9,281.49. Upon the surrender of the prior note the defendant Hanna made, executed, and delivered the note in controversy, indorsed by the defendant Bihler, who had full notice of all the facts. The court found that "plaintiffs had actual knowledge and notice before and at the time of the execution of the agreement of September 6 1883, that the defendant Mary L. Hanna was the duly-appointed, qualified, and acting executrix of said estate; and that the object and purpose of making the said agreements and transactions was to realize as large a sum as possible for the estate, and also to make a profit to herself out of the personal property to be bought in, and which was actually bought in, at said sale." Finding 16. Judgment was entered in favor of the plaintiffs, and the defendant Bihler has appealed on the judgment roll alone.

Upon the facts stated, the judgment is erroneous, and must be reversed. The contract out of which this transaction arose is unlawful and void; void because it is in aid of an act expressly prohibited by law, and because it is contrary to the policy of express law. Section 1576 of the Code of Civil Procedure provides: "No executor or administrator must, directly or indirectly, purchase any property of the estate he represents, nor must he be interested in any sale." It is a universal rule that courts will not aid parties in the enforcement of contracts thus interdicted by the law. Our Code provides: "That is not lawful which is (1) contrary to an express provision of law; (2) contrary to the policy of express law, though not expressly prohibited or (3) otherwise contrary to good morals." Section 1667, Civil Code. Wharton says that "a contract whose object is to violate a statute will not be enforced by the courts of the state by which the statute is enacted." "A party who goes into an illegal enterprise risks all he puts in, and cannot, in case of his confederate proving untrue or the adventure miscarrying, recover back his advances." 1 Whart. Cont. §§ 354, 360. Here all the parties went into the transaction with their eyes open. The plaintiffs expected a share in the profits of a scheme prohibited by law. As said in Bowers v. Bowers, 26 Pa. St. 74, "the question here is not upon the legality of the administration, but upon the sufficiency of the consideration for the defendant's promise; and as that, in its very nature, endangered the purity of the trust, the law will not sanction it." The contract upon which the note in suit is based was made for the benefit of Mrs. Hanna and plaintiffs, although the court finds that it was made "to realize as large a sum as possible for the estate." The result to the estate in any particular transaction is immaterial. The rule is one of universal application. It is founded upon public policy, and should be rigidly enforced by courts, because it "stands upon our great moral obligation to refrain from placing ourselves in relations which ordinarily excite a conflict between self-interest and integrity." Michoud v. Girod, 4 How. 555. See, also, the following authorites: Danielwitz v. Sheppard, 62 Cal. 339; Swanger v. Mayberry, 59 Cal. 91; Edwards v. Estell, 48 Cal. 194; Gardner v. Tatum, ante, 880, (No. 11,902, filed November 30, 1889;) Porter v. Jones, 52 Mo. 399; Saltmarsh v. Beene, 30 Amer. Dec. 525; Blasdel v. Fowle, 120 Mass. 447; Trust Co. v. Trust Co., 53 Amer. Dec. 742; Slocum v. Wooley, 11 Atl. Rep. 264; Dillon v. Allen, 46 Iowa, 299; Bowers v. Bowers, 26 Pa. St. 74. The question involved is much broader than those raised in the cases to set aside probate sales and enforce trusts relied on by respondent.

Plaintiffs' contention that defendant Bihler is estopped, under section 3116 of the Civil Code, from taking advantage of the facts relied upon, cannot be sanctioned. The respondents did not take the note without notice, and they are not *bona fide* holders. Section 3116 of the Civil Code[1] has not added any new liability of an indorser, —certainly not in favor of those who are not *bona fide* holders. The note in suit was given in pursuance of the original and unlawful contract. It is "the other security" referred to in the written agreement. Under such circumstances, any defense which the maker might make may be urged by the indorser. Davis v. Seeley, 38 N. W. Rep. 901; Smith v. Silsby, 55 Cal. 470; 3 Kent, Comm. *80; 1 Daniel, Neg. Inst. § 164. There are other points made by respondents, but we do not deem it necessary to consider them in this opinion. Judgment reversed and cause remanded with directions to enter judgment in favor of defendant.

We concur: BEATTY, C. J., SHARPSTEIN, J.; WORKS, J.; FOX, J.

THORNTON, J. I dissent. In this case, I adopt the opinion of the commission, drawn up by Commissioner VANCLIEF, and concurred in by BELCHER and FOOTE, CC., when the case was before department 1 of this court, as a clear and correct exposition of the law applicable to it. That opinion is as follows:

"This action is upon a promissory note made by Mary L. Hanna to the defendant Bihler, and by him indorsed to the plaintiffs. The defendant Bihler alone answered, and from a judgment against him this appeal is taken upon the judgment-roll alone, without any bill of exceptions; and the only error assigned is that the findings of fact by the trial court do not support the judgment. The trial court found that Peter Naylor Hanna died testate in the city and county of San Francisco, December 16, 1881. That on the 21st day of January, 1882, the superior court of said city and county admitted the will of said deceased to probate, and appointed Mary L. Hanna —the widow of the testator—and Catherine N. Hanna, executrices, and John Hanna, executor of said will, all of whom qualified; but John Hanna died on the 4th day of June, 1883, and after his death Mary L. and Catherine N. Hanna continued to act as executrices, and in July, 1883, procured an order of said court authorizing a sale at auction of certain personal property of said estate, which sale was made on the 7th day of September, 1883, by Newhall & Co., who were then licensed auctioneers, and who were employed by the executrices to make the sale. On the 6th day of September, 1883, and prior to the commencement of the sale, the defendant Mary L. Hanna executed a written contract with the plaintiffs (respondents) of which the following is a copy: 'San Francisco, Sept. 6, 1883. Messrs. S. L. Jones & Co.—Gentlemen: I hereby request and authorize you to purchase for my account, at the sale of the stock fixtures, etc., of the firm of J. & P. N. Hanna, as advertised for sale by Messrs. Newhall Sons & Co., or as may hereafter be advertised for sale by them during the present month, such quantities and kind of merchandise and fixtures, and at such prices as are agreed upon by and between Wm. B. Thompson and Thomas J. Haynes. In consideration of the above, I hereby agree to pay you a commission of two and one-half per centum on the amount of said purchase, also a commission of five per centum upon the amount of any sales which you may make of the whole or any part of said merchandise or fixtures for my account; and I further authorize you to cover by fire insurance the full amount of such purchases, with twenty per centum added. Interest for money advanced for the above purposes to be at the rate of nine per centum per annum. I hereby guaranty you against all loss or damage by reason of the above request and authorization, and agree to make a full settlement with you within ninety days from date. As part security, you will please hold the goods purchased until such time as other security is furnished to your satisfaction. MARY L. HANNA. Witness: W. B. THOMPSON.' At the time of this agreement the plaintiffs were regularly licensed auctioneers, and engaged in business as such in the city and county of San Francisco. All that plaintiffs did in connection with the purchase and sale of said property, as hereinafter stated, was done under and by virtue of said written contract. In accordance with said contract, the plaintiffs, in the name of Thomas J. Haynes, one of their employes, and for the private benefit of the defendant Mary L. Hanna, individually bought at said sale certain personal property belonging to said estate, to the value of $29,957, and paid said last-mentioned sum to said Newhall & Co. Immediately after the sale the property so purchased in the name of Haynes was removed to the store of the defendant Mary L. Hanna, on Clay street, in said city, and was there exposed for sale for her private benefit, under the immediate supervision of the plaintiffs. The sale as made to Haynes, was reported to the superior court by said executrices, and was duly confirmed on the 19th day of December, 1883. In addition to the foregoing, the court made the following findings:

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[1] Civil Code Cal. § 3116, provides that an indorser of a note warrants to every subsequent holder thereof that it is in all respects what it purports to be; that the signatures of all prior parties are binding upon them; and that if it is dishonored he will pay the same.

"'(11) That on the 13th day of September, 1883, and while the greater portion of the personal property so purchased was at the Clay-Street store, undisposed of, plaintiffs required of the defendant Mary L. Hanna security under the agreement of September 6, 1883, and thereupon she made and executed her promissory note for ten thousand ($10,000) dollars, and procured the defendant William Bihler to indorse it, and thereafter delivered it to the plaintiffs. (12) That upon the maturity of said note, and on the 10th day of May, 1884, the same was taken up and renewed by a similar note, made and executed by the defendant Mary L. Hanna, indorsed by the defendant Bihler, and delivered to plaintiffs. (13) That the store on Clay street was operated by the defendant Mary L. Hanna, under the supervision of plaintiffs, for about seven months; and a greater part of the property so purchased at the auction sale was sold thereat, during that time, at retail, and the proceeds thereof paid to plaintiffs. That thereafter, about the 30th day of April, 1884, the remainder of said personal property was sold at public auction by the plaintiffs, at the request and for the benefit of the defendant Mary L. Hanna. (14) That the net result of the purchase and sale of the property of said estate, as aforesaid, was this: Adding to the $29,957, the commissions of plaintiffs in purchasing and selling said personal property and interest on the advances as specified in said agreement, and deducting therefrom the proceeds, less the expenses of making the sales, a balance still remained due the plaintiffs of $9,281.49. (15) That on the 1st day of July, 1885, upon the surrender of said note of May 10, 1884, the defendant Mary L. Hanna made and executed, and the defendant William Bihler indorsed, the promissory note set forth and described in plaintiffs' complaint for the sum of $9,281.49, the same being the amount ascertained as aforesaid to be then due plaintiffs from defendant Mary L. Hanna, on account of the transactions hereinbefore set forth, and subsequently said note was duly delivered to plaintiffs. (16) That plaintiffs had actual knowledge and notice before and at the time of the execution of the agreement of September 6, 1883, that the defendant Mary L. Hanna was the duly appointed, qualified, and acting executrix of said estate, and that the object and purpose of making the said agreements and transactions was to realize as large a sum as possible for the estate, and also to make a profit to herself out of the personal property to be bought in, and which was actually bought in, at said sale. (17) That defendant William Bihler, at the date of his indorsement of the several notes above specified, had full knowledge and notice that the same were for moneys advanced and loaned by plaintiffs to Mary L. Hanna, while such executrix, to enable her to purchase the property belonging to said estate. (18) That no part of the principal sum specified in said promissory note has been paid, and that there is still due and unpaid the sum of $593 interest thereon' making in the aggregate $9,874.49 principal and interest still due and unpaid on said note.

"'And, as conclusions of law from the foregoing facts, the court finds that the plaintiffs are entitled to recover of and from the defendant William Bihler the sum of $9,874.49 and costs, in this behalf expended.'

"It is urged by counsel for the defendant that the contract between the plaintiffs and Mary L. Hanna, out of which the consideration for the note in suit arose, is in contravention of section 1576, Code Civil Proc., which provides that 'no executor or administrator must directly or indirectly purchase any property of the estate he represents, nor must he be interested in any sale.' The general principle is well established that a contract founded upon an illegal consideration, or which is made for the purpose of furthering, aiding, or assisting any matter or thing prohibited by statute, is void. Ladda v. Hawley, 57 Cal. 51; Swanger v. Mayberry, 59 Cal. 91; McGregor v. Donelly, 67 Cal. 149, 7 Pac. Rep. 422. Section 1667 of the Civil Code provides that: 'That is not lawful which is contrary to an express provision of law, or contrary to the policy of express law, though not expressly prohibited, or which is otherwise contrary to good morals.' But we are of the opinion that these rules of law are confined to contracts which appear to be directly promotive of an illegal or immoral act or object; or which are founded wholly or in part upon an illegal or immoral consideration, and do not apply to cases where the contract appears to be lawful in itself, and founded upon a consideration which is only collaterally and remotely connected with the prohibited transaction. In De Groot v. Van Duzer, 17 Wend. 170, BRONSON, J., said: 'It cannot, I think, be maintained that a contract which is in itself free from vice can be avoided on the ground that it may possibly facilitate an illegal transaction. * * * It is impossible to foresee where the doctrine would carry us, should it be held that a contract is void merely because it may have some remote connection with an illegal transaction.' Scott v. Duffy, 14 Pa. St. 18–20; Faikney v. Reynous, 4 Burrows, 2070; Hook v. Gray, 6 Barb. 398; Armstrong v. Toler, 11 Wheat. 258. The consideration for the promissory note sued on was principally money loaned by plaintiffs to Mary L. Hanna, and the remainder consisted of commissions for services in assisting her in purchasing and selling the property purchased for her at said sale. All these were lawful in themselves, since none of them is prohibited by any statute, or contrary to the policy of any express law, or otherwise contrary to good morals. The commissions on the sales of the property had no connection whatever with the transaction alleged to be illegal. The prohibition relied on (section 1576, Code Civil Proc.) is addressed solely to executors and administrators, for the benefit and protection of the heirs and others interested in the estate, which protection may be waived by the persons for whose benefit it was provided; it being well settled that a purchase of the property of an estate by the executor or administrator *per interpositam personam*, as in this case, is not void, but only voidable, at the instance of the parties interested. Boyd v. Blankman, 29 Cal. 33; Ives v. Ashley, 97 Mass. 198; Dunlap v. Mitchell, 10 Ohio, 117; Williams v. Rhodes, 81 Ill. 574. If all parties interested should deem it advisable, and agree that the executor should purchase the property of the estate at fair and fixed prices, would a purchase in accordance with such agreement, and entirely free from actual fraud be even voidable? Would not such an agreement be a good defense to an action by a party to it to set aside the sale on the sole ground of constructive fraud? In view of the construction given to section 1576 of the Code of Civil Procedure by this court, it would seem that it does not prohibit a purchase of the property of an estate by the executor or administrator which is satisfactory to all parties interested, and is not objected to by any of them; it being well settled that persons not beneficially interested in the estate have no right to object, and that the parties interested may waive their right to object, and may ratify the sale either expressly or by acquiescence. And it follows that what they may ratify they might have authorized in advance of the sale, since a ratification is but the equivalent of a previous authority. Taking this view of the case, the record fails to show that Mary L. Hanna, in purchasing the property of the estate of Peter Naylor Hanna, did what was prohibited by law, since it fails to show that any person interested in that estate ever objected to her purchase, and also fails to show who were interested in the estate. For aught that appears, Mary L. Hanna may have been the only heir and the only creditor. If, under any circumstances which may have existed, her purchase was lawful, and not immoral, it should be presumed to have been so until the existence of such circumstances are negatived; and the plaintiffs were entitled to act upon this presumption at the time they advanced money and rendered services in aid of her purchase, unless they had notice of facts not disclosed by the record in this case. The cases of Hotel Co. v. Wade, 97 U. S. 13, and Schermerhorn v. Talman, 14 N. Y. 123, shed much light upon the questions involved in this appeal, and furnish additional reasons for our conclusions in this case, which we have deemed it unnecessary to assign. We advise that the judgment of the court below be affirmed."

I add the following: The property which was to be sold and bought, and as to which the plaintiffs contracted herein, consisted, as described in the letter addressed to the plaintiffs, and signed "Mary L. Hanna" (which the court below found was the only contract entered into between the parties; see finding 8,) of "the stock, fixtures, etc., of the firm of I. & P. N. Hanna." In another letter, addressed by same to same, this property is described as the "entire stock, furniture, etc., of the firm of I. & P. N. Hanna." It is nowhere found that this property, belonging "to the firm of I. & P. N. Hanna," was the property of I. N. Hanna, or that I. N. Hanna was "I. & P. N. Hanna," nor can this court assume them to be the same. It would be going very far, and a bow-shot beyond the decided cases, to hold that a purchase by the executrix of I. N. Hanna, at public auction, of the property of the firm of which I. N. Hanna was a member, was utterly void. I know of no case which holds it. At most, it was only voidable, at the election of the heirs or devisees of I. N. Hanna. The rule applicable to executors is that applicable to all sorts of trustees,—to an executor as trustee for devisees and heirs,—and the rule is thus stated in Campbell v. Walker, 5 Ves. 678: "There is no rule that a trustee to sell cannot be the purchaser, but, however fair the transaction, it must be subject to an option in the *cestui que trust*, if he comes in a reasonable time to have a resale, unless the trustee, to prevent that, purchases under an application to the court." The questions here decided were directly adjudicated in the case cited. The above decision was by the master of the rolls, Sir RICHARD PEPPER ARDEN, afterward lord chancellor, as Lord ALVANLEY. This rule was in substance approved by Lord Chancellor ELDON, when this case came before him. Lord ELDON's decision is reported in 13 Vesey, where the case is entitled "Sanderson v. Walker." See 13 Ves. 601. The rule is fully stated in 2 Pom. Eq. Jur. §§ 958, 1049, 1077, 1078. The decision may be construed as finding that the executrix purchased at her own sale of the property of the estate of her testator, and we shall so treat it. That such a purchase is only voidable is expressly ruled in Boyd v. Blankman, 29 Cal. 34–36 et seq., where the matter is fully discussed. This decision has never been overruled, and is approved in San Diego v. Railroad Co., 44 Cal. 114. In Boyd v. Blankman, section 193 of the former probate act was construed. That section is the same as section 1576, Code Civil Proc., except that in the latter the words, "nor must he be interested in any sale," have been added. The whole question, including the effect of this section, was discussed ably and elaborately by the court, speaking by RHODES, J., and it was held that the section, as it then stood, did not render the purchase by the administrator void, but only voidable. The object of enacting this section is thus spoken of in the opinion: "An examination of the probate act will disclose the intent of section 193, and it is apparent that the object was not to declare who might or who might not become a purchaser of the property of the estate; but it was to prevent the property from being sold at a price less than its true value, which might be the case if the administrator, either directly or indirectly, prevented competition among the bidders by entering into the market, either personally or by his agents, or if, with a view of purchasing, he was tempted to undervalue the property in his proceedings respecting the sale. The protection to the estate designed by that section can be as fully secured by permitting the parties interested in the estate to set the sale aside and have the administrator declared a trustee as it would be to construe the section so as to allow strangers to impeach the sale, with the consequent risk to the *bona fide* purchaser without notice, from the administrator's agent, of losing the premises he purchased, relying on the apparent regularity of the probate proceedings, and the confirmation of the sale." Now, it certainly cannot be held that the words added in section 1576, Code Civil Proc., alter the effect of this statute. They are the same in legal effect. The old section was found in the probate act referring to sales and conveyances of the property of decedents, and so is the section of the Code. The title of chapter 7, in which section 1576 is found, is "of sales and conveyances of property of decedents," and the collocation of the sections in each Code of laws shows that it was inserted for the benefit of heirs and devisees, and perhaps of creditors, who can alone be injured by such conduct of the administrator or executor and who alone have a right to set it aside by appeal to a court of equity, or perhaps to the court of probate, whose equitable powers would be sufficient to deal with such a case. The fact that a court of equity has to be appealed to to set aside the sale shows that the sale is voidable only, for there is no reason to call in aid the power of equity to set aside a sale, if the sale were utterly void. If utterly void, the party aggrieved could obtain relief in an action at law. The words "void" and "voidable" are very loosely used in textbooks of approved authors, and in the judgment of courts. Discrimination must always be made in applying the rules of law stated by them on this matter. See comments in opinion of RHODES, J., in Boyd v. Blankman, 29 Cal. 37, as to the use of those words. The remarks just referred to will strike every intelligent reader as eminently true. On the question whether a sale is void or voidable, there is one test which never fails. If the title can be passed to a *bona fide* purchaser from the purchasing trustee, then the sale cannot be void; for, if void, no title ever passed, and the title to the property bought by Mrs. Hanna, through Haynes, would and could not pass to any purchaser from her. Nor could a purchaser from her convey title to any one. The sale being utterly void, no title to the property would pass, and Mrs. Hanna could, as executrix of P. N. Hanna, recover it from the parties to whom she sold it.

The learned author, Austin, in his lectures on Jurisprudence, (see volume 1, p. 322,) says: "The distinction in English law between void and voidable is the same as that in the Roman law between null *ipso jure* and *ope exceptionis*. The first conferred no right. The second conferred a right which might be rescinded or destroyed by some party interested in setting it aside." If the transaction must be impeached by *exceptio* or plea, it is voidable. If no plea is required to avoid it, it is utterly void. It is null *ipso jure*. In the latter case, any stranger may impeach it. In the former, there must be a party interested to set it aside; and in the case before us the devisees under the will may set the sale aside, but a stranger, like Bihler, cannot. What has Bihler to do with the sale? He had no interest in the property sold. What difference did it make to him what the property sold for, or who bought it? It was all the same to him. We cannot see how he can come in to vindicate a pretended outrage on the majesty of the law, when the sale is lawful as to all persons, the heirs or devisees not objecting. It would be novel and unprecedented law that a stranger, like Bihler, could get rid of his obligation in consequence of a sale perfectly legal to him, and concerning which he would not be listened to in any court of justice, on an application by him to set it aside. Section 1667, Civil Code, has no application here. When it does apply the contract is wholly void, as to the whole world. When the contract is unlawful the contracting parties have no standing in a court of justice. As soon as that appears the litigants are dismissed from the forum. Here the subject-matter of Bihler's complaint is only remotely and incidentally connected with the purchase by Mrs. Hanna. His contract is suretyship for Mrs. Hanna, for money borrowed by her of the plaintiffs. To enforce Bihler's contention we must hold that because Mrs. Hanna purchased property at her own sale, as executrix, without any objection by the heirs or devisees, and borrowed money of the plaintiffs to pay it to the estate, for the repayment of which Bihler became surety, Bihler's contract of suretyship never had any validity. One other matter should be recollected. The heirs or devisees cannot have the sale to Mrs. Hanna set aside without paying back to her the money she has paid for it. It is equity that it should be repaid. The heirs or devisees, asking equity, must do equity. The above is so well settled that it needs no citation of authority to support it. But see decree of court in Campbell v. Walker, 5 Ves. supra; Fox v. Mackreth, 1 Lead. Cas. Eq. 234, 257, 260. Hence, inasmuch as she lost nearly $10,000 by the transaction, she would doubtless be perfectly willing to have the sale set aside on the usual equitable terms. The parties aggrieved cannot set aside the sale without paying back the money; but, if the opinion of the majority is correct, Bihler can. A strange legal conclusion, certainly. Here a note was given, with Bihler as a party, and the plaintiff makes out his right to recover without having to prove anything of the transaction said to be illegal. "In Connecticut, in 1849," says Robinson, (5 Rob. Prac. 534,) "while admitting that, if a plaintiff requires any aid from an illegal transaction to establish his demand, he cannot recover it,—or, in other words, if he is unable to support it without relying upon an unlawful agreement between himself and the defendant, he must fail,—yet considers that, though the parties have been engaged in business either *malum in se* or merely prohibited by law, if the cause of action be unconnected with the illegal act, and is founded upon a distinct and collateral consideration, it will not be affected by their former unlawful conduct. Phalen v. Clark, 19 Conn. 432. Pertinent to this view is the case in the same year of

Gregg v. Wyman, 4 Cush. 329, and the case before the supreme court of the United States in 1854, in which Nelson, J., delivering the opinion of the court, said: 'The assignment was subsequent, collateral to, and wholly independent of the illegal transactions upon which the principal contract was founded.' McBlair v. Gibbes, 17 How. 235, 236." We understand the above to be the well-settled rule of law. The plaintiffs herein make their claim on their note, and base no claim on the illegal transaction. The defendant cannot set it up in defense; and the cases above cited from 5 Rob. Prac. sustain this view.

This is a singular case. Mrs. Hanna lost nearly $10,000 by the transaction, all of which the parties interested in the estate got. Still it is held that the defendant got rid of his obligation because the plaintiffs lent money to Mrs. Hanna to enable her to pay for the property bought by her. I think the judgment is without error, and should be affirmed.

It should be noted that the prevailing opinion overrules the well-considered case of Boyd v. Blankman, supra, without alluding to it.

(81 Cal. 579)

In re Walkerly's Estate. (No. 12,950.)

(*Supreme Court of California.* Dec. 2, 1889.)

Homestead for Widow.

1. Code Civil Proc. Cal. § 1476, provides that where a homestead has been selected during the marriage, and it is sought to have it set apart to the family after the death of the husband, there shall be a sale of the property, and payment of $5,000 to the family in lieu of the homestead, where it exceeds that amount in value, and cannot be divided; but, in determining whether it is worth more than $5,000, the value is to be fixed as of the time when it was selected. Sections 1465 and 1468, authorizing a homestead to be set apart to the family of a decedent where none has been selected before his death, contain no limitations as to the value of such homestead; nor is there any authority for paying money in lieu of a homestead, where none has been declared. *Held*, that where no homestead has been declared it is in the discretion of the court to set apart one worth more, at the time of decedent's death, than $5,000.

2. Decedent, who had not made any declaration of homestead during his life, left an estate worth $500,000. The homestead occupied by the family at his death was worth $18,000, and was indivisible. *Held*, that it was not an abuse of the court's discretion to set it apart for the family, though liberal provisions had been made for them by the will.

Beatty, C. J., and Thornton, J., dissenting.

In bank. Appeal from superior court, Alameda county; N. Hamilton, Judge.

L. Quint, for appellants. *Hall & Rogers*, for respondents.

Works, J. This is an appeal by the trustees and legatees under the will of the testator from an order setting apart to the widow and child of the deceased a homestead. The whole of the property of the deceased was his separate property, and was of the value of $500,000 over and above the indebtedness. The homestead occupied by the family at his death was of the value of $18,000, and was indivisible. The court below set apart this homestead to the widow and child for a limited time. It is contended that this was error, for the reason that the court could not set apart a probate homestead greater in value than $5,000. The provisions of the Code authorizing a homestead to be set apart to the family of a decedent, where none has been selected before his death, contains no limitation as to the value of such homestead. Code Civil Proc. §§ 1465, 1468. There is such a limitation where a homestead is declared before his death. Id. §§ 1474, 1475. And in that case, where it is sought to have the same set apart to the family after his death, provision is made for a sale of the property and payment of $5,000 to the family as or in lieu of the homestead, where it exceeds that amount in value, and cannot be divided. Id. § 1476. There is no provision for the payment of money in lieu of the property where no homestead has been declared, and this court has held that it cannot be done in this class of cases. Estate of Noah, 73 Cal. 590, 15 Pac. Rep. 290. Therefore, if we hold in this case that a homestead exceeding $5,000 in value cannot be set apart, we must hold that the court is wholly without the power to set apart any homestead. Counsel for appellants rely upon the following cases as supporting their contention that the homestead set apart must be limited to not exceeding $5,000 in value: Estate of Burns, 54 Cal. 223; Kearney v. Kearney, 72 Cal. 591, 15 Pac. Rep. 769; Estate of Noah, 73 Cal. 590, 15 Pac. Rep. 290; Kingsley v. Kingsley, 39 Cal. 666. It must be conceded that some of the language used in these cases supports the position taken by the appellants, but a careful examination of them reveals the fact that they do not decide the question. In Estate of Burns, while the court remarked, in passing, that the "homestead mentioned and referred to in article 2 [which is referred to in section 1465 for the procedure to be resorted to in setting off the homestead] must not exceed $5,000," the only question decided was that the appeal was not properly taken, and the same was dismissed. It will be seen that the remark made here, that the homestead must be limited to $5,000 in value, was based upon the fact that section 1465 requires the homestead to be set apart, "in the manner provided in article 2 of this chapter, out of the real estate belonging to the decedent," and that article 2 limited the value of the homestead as stated. But the portion of article 2 of the chapter referred to, if it had the effect claimed for it, which we very much doubt, has been repealed, and can no longer be looked to as a part of the law on the subject. Estate of McCauley, 50 Cal. 545; Mawson v. Mawson, Id. 541. If, therefore, it be conceded that article 2 of the chapter had the effect to limit the value of the homestead to be set apart, it must be clear that by the repeal thereof the limitation thereby imposed was taken away, leaving section 1465 to stand alone, and without any such limitation. In Kearney v. Kearney the homestead had been appraised at $4,200, and set apart in the administration of the estate, and the action before the court was to set aside the order on the ground of fraud and want of notice to the heirs, and on the further ground that the value of the homestead could not exceed $1,000. The court, as in the other case, remarked that the "section referred to provides for a homestead of not exceeding $5,000." The point made, and the one the court was discussing, was that only $1,000 worth of land could be taken for a homestead. As the homestead in that case did not exceed $5,000, the case, so far as it can be construed as holding that a homestead, in excess of that amount, cannot be set apart, must be regarded as a mere *dictum*. The statement in the opinion, to that effect, should be given but little weight, for the reason that the question now presented was not in the mind of the court, and could not have been considered. The case of Estate of Noah was one in which it was held that the property, being used exclusively as business property, and of the value of $25,000, could not be set aside as a homestead. The decision rests upon the sole ground that the property was not such as "could have been selected as a homestead during the continuance of the marriage," and that for that reason it could not be set apart as such after the death of the husband. In the case of Kingsley v. Kingsley the right to the homestead was denied for the sole reason that the property was partnership property, and not within the terms of the statute.

It must be seen, therefore, that these cases cannot aid us in arriving at a conclusion upon the question now presented. As we have seen, where the homestead has been selected during the marriage there is a limitation upon its value, but this court has held that the limitation referred to relates to the time the homestead was selected, and not to the time it is set apart by the probate court, and that, if the homestead did not exceed $5,000 in value at the time it was selected, it may, as between the widow and heirs, be set off to the family, although it has increased to a value greatly in excess of that sum. Burdick's Estate, 76 Cal. 639, 18 Pac. Rep. 805. If such a construction can be placed upon a statute expressly limiting the value of the homestead, we are unable to see upon what ground it can be held that a limitation should be placed upon it when the statute contains no such limitation. It seems to us that to so construe the section under consideration would be nothing less than judicial legislation. We must consider the sections relating to probate homesteads, where none have been previously selected, without reference to the provisions relating to voluntary homesteads, if we hope to avoid confusion. Their provisions are entirely unlike, and are not in any way dependent upon each other. The appraisement provided for in section 1476 applies to a selected homestead, and the value is to be fixed as of the time the homestead was selected. Section 1465 does not, in itself, require any appraisement. So much of section 1476 as requires an appraisement cannot be applied here, for the reason that it relates to a selected homestead and to an entirely different time. Under the latter section (1476) the homestead is treated as having vested at the time of its selection. Under section 1465 it is created by the order of the court. There is strong reason for holding that under one of these sections a limitation was intended, and not under the other. In one instance the selection is made by the party himself; in the other the selection and setting apart of the homestead is by the court. While it is fair to presume that the party will select a homestead of as great a value as he can, it is equally fair to presume that the court will give the family such an one as is just and proper, considering the amount and condition of the estate. Therefore in one case a limitation was necessary; in the other, it was not.

It is insisted by the appellants that the condition of this estate was such that, considering the liberal provision made for the wife and child of the deceased by his will, so valuable a homestead should not have been allowed. But this was a matter within the discretion of the court below, and, unless it appears that such discretion has been abused, we think this court should not interfere. The estate here is a large one, and we cannot say, from the evidence before us, that the court below abused its discretion in the matter. Order affirmed.

We concur: Paterson, J.; Sharpstein, J.; McFarland, J.; Fox, J.

I dissent: Beatty, C. J.

I dissent: Thornton, J.

In re Walkerly's Estate. (No. 13,154.)

(*Supreme Court of California.* Dec. 2, 1889.)

In bank. Appeal from superior court, Alameda county; N. Hamilton, Judge.

L. Quint, for appellants. *Hall & Rogers*, for respondents.

Works, J. The questions of law presented in this case are the same as in Re Walkerly's Estate, ante, 888, and on the authority of that case the order appealed from is affirmed.

We concur: Sharpstein, J.; McFarland, J.; Fox, J.; Paterson, J.

I dissent: Beatty, C. J.

I dissent: Thornton, J.

81 Cal. 542

Raisch v. Board of Education of the City and County of San Francisco. (No. 11,955.)

(*Supreme Court of California.* Dec. 2, 1889.)

Mandamus—To County Boards.

1. St. Cal. 1871–72, p. 846, § 7, provides that payments from the school fund of San Francisco shall be made by the city and county treasurer only on drafts drawn on him by the board of education. *Held*, that a writ of mandate would issue in favor of one who had fully performed all the conditions of a contract he had with the board, but for the payment for which it refused to draw any drafts, as the only ordinary action he could maintain would be against the members of the board for neglect of official duty in not drawing the draft, which would not be as convenient, beneficial, and effective as the writ.

2. Under Code Civil Proc. Cal. § 1090, providing that if, in an application for a writ of mandate, a question of fact essential to the determination of the motion be raised, and affecting the substantial rights of the parties, the court may order the question to be tried before a jury, the question whether the board had a semblance of cause for rejecting plaintiff's claim is properly left to the determination of a jury, though St. Cal. 1871–72, p. 846, § 1, subd. 12, gives the board power to reject any demand against it "for good cause, of which said board shall be sole judge."

Paterson, Fox, and Thornton, JJ., dissenting.

Commissioners' decision. In bank. Appeal from superior court, city and county of San Francisco; M. A. Edmonds, Judge.

Application for a writ of mandate by Frederick Raisch against the board of education of the city and county of San Francisco. From a judgment awarding the writ, defendant appeals. Code Civil Proc. Cal. § 1090, provides: "If an answer be made [to the application for the writ] which raises a question as to a matter of fact essential to the determination of the motion, and affecting the substantial rights of the parties, * * * the court may, in its discretion, order the question to be tried before a jury."

John L. Love and *George Flournoy, Jr.*, City and County Atty., for appellant. *Otto Tum Suden*, for respondent.

Belcher, C. C. This is an appeal from a judgment awarding the respondent a writ of mandate, and the case comes here on the judgment roll. The facts stated in the complaint are, in substance, as follows: The respondent and appellant, under and by virtue and authority of a statute of this state, entered into a written contract, by which respondent agreed to furnish appellant, during the fiscal year 1884–85, rubber hose of a certain description and quality, and appellant agreed to pay, or cause to be paid, to respondent therefor a sum of money equal to 35 cents for each and every lineal foot of hose so furnished, delivered, and accepted. In pursuance of this contract respondent furnished to appellant, during the year named, 1,000 feet of hose at one time, and 500 feet at another time, which was all of the kind and quality named in the contract, and was received and accepted by appellant. In due time respondent presented his claim, and demanded that appellant draw drafts in his favor upon the school fund of the city and county of San Francisco for the amounts due him for the hose according to the contract price, but appellant refused, and has ever since refused, to draw the drafts. It is further stated that respondent has no plain, speedy, and adequate remedy in the ordinary course of law. Respondent commenced this proceeding to compel appellant to draw the drafts asked for. Appellant interposed a general demurrer to the complaint, which was overruled, and then answered. After trial the court found that all the allegations of the complaint were true, and all the allegations of the answer were untrue, and by its judgment granted the relief prayed for.

In support of the appeal it is claimed that respondent had a plain, speedy, and adequate remedy by an ordinary action at law against appellant, and hence was not entitled to the remedy of *mandamus.* It is said: "Petitioner should first sue the board, get a judgment, (if possible,) and then have writ issued." It is admitted that appellant is a corporation created for school purposes, and that its powers and duties are defined by an act of the legislature of this state approved April 1, 1872. St. 1871–72, p. 846. Section 2 of that act, subd. 1, makes it the duty of the board of education of the city and county of San Francisco to furnish all necessary supplies for the several schools under its care, and directs how they should be obtained. Section 7 provides for the disposition of all moneys received or collected for school purposes as follows: "All moneys received or collected on account of public education in the city and county of San Francisco shall be deposited in the city treasury, and be known as the 'School Fund.' Payments from said fund shall only be made by the treasurer of the said city and county upon drafts drawn on him by the board of education, signed by the president and the superintendent of common schools, and countersigned by the auditor of said city and county; and all drafts shall be made payable to the person or persons entitled to receive the same." And section 1, subd. 12, declares that the board shall have power "to examine and allow, in whole or in part, every demand payable out of the school fund, or to reject any such demand for good cause, of which the said board shall be the sole judge."

The argument is that the board was clothed with discretionary power to allow or reject the respondent's claim, and that its discretion cannot be controlled by the courts in a proceeding like this. There can be no doubt that the board was authorized to purchase, and did purchase and receive, the hose, and that respondent fully performed all the conditions of the contract on his part. This is established by the findings, and they are not assailed. It is also clear that the respondent's claim must be paid, if paid at all, out of the school fund, and that such payment can only be made by a draft or drafts drawn by the board, and signed and countersigned by the designated officers. It is not pretended that respondent had any cause of action against the city and county. This being so, it is evident that, when the board purchased and received the hose, it became a matter of official duty on its part to pay the agreed price. And when it refused to do so the respondent must necessarily have had some remedy to enforce payment. It could not, of course, appropriate the hose, and leave the party furnishing it remediless. The only question, then, is, what was his remedy? Had he a plain, speedy, and adequate one by an ordinary action at law?

It has been held in this state that, to supersede the remedy by *mandamus*, the party must not only have a specific, adequate legal remedy, but one competent to afford relief upon the very subject-matter of his application, and one which is equally convenient, beneficial, and effective as the proceeding by *mandamus*. Fremont v. Crippen, 10 Cal. 215; Babcock v. Goodrich, 47 Cal. 508; Railroad Co. v. Railroad Co., Id. 551. The board contracted to pay respondent for the hose which he furnished, but, as it only had power to pay by drawing drafts on the school fund, its contract must be construed to be one to draw drafts, and not to pay money directly. If, then, respondent could have maintained an ordinary action, it must have been an action against the members of the board to recover damages for neglect of duty. But such an action evidently would not have been equally convenient, beneficial, and effective as the proceeding by *mandamus*, since it would not have compelled the board to do what it had contracted to do, and what, as we have seen, official duty required it to do.

The argument that the board had the discretion to allow or reject the claim, and that its action was final and conclusive so far as this proceeding is concerned, is without weight. It is true that, under the statute, the board may reject any demand "for good cause." But, although the board is to be "the sole judge" of what is good cause, still the rejection cannot be arbitrary or capricious. There must at least be the semblance of a cause. The board, after obtaining materials which it has ordered and needs for school purposes, cannot say: "True, the materials are of the kind and quality ordered, but we have concluded not to pay for them, and therefore reject the demand." And whether there was a semblance of cause for rejecting the claim or not, was a question which might be and was properly tried in the court below. Code Civil Proc. § 1090. If there was no semblance of cause, then it is clear that it was the duty of the board to draw the drafts, and the writ was properly granted to compel the performance of this duty. See Wood v. Strother, 76 Cal. 545, 18 Pac. Rep. 766, where the authorities upon the subject are very fully collated and reviewed. Our conclusion is that the judgment was right, and we therefore advise that it be affirmed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

I dissent: PATERSON, J.

FOX, J. I dissent. The contract set up in substance in the opinion was one made by competent authority on the part of a municipal corporation, for the purchase of certain goods which it has received under the contract, and now refuses to pay for. The refusal is a simple breach of contract, for which the party has an ample remedy by action. I see no reason why a municipal corporation should be treated differently from a natural person in such a case.

THORNTON, J. I dissent. The applicant for the writ in this case has never presented his claim to the board of education for their examination and allowance, and consequently he is not in a position to ask a mandate from a court to command the board of education to draw a draft in his favor for any sum payable out of the school fund of the city and county of San Francisco. Section 82 of the consolidation act provides that no payment can be made from the treasury or out of the public funds of said city and county unless the same be specifically authorized by this act, nor unless the demand which is paid be duly audited, as in this act provided, and that must appear on the face of it. Section 83 of the same act provides that "the term 'audited,' as used in the act with reference to demands upon the treasury, is to be understood their having been presented to and passed upon by every officer and board of officers, and finally allowed by law; and this must appear upon the face of the paper representing the demand, or else it is not audited." Section 84 of the same act is as follows: "Sec. 84. Every demand upon the treasury, except the salary of the auditor, and including [the] salary of the treasurer, must, before it can be paid, be presented to the auditor of the city and county to be allowed, who shall satisfy himself whether the money is legally due and remains unpaid, and whether the payment thereof from the treasury of the city and county is authorized by law, and out of what fund. If he allow it, he shall indorse upon it the word 'Allowed,' with the name of the fund out of which it is payable, with the date of such allowance, and sign his name thereto; but the allowance or approval of the auditor, or of the board of supervisors, or any other board or officer, of any demand, which upon the face of it appears not to have been expressly made by law payable out of the treasury or fund to be charged therewith, shall afford no warrant to the treasurer or other disbursing officer for paying the same. No demand can be approved, allowed, audited, or paid, unless it specify each several item, date, and value composing it, and refer to the law by title, date, and section authorizing the same." Section 85 of the act contains the following provision as to demands payable out of the school fund: "All demands payable out of the school fund must, before they can be allowed by the auditor or paid, be personally approved by the board of education, or by the president thereof, and superintendent of common schools, acting under the express authorization of said board." The school fund is kept by the treasurer of the city and county. Section 95, Consolidation Act, subd. 2. By the act of April, 1872, (St. 1871-72, p. 846,) the board of education has power "to examine and allow, in whole or in part, every demand payable out of the school fund, or to reject any such demand for good cause, of which the said board shall be the sole judge." The seventh section of the act of 1872 is as follows: "Sec. 7. All moneys received or collected on account of public education in the city and county of San Francisco shall be deposited in the city treasury, and be known as the 'School Fund.' Payments from said fund shall only be made by the treasurer of the said city and county upon drafts drawn on him by the board of education, signed by the president and superintendent of common schools, and countersigned by the auditor of said city and county, and all drafts shall be made payable to the person or persons entitled to receive the same."

Upon a consideration of these provisions of the statutes, valid in their enactment, I cannot perceive what right the applicant has for the mandate he asks. It does not appear that the demand has ever been presented to the board of education for examination or allowance. The board has had no opportunity to examine it and allow it or reject it. *Non constat*, that when properly presented, as required by law, *i. e.*, with the specifications of each item, date, and value, (section 34, Consolidation Act,) it will not be allowed. It has never been presented to the auditor for his action, as the law requires. The appellant is not entitled to a draft for the amount until his demand has been audited and allowed, and this audit and allowance indorsed on the claim. Such is the distinct provision of the statute as cited above. The petition for the writ fails to aver that any of these things have been done. The averments in each count of the complaint are that the plaintiff presented to the board the certificate in writing of Edward Casserly, the duly appointed and acting storekeeper of the board, to the effect that he (Casserly) had received from plaintiff the hose contracted for, and demanded a draft. This is not a presentation of the demand which the statute requires, and is insufficient. The findings show no ground for ordering the writ to issue. The law does not enjoin on the board of education the duty of drawing a draft in favor of a claimant until his demand has been presented and allowed, as required by law, by the board. The conclusion reached in the prevailing opinion is not sustained by Wood v. Strother, 76 Cal. 545, 18 Pac. Rep. 766. That case was entirely different from this, as a perusal of it will demonstrate. The conclusion here arrived at is sustained by Purdy v. Sinton, 56 Cal. 133; Christie v. Sonoma Co., 60 Cal. 164. If the writ was granted in this case it would control the discretion vested by law in the board of education. This cannot be done. Clune v. Sullivan, 56 Cal. 249; Cosner v. Colusa Co., 58 Cal. 274; Rhodes v. Spencer, 62 Cal. 43. It may be as well to add that, if the mandate asked for here issues, the treasurer would not be justified by law in paying it. The board has had no opportunity here to act, and it is therefore unnecessary to say what would be the remedy of plaintiff, if the board, on its presentation, rejected the claim. It will be in order to consider that question when the claim has been presented to the board and been rejected by it. In my opinion, the judgment of the court below is erroneous. The petition does not state facts sufficient to justify the issuance of the writ, and the demurrer to it should have been sustained The cause should be remanded, with directions to the court below to deny the writ and dismiss the application.

(81 Cal. 551)

HUMPHREYS *et al.* v. HOPKINS. (No. 12,626.)

(*Supreme Court of California.* Dec. 2, 1889.)

RECEIVERS—EXTRAJURISDICTIONAL POWERS.

Receivers, appointed by an order which does not vest the title to the property in them, but merely directs them to take possession of and preserve it, cannot, when they have sent it into a foreign jurisdiction, reclaim it as against a sheriff who has seized it on attachment at the suit of citizens of the foreign jurisdiction to enforce their demands against the owner of the property. THORNTON and MCFARLAND, JJ., dissenting.

On rehearing. For former report, see 20 Pac. Rep. 713.

Frank M. Stone, for appellant. *T. Z. Blakeman*, for respondents.

BEATTY, C. J. The plaintiffs in this action are receivers of the road and other property of the Wabash, St. Louis & Pacific Railway Company. They were appointed by the United States circuit court for the eastern district of Missouri, May 25, 1884, by an order made in an action to which the railway company was a party, and were thereby authorized to take possession of said road, to manage, control, and operate it, and preserve and protect all its property. At the date of their appointment a certain freight-car belonging to the company was at Toledo, in the state of Ohio, where, on the 29th of May, 1884, it came into their possession. It was subsequently brought by them, in the course of their business as receivers, to the city of St. Louis, in the state of Missouri, a place within the jurisdiction of the court by which they were appointed. On the 16th of March, 1885, they loaded the car with freight consigned to San Francisco, intending that when the freight was unloaded at San Francisco the car should be returned to St. Louis. While the car was in San Francisco it was attached by the defendant, as sheriff of San Francisco, in a suit brought by Henry Payot and Isaac Upham against the railway company. Payot and Upham were citizens of California, resident and doing business in San Francisco. This action was thereupon commenced by the plaintiffs to recover the car so attached. The judgment of the superior court was in their favor. Defendant appeals.

The question presented by the appeal is whether a receiver appointed in a foreign jurisdiction to take possession of the property of a railway corporation, and carry on its business, and who in pursuance of his authority as such receiver has taken the property into his actual possession within the jurisdiction of the court by which he was appointed, can hold such property against the claim of a citizen of this state who, upon finding the property here, has, in pursuance of our laws, caused it to be attached as security for his just demands against the railway company. Counsel for appellant contends for the proposition that a foreign receiver has no capacity to sue in his official character in our courts, but we do not understand the authorities to sustain this extreme view. The question, however, need not be decided in this case, for the plaintiffs, besides being receivers of the road, had an actual and lawful possession of the property at the time of its seizure, and by virtue of that possession could undoubtedly have recovered it from a mere trespasser. But their mere possession of the property of a foreign debtor cannot be held to exempt it from the claims of attaching creditors. A debtor cannot, by placing or allowing his property to be in the possession of a third party, screen it from attachment. However lawful the possession of the bailee, the property is still subject to attachment or garnishment at the suit of a creditor of the owner. Such rights as the bailee may have to the use or possession of the property, and such liens as he may have upon it, will, of course, be protected, but, saving the rights of the bailee, the creditor may take it. The question in such cases, therefore, is not as to the lawfulness of the bailee's possession, or his right to recover the property from a mere trespasser; it is a question as to which right is superior,—his or the attaching creditor's. And such is the question here. Conceding, as we think must be conceded, that these plaintiffs could have recovered the car in controversy from a mere wrong-doer, by virtue of their lawful possession at the date of the seizure, if not by virtue of their office, still it remains to be decided whether they could reclaim it from the defendant, who justifies under a writ of attachment issued at the suit of citizens of the state of California to enforce a just demand against the owner of the property. The solution of this question depends upon the effect to be given to the order of the court of Missouri, under whose appointment the plaintiffs are acting. For, we repeat, the mere possession by the plaintiffs of the debtor's property, however lawful, does not screen it from attachment. To show a right superior to that of creditors they must fall back upon the order appointing them receivers, and must depend upon the comity of this state as to the effect to be allowed that order.

The substance of that order has been already stated. It does not pretend to vest the title to the property of the railroad company in the receivers; it merely directs them to take possession of and use the property for the benefit, presumably, of creditors of the company who have resorted to that particular forum for the enforcement of their debts. The authorities as to the effect to be given in other jurisdictions to such orders are collected in a note to the case of Alley v. Caspari, reported in 6 Amer. St. Rep. 185, 14 Atl. Rep. 12. The result is summed up by the editor (page 189) as follows: "We deduce, therefore, from a thorough examination of the cases and text-books upon the subject, that the great weight of authority is, and should be, in keeping with the decision rendered by Mr. Justice WAYNE, in Booth v. Clark, 17 How. 334, that a foreign receiver has no right to sue in another state; but that, on the ground of comity, the court will, in a just and proper exercise of a sound legal discretion, permit such suits to be maintained for the purpose of thereby doing justice, where the good of a larger number would demand it, by recognizing the orders and judgments of the courts of a sister state. But in none of the cases is such right to sue conceded, or the suit permitted to be maintained by the foreign receiver, where the claim sought to be enforced conflicts with the rights of citizens or creditors in the state where the suit is brought." We think that the effect of the decisions is correctly stated in this extract from Mr. Freeman's note, and we think that in this case justice to our own citizens requires that we should not extend the principle of comity so far as to award this property to the representatives of creditors residing in other states, and who are seeking to hold it for their own exclusive benefit. The judgment and order appealed from are reversed, and cause remanded.

We concur: FOX, J.; WORKS, J.; PATERSON, J.

THORNTON, J., (*dissenting*.) Action to recover a car. Trial by the court, and judgment in favor of plaintiffs. Motion of defendant for a new trial, which was denied. Appeal by defendant from judgment and order denying the motion for a new trial.

It is conceded that on the 25th day of May, 1884, the plaintiffs were, by an order of the United States circuit court for the eastern district of Missouri, wherein the Wabash, St. Louis & Pacific Railway Company was a party, appointed receivers of the railroad, and all the property of the company, with power and instructions to take possession of the railroad, and to manage, control, and operate it, and preserve and protect all its property. It further appears that the car in suit came into the possession of the receivers above named at Toledo, Ohio, on May 29, 1884, when it was delivered by the company to the plaintiffs, as receivers, and that the receivers have used this car in carrying on the business of the railroad from that day until it was attached, as appears in this action, on the 1st day of April, 1885. After the car came into the possession of the receivers it was by them brought, in the course of their business as receivers, to the city of St. Louis, state of Missouri, a place within the jurisdiction of the court by which the plaintiffs were appointed. The receivers, on the 16th day of March, 1885, loaded the car with freight, destined for the city of San Francisco, and sent it so loaded to San Francisco, with the intent that the freight of said car might be delivered at San Francisco, and that the car might then be returned to St. Louis. The car was brought to San Francisco, and while there was attached by Henry Payot and Isaac Upham, citizens of the state of California, in an action wherein said Payot and Upham were plaintiffs, and the above-named railroad company was defendant. Under this attachment the defendant, as sheriff of the city and county of San Francisco, justifies.

It is argued that the plaintiffs, suing as receivers, cannot maintain this action, inasmuch as a receiver cannot maintain an action out of the jurisdiction of the court which appointed him. It may be conceded that this is the general rule, and still the plaintiffs can maintain this action. The right to sue and maintain the action is founded on the possession of the car, delivered to the plaintiffs as receivers by the railroad company, in May, 1884, at Toledo, Ohio, and its being taken from that place by plaintiffs in the course of their management, carrying on, and control of the business of the company, to St. Louis, where it was loaded and sent to the city of San Francisco. This possession was given by the owner of the car, the railroad company, in pursuance of the order of the court, and was never afterwards disturbed by the company. The possession of the car remained in the receivers, unchanged and never interfered with, until it was attached in this state, on the 1st of April, 1885. The plaintiffs, under the undisputed authority of the court making the appointment, and without challenge by the railroad company, were, during the period of this possession, using this car in carrying on the business of the railroad company. The taking possession of the car by the plaintiffs, as receivers, was lawful, and their continued possession was also lawful, and such possession vested in them as individuals a special property, on which title they can as individuals maintain this action. This conclusion is supported both on principle and by authority.

The case of Railway Co. v. Packet Co., 108 Ill. 317, is directly in point. There the contest was between a receiver of the property and effects of the Northern Line Packet Company, regularly appointed by the circuit court of St. Louis, Mo., in an action brought against that company, and an attaching creditor on a writ brought in the circuit court of Adams county, state of Missouri. The court held that the title of the receiver was good against the attaching creditor in the state of Missouri, and judgment was accordingly rendered in favor of the receiver. The court, speaking to the point, said: "The general doctrine that the powers of a receiver are co-extensive only with the jurisdiction of the court making the appointment, and particularly that a foreign receiver should not be permitted, as against the claims of creditors resident in another state, to remove from such state the assets of the debtor, it being the policy of every government to retain in its own hands the property of a debtor until all domestic claims against it have been satisfied, we fully concede; and were this the case of property situate in this state, never having been within the jurisdiction of the court that appointed the receiver, and never having been in the possession of the receiver, it would be covered by the above principles, which would be decisive against the claim of the appellee. But the facts that the property at the time of the appointment of the receiver was within the jurisdiction of the court making the appointment, and was there taken into the actual possession of the receiver, and continued in his possession until it was attached, take the case, as we conceive, out of the range of the foregoing principles. We are of opinion that, by the receiver's taking possession of the barge in question within the jurisdiction of the court that appointed him, he became vested with a special property in the barge, like that which a sheriff acquires by the seizure of goods in execution, and that he was entitled to protect this special property while it continued, by action, in like manner as if he had been the absolute owner. Having taken the property in his possession, he was responsible for it to the court that appointed him, and had given a bond in a large sum to cover his responsibility as receiver, and to meet such liability he might maintain any appropriate proceeding to regain possession of the barge which had been taken from him. Boyle v. Townes, 9 Leigh, 158; Singerly v. Fox, 75 Pa. St. 114. It is well settled that a sheriff does, by the seizure of goods in execution, acquire a special property in them, and that he may maintain trespass, trover, or replevin for them." The court concludes its observations on this point as follows: "By taking the barge into his possession within the jurisdiction of the court that appointed him, a special property in the barge became vested in the receiver; and it is the established rule that, where a legal title to personal property has once passed and become vested in accordance with the law of the state where it is situated, the validity of such title will be recognized everywhere." Citing Cammell v. Sewell, 5 Hurl. & N. 728; Clark v. Peat Co., 35 Conn. 303; Taylor v. Boardman, 25 Vt. 581; Crapo v. Kelly, 16 Wall. 610; Waters v. Barton, 1 Cold. 450. Cagill v. Wooldridge, 8 Baxt. 580, is to the same effect. In that case the contest was also between the receiver and an attaching creditor. The case was ruled in favor of the receiver.

A receiver of an important manufacturing company, appointed by a court of New Jersey, who took possession of its assets for the purpose of completing a bridge which the corporation had contracted to build in Connecticut, purchased iron with the funds of the estate, and sent it into that state, and it was held that the iron was not open to attachment in Connecticut by a creditor residing there. Pond v. Cooke, 45 Conn. 126.

In McAlpin v. Jones, 10 La. Ann. 552, and in Hurd v. City of Elizabeth, 41 N. J. Law, 1, receivers were allowed to maintain actions without the jurisdiction of the court appointing them. In the case cited from 10 La. Ann. the receiver had been appointed by a chancery court in Mississippi. He there took possession of the property, under the order of the appointment. A portion of the property, viz., four slaves, were stolen from the possession of the receiver, and came into the state of Louisiana. The owner brought suit in the latter state, and its highest court adjudged that he could recover. It may be observed that the property sued for in this case was in the possession of the receivers, within the jurisdiction of the court appointing them. The receivers got their possession in Ohio by delivery from the owner, and took the car to St. Louis, where it was within the jurisdiction of the circuit court of the United States for the eastern district of Missouri. The fact that they got possession of the car out of the jurisdiction of the appointing court cannot make any material difference, when the property was at once carried into such jurisdiction, and therein retained in their possession. That it cannot affect the right of plaintiff to recover that the car was afterwards sent by the receivers in the course of their duty, and in the prosecution of the business which they were appointed to carry on, see Railroad Co. v. Packet Co., 108 Ill. 323, 324.

In the same line of decision with the foregoing are Low v. Burrows, 12 Cal. 188, and Lewis v. Adams, 70 Cal. 403, 11 Pac. Rep. 833. In Low v. Burrows the action was brought by the assignee of a judgment recovered in New York. The assignment was made by an administrator in New York. It was contended that the administrator in New York had no right to assign the judgment, the debtor residing at that time beyond the state of New York. This contention was based on the ground that the authority of the administrator did not extend beyond the state in which the letters were granted. The court disposed of this contention adversely to counsel presenting it, and it was held that the administrator, having recovered the judgment, owned it, and could assign it. In Lewis v. Adams, supra, the action was brought on a judgment recovered by the plaintiff, as the executor of the last will of one Nat Lewis against the defendant, P. T. Adams, in the district court for the county of Bexar, state of Texas. In the complaint in this suit the plaintiff described herself as executrix of Lewis, and it was contended that she having been appointed executrix by a Texas court, her authority was confined to the state of Texas, and that she could not maintain any action in this state. It was held that the judgment recovered in Texas vested the title in her; that she was accountable to the court in Texas from which she received her appointment; and that she could maintain the action here on her own title as an individual. The whole subject is ably and fully discussed, and the authorities cited, in the opinion of Justice McKinstry. See 70 Cal. 406, 407, 11 Pac. Rep. 833.

In the same line of decisions is Wilkinson v. Culver, 25 Fed. Rep. 639, where a judgment was recovered by a receiver of a corporation appointed by a New Jersey court, and the receiver, as owner of the judgment in his individual capacity, was allowed to recover on it in an action brought in the United States circuit court for the southern district of New York. See, also, Biddle v. Wilkins, 1 Pet. 686, and Talmage v. Chappel, 16 Mass. 71; Trecothick v. Austin, 4 Mason, 34, 35; Barton v. Higgins, 41 Md. 539; Cherry v. Speight, 28 Tex. 503; Rucks v. Taylor, 49 Miss. 552. The three cases last cited were actions brought by foreign administrators on judgments which they had recovered as such administrators in their own states, and they were allowed to sue upon the judgments in their own names in the other states. See, also, Morton v. Hatch, 54 Mo. 408.

On this subject Justice Story, in his able work on Conflict of Laws, makes the following observations: "516. And here it may be necessary to attend to a distinction important in its nature and consequences. If a foreign administrator has, in virtue of his administration, reduced the personal property of the deceased, there situated, into his own possession, so that he has acquired the legal title thereto, according to the laws of that country, if that property should afterwards be found in another country, or be carried away and converted there against his will, he may maintain a suit for it there in his own name and right personally, without taking out new letters of administration; for he is, to all intents and purposes, the legal owner thereof, although he is so in the character of trustee for other persons. In like manner, if a specific legacy of personal property is bequeathed in a foreign country, and the legatee has, under an administration there, been admitted to the full possession and ownership by the administrator, he may afterwards sue, in his own name, for any injury or conversion of such property, in another country where the property or wrongdoer may be found, without any probate of the will there. The plain reason in each of these cases is that the executor and the legatee have, each in his own right, become full and perfect legal owners of the property by the local law; and a title to personal property, duly acquired by the *lex loci rei sitæ*, will be deemed valid, and be respected as a lawful and perfect title in every other country. 517. The like principle will apply where an executor or administrator, in virtue of an administration abroad, becomes there possessed of negotiable notes belonging to deceased, which are payable to bearer; for then he becomes the legal owner and bearer by virtue of his administration, and may sue thereon in his own name, and he need not take out letters of administration in the state where the debtor resides in order to maintain a suit against him. And for a like reason it would seem that negotiable paper of the deceased, payable to order, actually held and indorsed by a foreign executor or administrator in the foreign country, who is capable there of passing the legal title by such indorsement, would confer a complete legal title on the indorsee, so that he ought to be treated in every other country as the legal indorsee, and allowed to sue thereon accordingly, in the same manner that he would be if it were a transfer of any personal goods or merchandise of the deceased situate in such foreign country." Story, Confl. Laws, §§ 516, 517. To support the statements of the text, the learned author cites decided cases in the notes to the sections quoted. The cases above referred to are all governed by the rule that a title to personal property, once vested and duly acquired by the *lex rei sitæ*, will be deemed valid, and be respected as a lawful and perfect title in every other country. Id. § 384.

There is nothing in the foregoing in conflict with what is laid down in Booth v. Clark, 17 How. 322. In that case the action was attempted to be maintained in the circuit court for the District of Columbia on the mere order of a chancery court of the state of New York appointing a receiver

Booth, who was so appointed, failed to show that he had ever had possession of the claim, or the evidences of the claim, the proceeds of which the plaintiff (Booth) endeavored to recover. On the contrary, the claim had always remained in the possession of Clark until it went into the hands of his assignee in bankruptcy, and came back to Clark's possession under a purchase by Clark at a sale made by his assignee. The court dwells on the delay of the receiver to take steps to get possession of this claim as a material fact in the case. After pointing out the means by which, through the aid of the court, he could have obtained possession of this claim, it is observed in the opinion: "Such, however, was not the course pursued in this case, though the debtor was then a resident of the state of New York, and amenable to the jurisdiction of the court. No motion was made to force Clark to comply with the injunction which Camara had obtained under the creditor's bill. The matter was allowed to rest for seven years, Camara being aware that Clark had a pecuniary claim upon the republic of Mexico, at least as early as in the year 1843. The receiver during all that time took no action."

The essential nature of the action in Booth v. Clark is correctly set forth in the opinion of the court in Hazard v. Durant, 19 Fed. Rep. 477. It was there characterized, and properly characterized, as an action by a receiver, a mere officer and servant of the court appointing him, and having no title to the fund by assignment or conveyance, or other lien or interest than that derived from his appointment. It may be well conceded that such an officer, on such a showing of title, cannot recover in a foreign jurisdiction. If Booth, the receiver in Booth v. Clark, had, after his appointment as receiver, got possession of the Mexican claim prior to its coming to the hands of Clark's assignee in bankruptcy, and such had been made to appear in his action, the court, would, no doubt, in accordance with the principle of its rule laid down in Biddle v. Wilkins, 1 Pet., supra, have held in favor of Booth. Booth would then have shown an individual and personal right to recover. The cases cited by the counsel for appellant, which follow Booth v. Clark, are like it in the material feature above pointed out. The receiver in all such cases relied on his order of appointment merely, to recover. It cannot escape observation that if this court sanctions the contention of appellant's counsel it will authorize the taking of property from the hands of a court, having ample jurisdiction, which has, through the agency of a receiver, (its own instrument,) gotten lawful possession of property, and whose possession was lawful, when this property was attached here.

The statements made in the note referred to in the prevailing opinion relate merely to a suit by a receiver in a foreign jurisdiction, where he has never reduced the property to possession, and relies solely on the order of appointment to recover, as a careful perusal of the note will make evident. There is no case cited in the note which holds that a receiver, after he has reduced the property of the litigant to possession, and it is taken from him, cannot sue for it in any jurisdiction where he can find it. The title vests in the appointed receiver when he has reduced the property to possession, and on this title he can recover. His right to recover rests on his right and title procured in the mode above pointed out, and is not allowed in any consideration of comity. Title vests, and in consequence a right to recover in the courts of every civilized country, as a matter, not of comity, but of right. No court has the right to take the property of one person and give it to another, or have it sold for the benefit of another. Considerations of comity only arise where the receiver sues in a foreign jurisdiction on the mere order of appointment. Considerations of comity allow such suit, where there is no legal policy which forbids it, and it does not affect the rights of creditors or other persons, citizens of the jurisdiction where the suit is brought. Such is Hurd v. Elizabeth, 41 N. J. Law, 1, where the suit was allowed to be maintained on considerations of comity. The special property vested in the receiver gives him a title on which he can recover anywhere. A sheriff gets only a special property where he has levied an execution, and on such title he can sue and recover anywhere. If a sheriff of this state seizes horses under a writ of attachment or execution within its limits, and the horses escape into the state of Nevada, and were taken possession of by a third person, we cannot see why he cannot recover in a suit in a Nevada court, even against an attaching creditor there.

The title of the receiver vested when he reduced this car to possession by the consent of the corporation. He sent it out of the state of Missouri, where he had it, for a lawful purpose. Why has a creditor a right to attach it? It was not the property of the corporation when it was attached, but of the receiver of the court, of which the receiver is the hand and instrument. I cannot conceive how a creditor can attach the property of one person to pay a debt due him by another. The statement in the complaint that the plaintiffs were appointed receivers by the court of Missouri shows the origin of plaintiffs' right; but it is further alleged that the plaintiffs took possession of the car, and held it in possession until such possession was interfered with by the defendant, as afterwards stated in the complaint. The plaintiffs count specially on their own possession. We see nothing herein to prevent the plaintiffs from recovering on their individual rights. The averment as to their being receivers may be regarded as *descriptio personæ*, and may be rejected as surplusage, in accordance with the rule laid down in Lewis v. Adams, 70 Cal. 411, 412, 11 Pac. Rep. 833. I find no error in the record, and think that the judgment and order should be affirmed.

McFARLAND, J. I dissent, and concur in most of the views expressed in the dissenting opinion of THORNTON, J.

82 Cal. 347

ROGERS v. BORCHARD. (No. 13,216.)

(*Supreme Court of California.* Dec. 26, 1889.)

DEEDS—EVIDENCE.

A deed purporting to convey all of defendant's "right, title, and interest" in certain premises is not admissible in evidence to show compliance with an agreement by defendant to execute to plaintiff "a good and sufficient deed of bargain and sale to said property, free and clear of all incumbrances," and it is immaterial that the trial is by the court without a jury.

Department 2. Appeal from superior court, Ventura county; B. T. WILLIAMS, Judge.

Action by E. F. Rogers against Johanas Borchard. Judgment for defendant. Plaintiff's motion for a new trial denied, and he appeals.

Hall & Poplin, (*W. C. Stratton*, of counsel,) for appellant. *McKeeby & Smith* and *N. C. Bledsoe*, (*W. H. Wilde*, of counsel,) for respondent.

SHARPSTEIN, J. The plaintiff and defendant entered into a written agreement, wherein the defendant agreed to sell and convey to plaintiff lands in Ventura county, and, upon certain payments being made, to execute and deliver to plaintiff a good and sufficient deed of bargain and sale of the premises, free and clear of all incumbrances. The plaintiff was to and did pay defendant $1,200 at the time the agreement was entered into, but made no other payment; claiming, among other things, that defendant did not have title to a large portion of the land. Plaintiff brought this action to recover the $1,200 paid to defendant as above stated. On the trial plaintiff introduced in evidence the agreement set forth in the complaint, in which, for the consideration mentioned therein, the defendant promised to execute and deliver to plaintiff "a good and sufficient deed of bargain and sale to said property, free and clear of all incumbrances." To prove that he had executed such a deed the defendant offered in evidence a deed which purported to grant, bargain, and sell and convey unto the plaintiff, and to his heirs and assigns, forever, all the right, title, and interest of the defendant in and to certain tracts and parcels of land therein described. Plaintiff objected to its introduction on the ground that it is not such a deed as the agreement called for, (1) because it is not a grant, bargain, and sale deed; (2) because it does not purport to convey the land described in the complaint, or any part thereof, or interest therein, except such as the defendant had at the time of the execution of the deed; that it is a quitclaim deed; (3) because the land described in it is not the same land described in the complaint. Objection overruled, and plaintiff excepted.

The principal question being, did the defendant comply with his agreement? any evidence that shows, or tends to show, that he did was admissible. He agreed to execute and deliver to plaintiff a good and sufficient deed of bargain and sale to the premises, conveying the same free and clear of all incumbrances. To prove a compliance with that agreement, a deed was offered in evidence, which purported to convey all the right, title, and interest of the defendant in and to said premises, which clearly did not prove, or tend to prove, a compliance with the agreement. Respondent's counsel replies, admitting this to be so, but asserts that it became the duty of the court when the deed was offered in evidence to construe it, and that "in order to construe it, the deed must first be admitted in evidence." We think otherwise. When the deed was offered in evidence, and objection made to its introduction, it became the duty of the court to examine it sufficiently to enable it to determine whether it was admissible or not, and, if not, to sustain the objection to its introduction in evidence. As was said in Mason v. Wolf, 40 Cal. 246: "We think this evidence inadmissible, and none the less so because the case was tried by the court without a jury." Order denying plaintiff's motion for a new trial reversed.

Thornton, J. I concur.

McFarland, J. I concur in the judgment, because it appears that the deed erroneously admitted in evidence must necessarily have entered largely into the considerations which moved the court to give judgment for respondent. I do not think that Judge Temple intended to say, or did say, in Mason v. Wolf, 40 Cal. 249, that a judgment must be reversed for every abstract error committed in ruling upon the admissibility of evidence, when the case is tried without a jury; and I fear that the leading opinion in the case at bar might bear that construction. Greenleaf on Evidence says (volume 1, § 49) as follows: "In trials of fact without the aid of a jury, the question of the admissibility of evidence, strictly speaking, can seldom be raised; since, whatever be the ground of objection, the evidence objected to must, of necessity, be read or heard by the judge, in order to determine its character and value. In such cases the only question, in effect, is upon the sufficiency and weight of the evidence." While this language may state the principle too strongly, still, in my opinion, a judgment in a case tried without a jury should not be reversed for the erroneous admission of one piece of evidence, unless the error shows that the case was tried upon a wrong theory, or appears to have been in some way material, important, and clearly prejudicial to the rights of the losing party.

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81 Cal. 571

In re Grider's Estate. (No. 12,840.)

(*Supreme Court of California.* Dec. 2, 1889.)

Wills—Devise to Widow—Rights of Children.

1. Under Civil Code Cal. § 1307, providing that, where a testator dies leaving children unprovided for by his will, it not appearing that such omission was intentional, they shall take as if he had died intestate, a widow to whom her husband devised all his property, without mention of his children, takes only as a tenant in common with the children.

2. Under a decree of distribution adjudging that the petitioner has succeeded to all the right, title, and interest of the widow, and is entitled to the share of said estate described in his petition, and further decreeing that said estate is hereby finally distributed and set apart to said petitioner, the petition alleging that petitioner has succeeded by deed from the widow to a certain part of the real estate left by said decedent, and to all the interest of said devisee, the petitioner takes only the widow's interest in common with the children, though all the real estate left by decedent was described. Beatty, C. J., and Works, J., dissenting.

3. Pending the administration of the estate, an assignee of the interest of a co-tenant cannot acquire title against his co-tenants by limitation.

On rehearing. In bank. For opinion on hearing in department, see 21 Pac. Rep. 532.

McGee & Barnham, for appellants. *J. C. Bates*, for respondents.

Fox, J. H. C. Grider died May 29, 1872, seised of the lands involved in this proceeding. He left a widow, Sarah or Sallie Grider, and three children, N. G. Grider, T. S. Grider, and E. E. Grider then aged, respectively, 14, 12, and 8 years. He also left a will, making his widow sole devisee, and wholly omitting all provision for or mention of his children, or either of them. On or about the 24th day of June, 1872, said will was admitted to probate by the probate court of the county of Lake, and letters testamentary issued to said Sallie Grider. Administration of the estate has never been closed.

The present proceeding is one inaugurated in the superior court of that county, sitting in probate, by petition filed by said children under section 1664 of the Code of Civil Procedure, under which such proceedings have been had as that R. D. Merritt, the respondent herein, appeared and set up a claim that he was the sole owner in fee of the real estate described in the record, the same having been acquired through a chain of mesne conveyances from Sarah Grider down to himself, and a decree of partial distribution of said estate of H. C. Grider, made to him as successor in interest of said Sarah Grider by the said probate court on the 22d day of December, 1875. Upon this claim issue was joined, and a trial had, resulting in a judgment in favor of said Merritt from which, and from an order denying a new trial, this appeal was taken.

The court finds the facts in regard to the death of said Grider, his seisin in the land, his survivors, the making and probate of the will, and the terms thereof, as hereinabove stated. It fails to find whether or not said Sarah Grider ever conveyed her interest, or any interest, in the real estate described in the complaint, to any person, or whether or not there is any conveyance, or chain of conveyances, connecting the title claimed by this respondent with the said Grider title. But it does find, and recites in the fifth finding, that on 22d of December, 1875, in the probate court, and on the petition of said respondent, a judgment was entered in the matter of said estate, which judgment it sets out *in hæc verba*. That judgment, after reciting the jurisdictional facts, some of which are not otherwise proved in the record, proceeds to adjudge and determine that the petitioner R. D. Merritt "has succeeded to all the rights, title, and interest of said Sallie Grider, the sole devisee of the last will and testament of said H. C. Grider, deceased, and is entitled to the share of said estate in his petition and hereinafter described." And it further proceeds to decree that the real estate described in the petition, describing the same, (and being the same described in the complaint in this cause,) "be distributed to the said R. D. Merritt, upon his giving bond," etc., and finally adjudges: "It is adjudged and decreed that the estate hereinbefore described is hereby finally distributed and set apart to said petitioner R. D. Merritt, free and clear from further administration in said estate." The court further finds that the plaintiffs herein have never had set apart or distributed to them any part or parcel of said estate. In the sixth finding, after reciting the will, the court finds "that the said petitioners, appellants herein, are not, nor is either of them now, or at the time of filing their petition herein were, entitled to have any share or interest in the land and premises described in the petition herein set apart or distributed to them, or either of them." In the seventh and last finding of fact the court finds that the respondent here "claims" and "has a title to the land and premises described in the petition herein, and the whole thereof, from a separate and independent title from that of H. C. Grider, deceased, as follows," and then proceeds to set out that on the 14th of August, 1872, the said R. D. Merritt entered into the possession of the premises under an instrument in writing purporting to convey to him the premises, and the fact of his continuous, notorious, uninterrupted, and exclusive possession and enjoyment since that time, paying the taxes, etc.; that such possession has been adverse to the petitioners, and to all the world; and, as a conclusion of law, the court finds that the plaintiffs' or petitioners' cause of action is barred by the statute of limitations.

One of the provisions of the section of the Code under which the proceeding is brought is "that all appeals herein must be taken within sixty days from the date of the entry of the judgment or the order complained of." This appeal was not taken until more than 60 days after the date of the entry of the judgment. It follows that the appeal from the judgment is too late, and the case can only be considered on the appeal from the order denying the motion for new trial.

On the trial, the plaintiffs or petitioners having made out a *prima facie* case on their part and rested, the respondent offered in evidence, separately, the petition for partial distribution, filed by him in 1875, and the order of distribution made thereon; to each of which the plaintiffs objected, the objection was overruled, exception taken, and upon such exception error is assigned. If the ground of objection had been properly stated, we should have no hesitation in holding that it was error to admit either of these papers in evidence. But it is doubtful whether the ground of objection stated was sufficient, and as the error, if one, was not prejudicial to the appellants, it is unnecessary to pass upon that question.

The motion for new trial was also made upon the ground of insufficiency of evidence to justify the decision. The first specification of insufficiency reads as follows: "There is no evidence to justify that part of the sixth finding wherein it is found 'that the petitioners are not, nor is either of them now, or at the time of filing their petition herein were, entitled to have any share or interest in the land described in the petition herein set apart or distributed to them, or either of them,' in that the evidence shows that said last will of said deceased, by its terms, devises the whole of said lands of deceased to said Sallie Grider, and that deceased wholly omitted to provide therein for either of petitioners, and that such omission was not intentional, and that said petitioners, and each of them, are entitled to have and receive the same share of said lands as if deceased had died intestate." This specification is not artistically drawn, but it is sufficient, and the point made by it is, in our judgment, well taken. There is no conflict in the evidence establishing the fact that Grider died seised of this land, and leaving a widow and three children, the petitioners in this case, leaving a will in which he attempted to devise all his property to his said widow, and making no mention whatever of his said children or either of them. There is an entire failure to show that the omission to provide for them was intentional. Under these circumstances, the law gave to the children the same interest in the estate as if the father had died intestate. Civil Code, § 1307; Pearson v. Pearson, 46 Cal. 610; Estate of Wardell, 57 Cal. 484. The widow, therefore, became only a tenant in common with her children in this real property, all taking subject to administration, the exact proportion of the interest of each depending upon whether the real property was community property, or the separate property of the decedent,—a question of fact upon which no light is thrown in this record. The undisputed evidence offered and given by the respondent himself is that he entered into possession, claiming title, in 1872, under a conveyance from Mrs. Grider to one Gibson, and from said Gibson to himself, and he testifies that it has been fenced, cultivated, and pastured ever since Gibson got it from Mrs. Grider. The petition and order introduced by him show that in 1875 the estate under which he entered and claims was still in probate, and this proceeding is based upon the fact that it is still in probate. The law charges him with notice of its own provisions, and that, under it, his grantor, Mrs. Grider, was not the sole owner of the property, but only a tenant in common with her children, and that the property was subject to administration. He acquired no right except such as she had,—that of a tenant in common,—and entered as such. His possession was, and has ever since been, that of a tenant in common only, and, if his moiety was relieved from administration, it was only so because he had given bonds to pay his proportion of the debts and expenses of administration.

Our attention is called by respondent to the fact that the fifth finding is not attacked by any of the specifications. This is probably for the reason that, with the exception of the concluding sentence, which is that the petitioners here have never had any portion of the estate distributed to them, the finding is entirely of probative, and not of ultimate, fact, and, as it is a mere repetition of evidence which is undisputed, it was not the subject of attack.

But the probative fact here recited is the corner-stone upon which the whole superstructure of ultimate fact found in the seventh finding rests, and is insufficient to support that superstructure. The fifth finding, with the exception of the concluding sentence above referred to, consists of a recital of the alleged decree of distribution in favor of respondent. It is upon the faith of this decree and the conveyances from Sallie Grider to Gibson, and from Gibson to Merritt, that the court bases the ultimate conclusion of fact found in the seventh finding, that said Merritt "has title to the land described in the petition herein, and the whole thereof," and these facts do not support that finding. As before said, under his deeds he got no greater interest in the land than Sarah Grider had. Under the said order or decree of distribution the court "adjudged, decreed, and determined" that said petitioner Merritt "has succeeded to all the right, title, and interest of said Sallie Grider, * * * and is entitled to the share of said estate in his petition and hereinafter described." And after describing the land, fixing the bond to be given, etc., "it is further adjudged and decreed that the estate hereinbefore described is hereby finally distributed and set apart to said petitioner R. D. Merritt," etc. What estate? The interest of the said Sallie Grider in the land described. And this conclusion is strengthened by reference to the petition, to which the order itself refers, where the petitioner declares that he has "succeeded to a certain part of the real estate left by said decedent" by deed from said Sallie Grider. It not appearing that any real estate was left by said decedent, except that described in his petition and decree, the words "a certain part" can have no other meaning than "a certain interest in." In another part of his petition he says he "has succeeded by mesne conveyance to all the interest of said devisee," etc. Nowhere in the petition does he claim that his succession is to the entire interest in the property.

If this decree of distribution is to be construed in any other form than as simply a decree recognizing the petitioner therefor as having succeeded to the interest of Sallie Grider, and distributing to him the interest in this realty to which she was entitled, it is a nullity; for that is all that the court, in that proceeding and under that petition, had the power to do. Whether good or bad, the only purpose it serves in this proceeding is to show the respondent here entered as tenant in common with these appellants. The administration of the estate into which he entered as successor in interest to one of the distributees has never been closed, and he cannot, pending the administration, acquire title against his co-tenants by limitation, as the court has found that he did do. The seventh finding, in addition to what has already been said of it, finds that respondent has acquired a title independent of the Grider title, and proceeds to show how. But that showing is purely under the statute of limitation, after entry under the Grider title, as hereinbefore stated. Entering as he did, as a tenant in common with them, under the same common title, he has not brought himself by his proof within any rule which would enable him to acquire a title by limitation against a co-tenant, even if such a thing could be possible in favor of one distributee of an estate against another distributee, pending administration. The order denying a new trial is reversed, and the cause remanded.

We concur: McFarland, J.; Sharpstein, J.; Thornton, J.

Beatty, C. J. I dissent. As I construe the decree of December 22, 1875, it distributes the whole of the property in controversy to the respondent, and, if valid, invests him with the title. No doubt the decree was erroneous, as being founded upon an erroneous conclusion as to the effect of Henry C. Grider's will, but, never having been reversed on appeal, the decree is binding upon the appellants if, as to them, the court acquired jurisdiction to make it. As to this it seems to me that upon collateral attack, in the absence of any evidence to impeach it, the recitals in the decree of due notice, etc., are conclusive.

Works, J. I concur in the dissenting opinion of the Chief Justice.

82 Cal. 286

Spring Val. Water-Works v. City and County of San Francisco *et al.* (No. 13,411.)

(*Supreme Court of California.* Jan. 1, 1890.)

Water Companies—Regulation of Rates.

1. Const. Cal. art. 14, § 1, provides that the rates of compensation for the use of water supplied to any city, county, town, or inhabitants thereof, shall be fixed annually by the board of supervisors, or other governing body, of such city, county, or or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force one year, and no longer. Any such body failing so to do within the proper time shall be subject to peremptory process to compel action, at the suit of any one interested. Any one collecting water-rates otherwise than as so established shall forfeit his franchises and water-works for the public use. Section 2 provides that the right to collect such water-rates is a franchise, and cannot be exercised except by authority of, and in the manner prescribed by, law. *Held*, that the constitution did not make the board of supervisors part of the legislative department of the state, but that the power granted to it was to fix reasonable rates and just compensation.

2. Where such board of supervisors have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference either to what they should be, without reference either to the expense necessary to furnish the water or to what is a fair and reasonable compensation therefor, so as to render it impossible to furnish water without loss, and so low as to amount to a practical confiscation of the property invested in the business, it is within the jurisdiction of a court of equity to set aside such ordinance and direct the board to fix such rates as the constitution provided for.

3. In an action to set aside such an ordinance, it is not necessary that the mayor of the city should be made a party defendant.

4. It is not necessary that the board should give notice to parties furnishing water of an intention to fix the rates, the notice not being provided for by the constitution; but it is the duty of the

board to obtain all information necessary to act intelligibly and fairly.

5. An ordinance is not objectionable for uncertainty, in that it gives every householder the option to require a meter, and to pay for the water used at water-rates which are different from house-rates, as the rates are fixed.

6. It is not an unreasonable regulation that the meter should be supplied by the party furnishing water.

THORNTON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. P. HOGE, Judge.

Action by the Spring Valley Water-Works against the city and county of San Francisco and others to set aside an ordinance and require the passing of another. Judgment for plaintiff, and defendants appeal.

Geo. Flournoy, Jr., City and Co. Atty., *Flournoy & Mhoon*, and *W. W. Foote*, for appellants. *Wm. F. Herring* and *Barber, Boalt & Bishop*, for respondent.

WORKS, J. This action is brought to set aside and declare void an ordinance of the board of supervisors of the city and county of San Francisco fixing water-rates to be charged for water to be furnished to said city and its inhabitants for the year commencing July 1, 1889. The complaint, after alleging the plaintiff's corporate existence, and its object and purpose, viz., to furnish water to said city and county, and other preliminary and technical matters, avers that it has, for the purpose mentioned, "constructed aqueducts and pumping and other works, and laid many miles of water-pipe for distributing water to its consumers, and that its aforesaid lands, water-rights, works, buildings, and improvements necessary to enable it to fulfill the said purposes of its incorporation, are of very great value, to-wit, of a value exceeding $25,000,000." That it has projected, and has now in course of construction, large additions to its works, necessary to meet the demands of said city and its inhabitants, and, in order to meet the wants of said city and its inhabitants, and "to meet the expenses and pay the cost of the said additions to its works and improvements, it will be necessary for the plaintiff to lay out and expend, during the year ending June 30, 1890, very large sums of money, amounting in the aggregate to more than $1,500,000." That for these purposes it has borrowed large sums of money, amounting, in the aggregate, to more than $9,600,000, and has an aggregate interest-bearing indebtedness, secured by mortgage on its property, of $9,000,000. That the interest which will accrue and have to be paid during the year ending June 30, 1890, will amount, in the aggregate, to $498,000. That the operating expenses of the plaintiff's business for said year will amount to $390,000, and the taxes to be paid by it will amount to $70,600. That its capital stock is $10,000,000, is divided into 100,000 shares, and held by more than 1,100 shareholders, and that the holders of said stock are reasonably entitled to receive, in dividends upon their said stock, not less than 7 per cent. per annum upon the par value of said stock. That the plaintiff is entitled to receive a reasonable and just compensation for the services rendered, "and that, if so fixed, its aggregate annual income from such rates would be sufficient to pay the interest on its indebtedness, the taxes upon its property, and its operating and other fixed expenses, and to pay dividends to its stockholders amounting to at least 7 per cent. upon the par value of their stock; and that to this end it was and is entitled to have its rates for the year commencing July 1, 1889, and ending June 30, 1890, so fixed and established that its gross income for said year will amount to at least $1,670,000." That, as required by law, the plaintiff furnished said board of supervisors, and filed with the clerk thereof, a detailed statement, verified by the oath of the president and secretary of the plaintiff, showing the name of each water-rate payer, his or her place of residence, the amount paid by each such water-rate payer during the year preceding the date of such statement, and also showing all revenue derived by said plaintiff from all sources during said year, and an itemized statement of expenditures made by plaintiff for supplying water during said time. "That from said statement it appeared, and so the fact is, that the receipts and expenditures made by the plaintiff from furnishing and for supplying water during said time were as follows, viz.: Receipts—From water-rates, $1,421,751.39; from other sources, $12,498.25; total, $1,434,249.64. Disbursements—For operating expenses, $361,653.65; for interest, $443,257.85; for taxes, $70,624.40; for dividends, $600,000; total, $1,475,535.90. Balance, expenditures over receipts, $41,286.26." The complaint further alleges: "That said board of supervisors did not, during said month of February, 1889, so fix and prescribe said rates for said year, and have not at any time lawfully or duly fixed or prescribed any rates whatever for supplying fresh water to said city and county, and its inhabitants, during said year; that on the 28th day of February, 1889, the said board of supervisors assumed and pretended to pass a certain pretended ordinance or order, purporting to fix the maximum rates to be charged for furnishing fresh water to said city and county, and its inhabitants, for the said year commencing July 1, 1889, and ending June 30, 1890, a true and full copy of which said ordinance or order is hereto annexed, marked 'Exhibit A,' and made a part of its complaint. That the said ordinance or order purports to fix the rates to be charged for supplying fresh water to said city and county, and its inhabitants, for said year; but that the same is, in fact, null and void, and of no effect, and that the rates pretended thereby to be fixed are wholly illegal and unauthorized. That the said ordinance or order was passed, or pretended to be passed, without any notice or opportunity to be heard against it on the part of the plaintiff or other person interested. That said order was first introduced in said board of supervisors without any previous notice to plaintiff or hearing accorded to plaintiff with reference to the subject-matter thereof, at a meeting of said board of supervisors held on the 21st day of February, A. D.

1889, and was thereafter called up for final passage at a meeting of said board of supervisors held on the 28th day of February, A. D. 1889. That the first information which the plaintiff received thereof was through the public newspapers, and on said 21st day of February, and that the first opportunity which the plaintiff had to object to said order, or to offer to introduce evidence before said board of supervisors, showing that said order was unreasonable and unjust, was at said meeting of February 28, A. D. 1889. That at said meeting, and at the first opportunity, and before the passage of said order, the plaintiff offered to produce and introduce evidence and testimony before said board showing that said order was unreasonable and unjust, in that it would not allow the plaintiff to collect sufficient revenue to pay its necessry operating expenses, interest on its indebtedness, and taxes; but that the said board of supervisors would not and did not allow the plaintiff to introduce, and refused to hear evidence offered by the said plaintiff, to show that the said ordinance or order was, and that the rates pretended to be fixed thereby were, unreasonable, unjust, and oppressive, and refused to allow, and did not allow, any evidence whatever to be introduced respecting the reasonableness and justice of the said ordinance or order, and of the rates purported to be fixed thereby, but immediately passed and adopted said order, without giving the plaintiff any opportunity to be heard whatever. That the rates purporting to be fixed by said ordinance or order were fixed arbitrarily, at random, and by mere guess-work, without any consideration of or regard to the right of plaintiff to a reasonable compensation for supplying water to the said city and county, and its inhabitants, or to a reasonable income, or any income, upon its investment, and without any consideration of, or regard to, the value of the plaintiff's works and property, or the amount of its interest-bearing indebtedness, and the annual interest charge thereon, or its operating expenses, or the amount of taxes which it would be required to pay, or the right of the plaintiff's stockholders to reasonable or any dividends upon their stock, and without any reference to, or consideration of, the actual cost of supplying said water, but in total disregard of all such matters; and that in the passage or pretended passage of said ordinance or order the said board of supervisors acted wholly without jurisdiction, power, or authority, and in excess of their lawful jurisdiction, power, or authority. That the said ordinance or order is, and the rates purporting to be prescribed and fixed thereby are, grossly unjust, unreasonable, and oppressive. That said rates do not permit of nor provide for a just or fair or reasonable compensation for the water to be supplied during said year by this plaintiff to said city and county, and the inhabitants thereof; and that if said ordinance or order is enforced, and if the plaintiff is prevented from charging and collecting any other or greater rates than those prescribed, its gross income from the said rates for the year commencing July 1, 1889, and ending June 30, 1890, will not and cannot possibly exceed the sum of $750,000; and it will be wholly insufficient to pay the interest on plaintiff's indebtedness, its operating expenses, and taxes; and not only will not and cannot yield any dividend to its stockholders, but will render it necessary to levy heavy assessments upon said stockholders, to pay said interest, expenses, and taxes." It is further averred that the defendants are about to enforce said ordinance; that its passage has already impaired the plaintiff's credit and depreciated the value of its property, and, if enforced, it will greatly impair, if not entirely destroy, the plaintiff's credit, as well as the value of its property and capital stock, and prevent it from constructing and completing the work necessary to supply water to the city and its inhabitants; and that the ordinance operates, and will operate, to take away the plaintiff's property without due process of law, and deprive the plaintiff of the equal protection of the laws, and that the plaintiff has no adequate remedy at law. There are other allegations in the complaint, but they need not be particularly noticed.

The prayer of the complaint is as follows: "Wherefore, the plaintiff prays the judgment and decree of this court: (1) That the said pretended ordinance or order of the board of supervisors of said city and county is utterly null and void, and of no effect in law. (2) That the plaintiff is entitled to have the rates for supplying fresh water to said city and county and its inhabitants, for the year commencing July 1, 1889, and ending June 30, 1890, and for other years, so fixed that they will, in the aggregate, afford a reasonable and just compensation for the service rendered, and will yield a sufficient annual income to pay the interest on its indebtedness, its running expenses and taxes, and to the plaintiff's stockholders a dividend of not less than 7 per cent. per annum upon the face value of their stock. (3) That the court issue its mandatory injunction or other peremptory process requiring the said board of supervisors forthwith to fix the rates for supplying water to said city and county, and its inhabitants, for the year commencing July 1, 1889, and ending June 30, 1890, in accordance with the foregoing principles; to give plaintiff and all other persons interested due notice and an opportunity to be heard before the said board prior to the final adoption of any order fixing such rates; and to allow the plaintiff and others interested to introduce evidence respecting the reasonableness and justice of such proposed order; and to make, by their counsel, such argument upon the subject as they may see fit. (4) That each and all of said defendants be personally enjoined from any attempt to enforce, or to cause to be enforced, the said pretended ordinance or order, or from bringing, or causing to be brought, any action or suit against the plaintiff in law or in equity, to enforce any forfeiture of the plaintiff's franchise or works, or for any other purpose, for any refusal or failure of the plaintiff to obey the said pretended ordinance or order, or to conform to the rates thereby prescribed, and from any attempt, directly or indirectly, to compel the plaintiff to furnish water at any other rates than those fixed by the board of supervisors, in obedience to the decree and mandate of this court. (5) That the plaintiff's rights in the premises be forever quieted against each and all of the defendants. (6) That the plaintiff have such other and further relief as to the court may seem meet and conformable to equity and good conscience, together with the costs of this suit." There was a demurrer to the complaint, which was overruled, and, the defendants declining to answer, judgment was rendered in favor of the plaintiff, that the rates and compensation "are grossly unreasonable, unjust, and oppressive, and amount to the taking of the property of the plaintiff for public use without just compensation, and without due process of law;" that said ordinance "is outside and in excess of the jurisdiction of the board of supervisors, as conferred by article 14, § 1, of the constitution of the state of California, and not a compliance with the provisions of said article and section, and is, and ever has been, illegal, unauthorized, and void." It was further decreed that the ordinance be set aside and vacated, that the defendants be enjoined from enforcing the same, and that they be enjoined from bringing any action against the plaintiff to enforce any forfeiture of its franchise and works on account of any past or future refusal to obey said pretended ordinance, or to conform to said rates, or any of them, quieting plaintiff's rights in the premises, and directing that the board of supervisors proceed forthwith to fix said rates and compensation as provided by the constitution.

The appellants having seen fit to rest their case upon the facts as stated in the complaint, instead of answering and attempting to show that the board of supervisors had endeavored to comply with the provisions of the constitution by an honest and fair effort to ascertain and fix a fair and reasonable rate for water to be furnished, the only question for us to determine is whether, under the allegations of the complaint, which are by the demurrer admitted to be true, the plaintiff is entitled to any relief. If so, the judgment must be affirmed. The appellants take the broad ground that the constitution has conferred upon the board of supervisors the absolute and exclusive right to fix water-rates, and that under no circumstances have the courts any jurisdiction to interfere with or control such authority; while the respondent contends that there is a limitation on the power of the board which compels the board to fix reasonable rates or compensation, and that whether the rates or compensation fixed by such board are reasonable or not the courts have the power and jurisdiction to determine. The constitution (article 14) provides: "Section 1. The use of all water now appropriated, or that may hereafter be appropriated, for sale, rental, or distribution, is hereby declared to be a public use, and subject to the regulation and control of the state, in the manner to be prescribed by law: provided, that the rates or compensation to be collected by any person, company, or corporation in this state, for the use of water supplied to any city and county, or city or town, or the inhabitants thereof, shall be fixed, annually, by the board of supervisors, or city and county, or city or town, council, or other governing body of such city and county, or city or town, by ordinance or otherwise, in the manner that other ordinances or legislative acts or resolutions are passed by such body, and shall continue in force for one year, and no longer. Such ordinances or resolutions shall be passed in the month of February of each year, and take effect on the 1st day of July thereafter. Any board or body failing to pass the necessary ordinances or resolutions fixing water-rates, where necessary, within such time, shall be subject to peremptory process to compel action at the suit of any party interested, and shall be liable to such further processes and penalties as the legislature may prescribe. Any person, company, or corporation collecting water-rates in any city and county, or city or town, in this state, otherwise than as so established, shall forfeit the franchises and water-works of such person, company, or corporation to the city and county, or city or town, where the same are collected, for the public use. Sec. 2. The right to collect rates or compensation for the use of water supplied to any county, city and county, or town, or the inhabitants thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law." The first point made as to the jurisdiction of the court below is that, conceding the complaint states a cause of action, no jurisdiction to hear and determine the question raised thereby is vested in the superior courts by the constitution or laws of this state. There is no force in this contention. If any cause of action is stated in the complaint, it is an equitable one, and of such cases superior courts are given jurisdiction in the broadest terms, by the constitution of this state. Const. art. 6, § 5.

We pass, therefore, to the only real question in the case, viz., whether there is any power on the part of any court, no matter how broad and comprehensive its grant of jurisdiction may be, to review, interfere with, or set aside the action of the board of supervisors, or whether the power and authority of such board is exclusive and beyond the reach of the courts, under any and all circumstances. It must be conceded, in the outset, that the use of water for sale is a public use, and that the price at which it shall be sold is a matter within the power of the board of supervisors to determine. Munn v. Illinois, 94 U. S. 113; Water-Works v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48. Indeed, this is not controverted by the respondent. The constitution does not, in terms, confer upon the courts of the state any power or jurisdiction to control, supervise, or set aside any action of the board in respect to such rates. It may also be conceded, for the purposes of this case, that when the board of supervisors have fairly investigated and exercised their discretion in fixing the rates the courts have no right to interfere on the sole ground that in the judgment of the court the rates thus fixed and determined are not reasonable. That such is the case is attested by numerous authorities. Nesbitt v. Board, 14 Moak, Eng. R. 287; Davis v. Mayor, 1 Duer, 451–497; Munn v. Illinois, supra; Water-Works v. Schottler, supra; Railway Co. v. Dey, 35 Fed. Rep. 866.

But it seems to us that this complaint presents an entirely different question from this. The whole gist of the complaint is that the board of supervisors have not exercised their judgment or discretion in the matter; that they have arbitrarily, without investigation, and without any exercise of judgment or discretion, fixed these rates without any reference to what they should be, without reference either to the expense to the plaintiff necessary to furnish the water, or to what is a fair and reasonable compensation therefor; that the rates are so fixed as to render it impossible to furnish the water without loss, and so low as to amount to a practical confiscation of the plaintiff's property. If this be true, and the demurrer admits it, a party whose property is thus jeopardized should not be without a remedy. If the action of the board of supervisors was taken as the complaint alleges, they have not in any sense complied with the requirements of the constitution, and their pretended action was a palpable fraud, which might result injuriously either to the plaintiff or the city and its inhabitants, and would almost certainly work injustice to one or the other. The constitution does not contemplate any such mode of fixing rates. It is not a matter of guess-work or an arbitrary fixing of rates without reference to the rights of the water company or the public. When the constitution provides for the fixing of rates or compensation, it means reasonable rates and just compensation. To fix such rates and compensation is the duty, and within the jurisdiction, of the board. To fix rates not reasonable or compensation not just is a plain violation of its duty. But the courts cannot, after the board has fully and fairly investigated and acted, by fixing what it believes to be reasonable rates, step in and say its action shall be set aside and nullified because the courts, upon a similar investigation, have come to a different conclusion as to the reasonableness of the rates fixed. There must be actual fraud in fixing the rates, or they must be so palpably and grossly unreasonable and unjust as to amount to the same thing. The right of the plaintiff to dispose of the water collected in its reservoirs, at reasonable rates, is the only value it has, and is the only thing that can bring the plaintiff any return for the money expended for reservoirs for its storage and pipes for its distribution. Not only reservoirs, pipes, and other works and improvements necessary to carry out the objects of its incorporation, but the water itself, is property which cannot be taken without just compensation. The fact that the right to store and dispose of the water is a public use, subject to the control of the state, and that its regulation is provided for by the constitution of this state, does not affect the question. "Regulation," as provided for in the constitution, does not mean "confiscation," or a taking without just compensation. If it does, then our constitution is clearly in violation of the constitution of the United States, which provides that this shall not be done. The ground taken by the appellant is that the fixing of rates is a legislative act; that by the terms of the constitution the board of supervisors are made a part of the legislative department of the state government, and exclusive power given to them, which cannot be encroached upon by the courts. In other words, the board of supervisors, for the purpose of fixing these water-rates, is a part of one of the co-ordinate and independent departments of the state government, and as such beyond and independent of any control by the judicial department. This court has held that the fixing of water-rates is a legislative act, at least to the extent that the action of the proper bodies clothed with such power cannot be controlled by writs which can issue only for the purpose of controlling judicial action. Water-Works v. Bryant, 52 Cal. 132; Water-Works v. City and County of San Francisco, Id. 111; Water-Works v. Bartlett, 63 Cal. 245. There are other cases holding the act to be legislative, but whether it is judicial, legislative, or administrative is immaterial. Let it be which it may, it is not above the control of the courts, in proper cases. It has also been held that where a power is vested in an officer of the state, involving the exercise of discretion and judgment on his part, such discretion and judgment cannot be controlled by the courts by *mandamus*. Berryman v. Perkins, 55 Cal. 483. The right and jurisdiction in this respect is fully and accurately stated in Davis v. Mayor, 1 Duer, 451–497, as follows: "Notwithstanding these observations, the question still remains, has this court, or any court of equity, the power to interfere with the legislative discretion of the common council of this city, or of any other municipal corporation? And to this question I at once reply, certainly not, if the term 'discretion' be properly limited and understood; and, thus understood, I carry the proposition much further than the counsel who advanced it. This court has no right to interfere with and control the exercise, not merely of the legislative, but of any other discretionary power, that the law has vested in the corporation of the city, and hence I deem it quite immaterial whether the resolution in favor of Jacob Sharp and his associates be termed a 'by-law,' a 'grant,' or 'contract,' or whether the power exercised in passing it be termed 'legislative,' 'judicial,' or 'executive;' for, if the corporation had the power of granting at all the extraordinary privileges which the resolution confers, the propriety of exercising the power, and, perhaps, even the form of its exercise, rested entirely in its discretion. Nor is this all. A court of equity has no right to interfere with and control in any case the exercise of a discretionary power, no matter in whom it may be vested,—a corporate body, or individuals, the aldermen of a city, the directors of a bank, a trustee, executor, or guardian; and I add that the meaning and principle of the rule, and the limitations to which it is subject, are, in all the cases to which it applies, exactly the same.

The meaning and principle of the rule are that the court will not substitute its own judgment for that of the party in whom the discretion is vested, and thus assume to itself a power which the law had given to another: and the limitations to which it is subject are that the discretion must be exercised, within its proper limits, for the purposes for which it was given, and from the motives by which alone those who gave the discretion intended that its exercise should be governed."

We are not inclined to the doctrine asserted by the appellants in this case, that every subordinate body of officers to whom the legislature delegates what may be regarded as legislative power thereby becomes a part of the legislative branch of the state government, and beyond judicial control. In the case of Davis v. Mayor, supra, it is said: "It is this construction, therefore, that I adopt; and, for the purposes of this opinion, I shall treat the resolution as an ordinance or by-law, and its reconsideration and adoption as properly acts of legislation, in the fullest sense in which the term 'legislation' can be justly applied to the acts of a corporate body. Making these concessions, the denial of the jurisdiction of this court amounts to this: that a court of equity, of general jurisdiction, has no power, in any case or for any purpose, to restrain the legislative action of a municipal corporation, nor in any manner to interfere with or control its legislative discretion, no matter to what subject the action may be directed, nor how manifest and gross the violation of law, even of the provisions of its own charter, that it may involve, and no matter by what motives of fear, partiality, or corruption its discretion may be governed, nor how extensive and irreparable the mischief that in the particular case may be certain to result to individuals or the public from its threatened exercise. If this be true, as a proposition of law, then the injunction order of this court, from the want of jurisdiction manifest on its face, was wholly void. If the proposition be not true, the order was valid, and should have been obeyed. * * * In reply to a question put by the court, it was expressly affirmed by one of the counsel, that should the common council attempt, by an ordinance, and from motives manifestly corrupt, to convey, for a grossly inadequate or merely nominal consideration, all the corporate property of the city, neither this nor any other court would have power to suppress by an injunction the meditated fraud, or, when consummated, to rescind the grant, or punish its authors, or divest them of its fruits. There could be no remedy, we were told, but from the force of public opinion, and the action of the people at an ensuing election; and all this upon the ground that neither the propriety nor the honesty of the proceedings of a legislative body, nor, while they are pending, even their legality, can ever be made a subject of judicial inquiry. This, it must be confessed, is a startling doctrine. We all felt it to be so when announced, and I rejoice that we are now able to say, with an entire conviction, that, applied to a municipal corporation, it is just as groundless in law as it seems to us it is wrong in its principle, and certainly would be pernicious in its effects. The doctrine, exactly as stated, may be true when applied to the legislature of the state, which, as a co-ordinate branch of the government, representing and exercising, in its sphere, the sovereignty of the people, is, for political reasons of manifest force, wholly exempt in all its proceedings from any legal process or judicial control; but the doctrine is not, nor is any portion of it, true, when applied to a subordinate municipal body, which, although clothed to some extent with legislative and even political powers, is yet, in the exercise of all its powers, just as subject to the authority and control of courts of justice to legal process, legal restraint, and legal correction as any other body or person, natural or artificial. The supposition that there exists an important distinction, or any distinction whatever, between a municipal corporation and any other corporation aggregate, in respect to the powers of courts of justice over its proceedings, is entirely gratuitous, and, as it seems to me, is as destitute of reason as it certainly is of authority. The counsel could refer us to no case, nor have we found any, in which the judgment of the court has proceeded upon such a distinction, nor, in our researches, which have not been limited, have we been able to discover that, by any judge or jurist, the existence of such a distinction has ever been asserted or intimated." Pages 494, 495. This case was affirmed by the court of appeals of New York, in People v. Sturtevant, 9 N. Y. 263, and the doctrine announced meets with our approval.

Counsel for appellants rely, mainly, in support of their position, on the decision of the supreme court of the United States in what are known as the "Granger Cases," the leading one of which is the case of Munn v. Illinois, 94 U. S. 113; but, while there may be some language used in the opinion in that case tending to maintain their contention, there was no such question presented as we have here, and the point made in this case was not decided. The question there presented is clearly stated by the learned chief justice in his opinion: "The question to be determined in this case is whether the general assembly of Illinois can, under the limitations upon the legislative power of the states imposed by the constitution of the United States, fix by law the maximum of charges of the storage of grain in warehouses at Chicago and other places in the state having not less than one hundred thousand inhabitants, 'in which grain is stored in bulk, and in which the grain of different owners is mixed together, or in which grain is stored in such a manner that the identity of different lots or parcels cannot be accurately preserved.'" Page 123. See, also, for a statement of the questions passed upon in this case, Railway Co. v. Illinois, 118 U. S., 557-568, 7 Sup. Ct. Rep. 4. It will be observed from this statement that the only question there was whether the power to regulate prices rested in the legislature of the state of Illinois at all, and not whether, if it did exist, it was exclusive, and beyond judicial inquiry and control. That there was no intention to decide that the courts have no jurisdiction to interfere in this class of cases, upon a proper showing, is clearly indicated by what is said by the same court in later decisions, and by judges of other federal courts. In the case of Water-Works v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, Chief Justice WAITE, who delivered the opinion in Munn v. Illinois, said: "That it is within the power of the government to regulate the prices at which water shall be sold by one who enjoys a virtual monopoly of the sale, we do not doubt. That question is settled by what was decided on full consideration in Munn v. Illinois, 94 U. S. 113. As was said in that case, such regulations do not deprive a person of his property without due process of law. What may be done if the municipal authorities do not exercise an honest judgment, or if they fix upon a price which is manifestly unreasonable, need not now be considered, for that proposition is not presented by this record. The objection here is not to any improper prices fixed by the officers, but to their power to fix prices at all. By the constitution and the legislation under it, the municipal authorities have been created a special tribunal to determine what, as between the public and the company, shall be deemed a reasonable price during a certain limited period. Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound, in morals and in law, to exercise an honest judgment as to all matters submitted for their official determination." 110 U. S. 354, 4 Sup. Ct. Rep. 51. Again, in Stone v. Trust Co., 116 U. S. 307–331, 6 Sup. Ct. Rep. 334, 388, 1191, Chief Justice WAITE said: "From what has thus been said, it is not to be inferred that this power of limitation or regulation is itself without limit. This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use, without just compensation, or without due process of law. What would have this effect we need not now say, because no tariff has yet been fixed by the commission, and the statute of Mississippi expressly provides 'that in all trials of cases brought for a violation of any tariff or charges, as fixed by the commission, it may be shown in defense that such tariff, so fixed, is unjust.'" 110 U. S. 331, 6 Sup. Ct. Rep. 345. See, also, Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028. In the case of Banking Co. v Smith, 128 U. S. 174–179, 9 Sup Ct. Rep. 47, Mr. Justice FIELD sums up the former decisions of that court as follows: "It has been adjudged by this court, in numerous instances, that the legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation; and that what is done does not amount to a regulation of foreign or inter state commerce." 128 U.S. 179, 9 Sup.Ct. Rep. 48. It will be observed that in all the decisions of the supreme court of the United States, while the power of the state to regulate these charges is recognized, the power is so limited as to authorize just what it is contended should be done by the court in this case. This same limitation, so necessary to the rights and property of corporations and individuals vested with a public use, is fully recognized by BREWER, J., now one of the justices of the supreme court of the United States, in Railway Co. v. Dey, 35 Fed. Rep. 866, 877. After reviewing the Granger Cases, and other cases above cited, he says: "It is obvious from these last quotations that the mere fact that the legislature has pursued the forms of law in prescribing a schedule of rates does not prevent inquiry by the courts; and the question is open, and must be decided in each case, whether the rates prescribed are within the limits of legislative power, or mere proceedings, which, in the end, if not restrained, will work a confiscation of the property of complainant. Of course, some rule must exist, fixed and definite, to control the action of the courts; for it cannot be that a chancellor is at liberty to substitute his discretion as to the reasonableness of rates for that of the legislature. The legislature has the discretion, and the general rule is that, where any officer or board has discretion, its acts, within the limits of that discretion, are not subject to review by the courts. Counsel for complainant urged that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest, say 3 per cent. Decisions of the supreme court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as a right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge." Page 878. See, further, as supporting this view, Railroad Co. v. State, 5 South. Rep. 833. Counsel on both sides have shown great industry and research in the presentation of this case, and many authorities are cited bearing more or less directly on this question, but we cannot extend this opinion by noticing or even citing them all. We have cited sufficient, we think, to sustain fully our view that the court below had jurisdiction, and that the complaint presented a case sufficient to call for the interposition of the court in the matter. The conclusion we have reached on this question is decisive of the case, but there are other points made and argued in the briefs which it is proper we should notice.

On the part of the appellant, it is contended that a part of the allegations of the complaint necessary to make out a cause of action are of mere conclusions of law, and should not be considered. We think, however, that the allegations referred to, or enough of them to entitle the plaintiff to the relief demanded, are well pleaded. There are other objections to the form of the complaint, and the manner of alleging the facts, which are equally groundless. It is further claimed that the mayor of the city should have been made a party, but we do not regard this as necessary.

On the part of the respondent, it is contended, in support of the decision of the court below, that notice to the plaintiff of an intention to fix the rates was necessary, and that without such notice being given the action of the board was a taking of its property without due process of law. But the constitution is self-executing, and, as it does not require notice, we think no notice was necessary. It does not follow, however, that, because no notice is necessary, the board are for that reason excused from applying to corporations or individuals interested to obtain all information necessary to enable it to act intelligibly and fairly in fixing the rates. This is its plain duty, and a failure to make the proper effort to procure all necessary information from whatever source may defeat its action. Both the corporation and the individuals furnishing the water, as well as the public, who must pay for its use, are entitled to a careful and honest effort on the part of the board to obtain such information and to have it act accordingly.

It is objectd to the ordinance that it gives every householder an option to require a meter upon his premises, and to pay for the water furnished at water-rates which are different from the house-rate. It is contended that this does not fix the rate as the constitution requires, but leaves it indefinite and uncertain. We do not think the ordinance is defective in this respect. The rates are definitely fixed, and the fact that there may be one price for the consumer who has a meter and a different price for one who has none does not render the ordinance uncertain. It is also contended that the requirement that meters shall be furnished by the plaintiff is unreasonable, and cannot be enforced; but we think otherwise. The requirement that the party furnishing water shall provide the means necessary for its measurement, so that the quantity furnished and to be paid for may be known, is not an unreasonable regulation The expense of the meter could not be imposed on the consumer. Steam-Ship Co. v. Jersey City, 45 N. J. Law, 246. There are other objections to the ordinance which we need not notice specifically. It is enough to say that, in our opinion, none of them are well taken.

Finally, we are asked by the respondent to lay down some basis upon which the board must proceed in fixing rates. But we do not feel that we should attempt to lay down such a rule in advance. This must be left to the board to determine. Judgment affirmed.

We concur: BEATTY, C. J.; MCFARLAND, J.; SHARPSTEIN, J., PATERSON, J.

I dissent: THORNTON, J.

FOX, J., being disqualified, did not participate in the decision of this case.

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PEOPLE v. BOWMAN. (No. 20,549.)

(*Supreme Court of California.* Dec. 2, 1889.)

ARRAIGNMENT AND PLEA—EVIDENCE OF GOOD CHARACTER.

1. Where one is arraigned and offered an opportunity to plead, but does so only through his attorney, no error can be predicated of the court's ordering the plea of not guilty to be entered; it being the duty of the court so to do where the prisoner stands mute, under Pen. Code Cal. § 1024.

2. An instruction, in a trial for murder, that "the defendant has introduced evidence tending to show his good character as a man of peace and quiet, and for honesty and integrity. If in the present case the good character of the defendant for these qualities is proven to your satisfaction, then such fact is to be kept in view by you in all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain any reasonable doubt of the defendant's guilt, then it is your duty to acquit him,"—contains all that defendant is entitled to have on the point.

Commissioners' decision. In bank. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

G. D. Murray and *T. H. Selvage*, for appellant. *Atty. Gen. George A. Johnson*, for the People.

FOOTE, C. The defendant was tried and convicted, upon an information, of murder in the first degree, in the killing of one Samuel Dunn. From the judgment therein rendered and an order refusing a new trial, he has appealed.

One of the grounds upon which he bases his contention that a new trial should be awarded him is that the evidence does not show he committed the murder with which he is charged; and, conceding that any killing is shown to have been done by him, it does not appear that murder in the first degree was committed. It is undoubtedly the law, as he claims, that, in order to convict of murder in the first degree, the defendant must be shown by the evidence, beyond a reasonable doubt, to have killed the person with whose murder he is charged, with the deliberate, premeditated, and malicious intent so to do. People v. Cox, 76 Cal. 282, 286, 18 Pac. Rep. 332; Pen. Code, § 189. But it is the province of the jury to determine, from all the facts and circumstances in evidence, whether the killing is accompanied by all the ingredients which go to make up the crime charged. In this case a very strenuous argument is made upon all the evidence which was adduced, both direct and circumstantial, that the defendant is not proved to have been guilty as charged beyond reasonable doubt, and that the jury have found him guilty by inferring material facts not in evidence from facts in evidence which only amount to inferences. When counsel proceed by argument to elaborate their views on the matter, they seem to advance no further than to the point that the circumstantial evidence in the case is insufficient to show the identity of the body found with that of the deceased; that the defendant killed him, and that he did it maliciously, with premeditation and deliberation. There are many facts and circumstances appearing in the record before us which tend strongly to show that the defendant, and none other, was the slayer of Dunn; that the purpose of the killing was plunder, to obtain possession of the property which Dunn had and the defendant lacked; that the murder was accomplished by, first, a shot in the head, and then by the crushing of the disabled man's skull with a rock; that the murderer then left the body of his mutilated and whilom trusting friend, to be the prey of wild beasts. There was proof that the defendant took Dunn's watch and other property, and endeavored to prevent inquiry by asking a witness not to tell that he had a companion or partner on the "Summit." The body of Dunn was found decomposed in a secluded place, with the skull in the condition above mentioned, and the hat identified as being his lying near, with a bullet hole in it. These things, and many other matters which were disclosed by the evidence, were duly weighed by the jury, under the instructions of the court, and we cannot say their conclusions were manifestly wrong. They must have given each fact or circumstance, whether for or against the defendant, proper consideration; and this is not a case where we can declare that the evidence is such that the jury should have acquitted, or only found the defendant guilty of murder in the second degree. They saw and heard the witnesses, and were in possession of all that was said orally by them, whether the statement of a fact or circumstance. They looked upon the mute evidence in the case,—the shoes with peculiar pegs, the handkerchief, the watch, the gun, the hat, the pieces of skull, and the rock. They have declared by their verdict that they believe, from all the evidence in the case, beyond a reasonable doubt, that the defendant is guilty of murder in the first degree. We do not feel called upon to say their verdict is unwarranted.

It is further argued that the judgment cannot stand because the defendant, although arraigned and offered an opportunity to plead, only did so through his counsel, and not in person. Conceding that the plea by counsel amounted to no plea at all, and then the matter stands as if the defendant, when called on to plead to the information, stood mute. It then became the duty of the court to order the plea of not guilty to be entered for him. If the defendant is properly arraigned, and is given the opportunity to enter his plea, and he evades it either by standing mute, or having his counsel enter his plea for him of not guilty, we can see no material injury to him in the court ordering his plea of not guilty to be entered as the law requires it to be done, when none is entered by the defendant in person. The case of People v. Corbett, 28 Cal. 328, is not in point. There the prisoner had not been arraigned and given an opportunity to plead. "Not only did the defendant not plead, but, inasmuch as the statutory opportunity for pleading was never extended to him, he was never under any obligation to plead." Id. 331. Here the opportunity was extended, and the defendant was under an obligation to plead, but did not fulfill his obligation, and the plea of not guilty was entered by the court, at the instance of the defendant, through his attorney. As heretofore said, he was in no worse condition than if he had stood mute. His attorney had entered no plea for him, and the court had fulfilled its obligation under the law by entering the plea of not guilty Pen. Code, § 1024.

It is further claimed that the court erred in refusing an instruction for the defendant as follows: "The defendant has introduced evidence of his good character as a man of peace and quiet, and for honesty and integrity. If in the present case the good character of the defendant for these qualities is proven to your satisfaction, it is to be considered by you in connection with the other facts in the case, and it may be sufficient to create in your minds a reasonable doubt of his guilt, although no such doubt would have existed but for such good character." But the court gave in place of the refused instruction another, which reads: "The defendant has introduced evidence tending to show his good character as a man of peace and quiet, and for honesty and integrity. If in the present case the good character of the defendant for these qualities is proven to your satisfaction, then such fact is to be kept in view by you in all your deliberations, and it is to be considered by you in connection with the other facts in the case; and if, after a consideration of all the evidence in the case, including that bearing upon the good character of the defendant, the jury entertain any reasonable doubt of the defendant's guilt, then it is your duty to acquit him." The defendant was not prejudiced. The last instruction was a clearer enunciation of the law than the first, and contained all that the defendant was entitled to have on the point. Good character must be considered in connection with all the other evidence in the case, and if then the jury have a reasonable doubt of the defendant's guilt they must acquit. Thomp. Trials, § 2444.

There was no error in permitting the witnesses Day and Nichols to relate what the defendant said about "his partner" going to Scott's valley. The evidence tended to show that Dunn and he were partners at the "Summit" in hunting, and as to what hides and meat they got; that they bought the mule they had jointly, that they slept together in Dunn's blankets, and it is evident that the word "partner," as used, referred as much to the companionship of the two men as to their business relations. Upon the whole case, as presented by the record, we perceive no prejudicial error, and advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(81 Cal. 590)

BULLOCK *et al.* v. ROUSE. (No. 12,027.)

(*Supreme Court of California.* Dec. 4, 1889.)

PUBLIC LANDS—HOMESTEAD ENTRIES—SURVEY.

1. Act Cong. March 3, 1853, § 7, "for the survey of public lands in California, the granting of pre-emption rights therein, and for other purposes," provides "that where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other land shall be selected by the proper authorities of the state in lieu thereof." Under Rev. St. U. S. § 2395, the government survey of public lands is made by running and marking the lines of the townships and sections, and by marking the corners of the townships, sections, and quarter sections. *Held*, that the state could not acquire lands in the sixteenth or thirty-sixth sections prior to survey, and that the purchaser of such land from the state, before all the lines and corners of the section were run and marked by an approved survey, took no title.

2. Fences and natural barriers may constitute such inclosure of public lands as to give actual possession to one making or using the inclosure, and another cannot acquire a pre-emption or homestead claim thereto by intruding upon such possession; but, where the fences are dilapidated and down in places, and it does not appear that anything has been done to repair them, or that herders or other means are employed to prevent the escape of stock pastured on the land, or the intrusion of other stock, another may make valid settlement on, and acquire title to, the land, under the homestead law.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; JOHN J. DE HAVEN, Judge.

Chamberlain & McGowan, for appellants. *Ernest Sevier*, for respondent.

BELCHER, C. C. This action was brought to determine an adverse claim to a piece of land described as the S. ½ of the S. E. ¼ of a certain thirty-sixth section. The plaintiffs claim the land under a certificate of purchase issued by the proper officers of the state; and the defendant claims it under a certificate of homestead entry issued by the proper officers of the United States. The court below gave judgment for the defendant, and the plaintiffs appeal. The case is brought here on the judgment roll.

It appears from the findings that prior to the 21st of December, 1871, the greater part of the exterior lines of the township in which the land in question is situated, had been run and established by the United States, and some of the sections therein had been ascertained and established. Lines had also been run on the north, south, and west sides of section 36, and section corners had been established at the ends of each of these lines, and quarter section corners at the middle of each one of them. But the east line of this section had not been run, and no quarter section corner had been established upon it; and on the plat of the survey of the township, filed in the local land-office, the whole of the east half of section 36 was marked and returned as unsurveyed. With the survey in this condition, one Robert Lowery made application to purchase from the state the land in controversy, and, on the 21st of December, 1871, a certificate of purchase of the land, in due form, was issued to him by the state. Subsequently, one Joseph Russ, the plaintiff's testator, acquired by purchase and conveyance all the right, title, and interest of Lowery in and to the land. After his purchase, and prior to June, 1884, Russ erected a fence upon the east and west sides of the land, which, connecting with gulches and timber, served to inclose the land sufficiently to keep stock out; that is to say, the fences and natural barriers answered, for all practical purposes, as an inclosure. The land was grazing land, and was used by Russ for the pasturage of his stock; but in June, 1884, the fences had become somewhat dilapidated, and in places were down for a few feet. Neither Russ nor his grantor ever made any other improvements upon the land. In June, 1884, the defendant, with notice of all the facts above stated, made a peaceable entry upon the land, and erected a dwelling-house thereon, in which he thereafter, peaceably and without molestation, continued to reside up to the time of the trial, asserting all the time a claim to the land by virtue of his settlement. After his entry, defendant, at his own expense, procured the United States to complete the survey of the section by running the east line thereof, and marking the quarter corner thereon; and such survey was duly approved by the United States surveyor general for California, and the plat thereof was filed in the local land-office on the 19th of February, 1885. On the 3d of March, 1885, the defendant, then possessing all the qualifications necessary to entitle him to enter land as a homestead under the laws of the United States, filed in the land-office his application, in due form, to enter the land in controversy as a homestead. Upon these facts, two questions arise: *First.* Was the survey made prior to the issuance of the certificate of purchase to Lowery by the state sufficient to vest the title to the land in the state, as a portion of a thirty-sixth section? *Second.* Was the inclosure and possession of Russ, at the time of defendant's entry, sufficient to bring the case within the rule declared in Atherton v. Fowler, 96 U. S. 513; Davis v. Scott, 56 Cal. 165; and other cases following in the same line?

1. Whatever title the state has to the sixteenth and thirty-sixth sections is acquired under and by operation of the act of congress approved March 3, 1853, and entitled "An act to provide for the survey of the public lands in California, the granting of pre-emption rights therein, and for other purposes." 10 U. S. St. 244. The seventh section of this act provides "that where any settlement, by the erection of a dwelling-house or the cultivation of any portion of the land, shall be made upon the sixteenth and thirty-sixth sections, before the same shall be surveyed, or where such sections may be reserved for public uses, or taken by private claims, other land shall be selected by the proper authorities of the state in lieu thereof." Under this provision, it has been held by the supreme court of the United States "that whenever, at the time these sections are ascertained by the government survey, there is either a dwelling-house or the cultivation of any portion of the land on which some one is residing and is asserting claim to it, the title of the state does not vest, but the alternative right to

other land, as indemnity, does." Mining Co. v. Mining Co., 102 U.S. 175. It has also been said, by the supreme court of this state: "It may be admitted that, by virtue of the act of congress of 1853, the state became entitled to an amount of land equal to two sections in each congressional township; yet, as the state did not, by virtue of that act, acquire the title to any specified tract of land, and could not acquire it until the survey had been made under the authority of congress, it necessarily follows that, prior to such survey, she had no power or authority to confer upon a purchaser from her any right, title, or interest in any specified parcel of such lands." Grogan v. Knight, 27 Cal. 522. The government survey of the public lands is made by running and marking the lines of the townships and sections, and by marking the corners of the townships, sections, and quarter sections. Rev. St. § 2395 et seq. It is not necessary that a whole township be surveyed at one time, and often different parts of a township are surveyed at different times. But no survey of any part is complete until the lines and corners about that part are run and established as required by the statute. "Even after a principal meridian and a base line have been established, and the exterior lines of the townships have been surveyed, neither the sections nor their subdivisions can be said to have any existence until the township is subdivided into sections and quarter sections by an approved survey. The lines are not ascertained by the survey, but they are created." Robinson v. Forrest, 29 Cal. 325. "There is, in fact, no such tract of land as that described in the petition, until it has been located within the congressional township, by an actual survey and establishment of the lines under the authority of the United States, and the survey has been approved by the proper United States surveyor general. A person may approximate to the lines that may be run,—may surmise the precise lines,—but the tract has no separate legal identity until the survey is made and approved under the authority of congress." Middleton v. Low, 30 Cal. 605. When Lowery obtained his certificate of purchase, the east half of the section had not been fully surveyed and marked out as required by law. And it was returned by the surveyor general, and shown on the map of the township, filed in the land-office, as unsurveyed land. Under these circumstances, and in the light of the authorities above cited, we think it must be held that the title to the land in controversy had not vested in the state.

2. It is settled law that, when one person is in the actual possession of a parcel of public land, another person cannot forcibly or surreptitiously intrude upon his possession, and thereby acquire a right to the land by filing thereon a pre-emption or homestead claim. Atherton v. Fowler, 96 U. S. 513; Hosmer v. Wallace, 97 U. S. 575; Trenouth v. San Francisco, 100 U. S. 251; Mower v. Fletcher, 116 U. S. 381, 6 Sup. Ct. Rep. 409, Davis v. Scott, 56 Cal. 165; Smer v. Duggan, Id. 257; McBrown v. Morris, 59 Cal. 64; Goodwin v. McCabe, 75 Cal. 584, 17 Pac. Rep. 705. It is also settled that fences and natural barriers may constitute a sufficient inclosure to give actual possession of land. Brumagim v. Bradshaw, 39 Cal. 25; Southmayd v. Henley, 45 Cal. 101; Conroy v Duane, Id. 603. And one who uses land for the pasturage of stock may have actual possession thereof, without any inclosure, if he employs herders to keep his own stock on the land and other stock off. Goodrich v. Van Landigham, 46 Cal. 603; Sheldon v Mull, 67 Cal. 301, 7 Pac. Rep. 710; Webber v. Clarke, 74 Cal. 11, 15 Pac. Rep. 431. But whether one who claims possession of a particular piece of land, has actual possession of it or not is a question of fact; and the burden is upon him to establish the fact by competent evidence. It was found by the court below that the land involved in this case had been inclosed by Russ; but the fences had become somewhat dilapidated, and were down in places, when defendant entered. It does not appear how long the fences had been down, nor that anything had been done to repair them. Nor does it appear that any herders, or other means, were employed by Russ to prevent the escape of his stock, or the intrusion of other stock. This being the condition of things when the defendant entered and erected his dwelling-house on the land, the court held that his entry was not unlawful, or in contravention of the rule declared in the above-cited cases. This conclusion seems to us correct; for, while the fences were down, they did not constitute an inclosure, and could not show actual possession. We therefore advise that the judgment be affirmed.

We concur: VAN CLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

(81 Cal. 528)

HUMBOLDT SAV. & LOAN SOC. v. WENNERHOLD *et al.* (No. 11,674.)

(*Supreme Court of California*. Dec. 2, 1889.)

BONDS—PRINCIPAL AND SURETY.

1. Civil Code Cal. §§ 1636, 1641, provide that "a contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful," and that "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." Sections 2836, 2837, provide that "a surety cannot be held beyond the express terms of his contract;" and that, "in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts." The bond of the secretary of a savings society was conditioned that he should, "during all the time he shall hold said office, well and truly serve said corporation as such secretary," and "well, truly, and honestly perform and discharge all his said duties as such officer, and do all things required of him by the by-laws of said corporation." The by-laws required him to keep on hand all the moneys, securities, or property received by him on account of the society until the same were disposed of by direction of the board of directors, and that he should not use, loan, exchange, or otherwise dispose of the same. *Held*, that the provisions of the by-laws relating to the secretary entered into the contract of the sureties, and that they were liable for all moneys received by him on account of the society, and not merely for such as he was required as secretary to collect. BEATTY, C. J., and WORKS, J., dissenting.

2. The sureties were not liable for money taken by the secretary from bags, in the society's vault, which had been set aside for borrowers who had executed notes and mortgages for its payment, and who were being charged interest thereon by the society, there being no entries of the money as that of the society.

3. Though the secretary was chosen by the directors, the tenure of his office did not depend on their official term, which was one year; but as they were authorized by the by-laws to fix his term of office, and to summarily dismiss him, they could, by electing him once, without further action, continue him in office indefinitely, and during such continuance his sureties were liable.

On rehearing. In bank. For opinion on hearing in department, see 20 Pac. Rep. 553.

Manuel Eyre, for appellants. *A. H. Loughborough*, for respondent.

THORNTON, J. In April, 1870, one Adolph Hartmann was appointed secretary of the plaintiff, an incorporated savings bank. This corporation was formed for the purpose of aggregating the funds and savings of the members thereof and others, and the preservation and safe investment of the same for the common benefit of all. It received money on deposit, and lent such money at interest. Hartmann's appointment was made by the board of directors by virtue of the by-laws of the corporation. The duties of the secretary were prescribed by the by-laws. These duties were as follows: "The secretary shall keep, or cause to be kept, such books as the business of the society shall require, subject to the approval of the board of directors. He shall attend all the meetings of the society and of the board of directors, shall serve or cause to be served all notices of meetings, and keep accurate record thereof. He shall further collect all moneys due to the society, and shall keep the same in the mode prescribed by the board of directors." Although, under the by-laws, the board of directors was empowered to prescribe the term of office of the secretary, no term was ever fixed. Hartmann held the position of secretary from his appointment, above mentioned, until September 18, 1883, when he was dismissed. During this period, from April, 1870, until September 18, 1883, Hartmann received and paid out the money of the bank. There was no one acting as "teller" by that name, and no one acting as cashier by the name of "cashier." On the 2d day of January, 1880, Hartmann was required by the board of directors to give a bond for the faithful performance of his duties as secretary, in the sum of $5,000, with sureties, and on the same day he executed such bond, with the defendants and others as sureties. The condition of this bond, with a preliminary recital, was as follows: "Whereas, the above-named Adolph Hartmann has been chosen and appointed secretary of said corporation; and whereas, he may hereafter, from time to time, be re-elected, rechosen, and reappointed or continued in said office, or suffered to hold the same: Now, the condition of this obligation is such that if the said Adolph Hartmann shall, during said term, and during all the time he shall hold said office, well and truly serve the said corporation as such secretary so long as he shall continue and be continued in said office, and well, truly, and honestly perform and discharge all his said duties as such officer, and do all things required of him by the by-laws of said corporation which may be now in force, or which may be hereafter enacted by said corporation, and shall well and truly and faithfully perform all the duties which shall be required of him, and obey all orders and directions given him by the board of directors of said corporation, then this obligation to be void; otherwise to be and remain in full force and effect."

This action was brought against some of the sureties to the above-mentioned bond for alleged defalcations by Hartmann, committed while he acted as secretary of the plaintiff. The defalcations appear to be as follows: *First.* While acting in the employ of plaintiff, he (Hartmann) received in the plaintiff's bank certain sums of money from depositors, who came to deposit money in the bank, entered the sums so received in the pass-books of the depositors, but did not enter them in the books of the bank. These sums amounted to $3,695. *Second.* Certain persons deposited money, filling out the deposit tags. Hartmann received the money, signed or indorsed the tags with his name as secretary, and returned them to the depositors as their vouchers, but failed to enter the amounts in the books of the bank. These sums amount to $5,344.50. *Third.* Hartmann took from bags deposited in the vault and safe of the plaintiff's bank money set apart for persons who had borrowed the same from the bank, amounting to $3,800. *Fourth.* He took from the bank certain sums, filing a check or receipt to which he forged the name of V. Chapman, so that it appeared that the money had been paid by him to Chapman, whereas he had paid her nothing, in sums amounting to $5,245.36. All of the foregoing amounts of money were, during the period above mentioned, taken by Hartmann, and converted to his own use.

It is argued that the defendants only agreed to become responsible for money received by Hartmann as secretary; that as secretary he was "to collect all moneys due to the society," and "to keep the same in the mode provided by the board of directors;" that the moneys due to the society he was as secretary to collect consisted of interest on loans due to the corporation, amounts due on a levied assessment, rents of their building, and the principal of a loan, when repaid. It is clear that none of the moneys converted by Hartmann came within either of the classes just named, and, if the obligation of the defendants extended no further than to such moneys, the defendants cannot be charged in this action. But the by-laws, in defining the duties of the secretary, provided that he should keep on hand all the moneys, securities, or properties received by him on account of the society, until the same be disposed of under the direction of the board of directors, and that he shall not use, loan, exchange, or otherwise dispose of any funds of the society. Of these provisions of the by-laws, which were in existence when the society received the bond, it must be held that the defendants were aware. These provisions of the by-laws went into the contract of the sureties, and constituted a part of it. They must be considered as having been inserted in the bond.

The Civil Code provides that, "in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts." Civil Code, § 2837. The rules for the interpretation of contracts will be found in the Civil Code in sections 1636 to 1661, both inclusive. "A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful." Id. § 1636. "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable; each clause helping to interpret the other." Id. § 1641. It should be remarked, however, that all the foregoing sections, including section 2837, must be read in connection with section 2836 of the Civil Code, which provides that "a surety cannot be held beyond the express terms of his contract." So far as the words of this latter section limit and control the other sections referred to, they must be regarded. This court, in speaking of bonds like the one under consideration, said, of the matters to which they relate, that they are subjects of private contract, in regard to which the parties may bind themselves in any manner or to any extent not violative of public policy or positive statute. Hubert v. Mendheim, 64 Cal. 226; Enterprise Co. v. Allen, 67 Cal. 508, 8 Pac. Rep. 59. We cannot see why the sureties here have not bound themselves by that portion of the provisions of the by-laws above set forth, as constituting a part of their bond. The obligation is not limited to the moneys due to the society, which the secretary was to collect and keep, but extends also to other moneys of the society received by him which he is to keep on hand, and which he is not to use, loan, exchange, or otherwise dispose of. For these duties of the secretary, common prudence, and that knowledge of the law which we must presume the defendants had when they executed the bond, prompted and counseled them to look to the by-laws of the society; and, if they had examined them, they would have ascertained that these duties were prescribed as stated above, and they would have then found that the duties which are prescribed in the by-laws to be discharged by the secretary are not merely clerical, nor are they limited, as contended by counsel for appellants here, to the moneys due to the society, which he is to collect and keep in the mode prescribed by the board of directors. Having regard to the rules above referred to, provided by the Civil Code for the interpretation of contracts, we cannot, in ascertaining what is the true meaning of the contract of the defendants, confine the examination to the recital which precedes the condition, but the whole must be taken together, inasmuch as "the whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable." Civil Code, § 1641, supra. We should be disregarding this rule solemnly enacted for our guidance, as well as the dictates of a sober judgment, did we confine our consideration, in ascertaining what the parties meant by the words employed in their contract to express their intent, to the recital, as regards the duties of secretary, above referred to.

It is argued that as the board of directors was elected for only one year, their appointment of Hartmann as secretary existed during the year for which they were chosen; and as the defalcations, except to the amount of $600, occurred subsequent to that year, that the defendants cannot be held responsible for them. We do not think that such contention is maintainable. It is contrary to several well-considered cases, to which we refer: Bank v. Ledoux, 3 La. Ann. 674; Anderson v. Longden, 1 Wheat. 91; Bank v. Ridgely, 1 Har. & G. 432; Bank v. Chickering, 3 Pick. 340. In the foregoing cases the point was distinctly made, argued, and determined. In the case first cited one Duplessis had been appointed note clerk in the Louisiana State Bank. He was appointed to continue in office during the will of the present or any future board of directors of the bank. It was so recited in the bond. The court there said: "The argument presented is mainly deduced from the provisions of the charter with regard to the election of directors. It provides that the directors of the bank shall be annually elected, and forbids the re-election of more than two-thirds of the directors in office at the time of each annual election, permitting no director to hold his office more than three years out of five in succession. But it does not follow, from this legislation with regard to the board of directors, that the mere clerks and servants of the corporation should hold their appointments by the same tenure. If these clerks and servants were to be considered the mere clerks and servants of the directors who appoint them, the conclusion might be a reasonable one. But we do not so regard them. They are the clerks and servants of the corporation, and the limited term of service of the directors does not control the duration of such appointments. It is proper to add that there is nothing in the by-laws of the bank limiting the duration of the place of note clerk, and his appointment itself was general."

In the case of Anderson v. Longden, supra, where a similar point was presented, Chief Justice MARSHALL pointed out the difference in a sheriff's bond, given under the statute of Virginia. "The case of the sheriff's bond," said the chief justice, "is very different. The commission of sheriff, in Virginia, is annual. Of course, his sureties are bound for one year only. It is true the directors of this company are elected annually, but the company has not said that the agent shall be for one year only; his appointment is during pleasure. The sureties do not become sureties in consequence of their confidence in the directors, but of their confidence in the agent whose sureties they are." The question was also discussed in Bank v. Ridgely, supra. This decision will be found on page 432 of 1 Har. & G.

The office of secretary of the plaintiff was not an annual office. It does not appear that the charter or constating papers of the corporation made such office an annual one. Nor is there any by-law or regulation of the society which made such office annual. Though a power was given to the board of directors to fix the term of office of the secretary, it appears that it was never done. The board might have fixed it at one or two or three years. They never did define such term. Of this the defendants were informed by the language of the bond. The bond set forth that "whereas, Hartmann has been chosen and appointed secretary; and whereas, he may hereafter, from time to time, be re-elected, rechosen, and reappointed, or continued in said office to hold the same: now, if said Hartmann shall, during said term, and during all the time he shall hold said office, well and truly serve the said corporation as secretary, so long as he shall continue and be continued in said office, well and truly," etc. The board of directors had power invested in them, under the bylaws, to dismiss the secretary summarily, and it might have made the appointment of secretary for an indefinite period; subject, always, to the power of the board to dismiss him summarily. We can see no reason why the defendants could not contract to be responsible for the conduct of Hartmann, so long as he should continue in the office of secretary. This, we think, they clearly did do. There was no law in existence when they executed the bond which prohibited them from so contracting.

On this point, Hughes v. Smith, 5 Johns. 167, is in point, and, as was observed of it in Hubert v. Mendheim, 64 Cal. 223, "is worthy of much consideration, because the decision in that case has the sanction of the honored name of Chief Justice KENT. There the bond (on which the action was brought) was given to the sheriff by a deputy, conditioned for the due execution of the office of deputy-sheriff during his continuance in such office. The sheriff having taken on himself the office on the 16th of September, 1801, pursuant to an appointment in August, was reappointed in March, 1803. The defendants (who were sureties on the bond) pleaded that the sheriff had sustained no damages in consequence of any act of defendants previous to his taking upon himself the office under his reappointment in 1803. It was held the plea was no answer to the declaration." "The bond" said the court, "was that Smith should execute well the office of under-sheriff during his continuance in such office, and he was equally in that office after as before the reappointment of the plaintiff. There was no interval between the one appointment and the other in which the plaintiff was not sheriff, and it was not necessary to reappoint Smith in order to constitute him under-sheriff." 5 Johns. 172. We are of opinion that by the terms of the bond the defendants made themselves responsible for the defaults of Hartmann so long as he continued to be secretary.

It is contended that the sixteenth finding is not sustained by the evidence as to the sum of $3,800, which, it is found, was taken from the safe of plaintiff while the same was in his custody as secretary of said corporation. The defendants were not responsible for any moneys converted by Hartmann which were not the funds of the society. The defendants, as sureties, "cannot be held bound beyond the express terms of his contract." Civil Code, § 2836. The terms of their contract do not include any moneys not belonging to the society, and the evidence on this point does not show that these moneys were the moneys of the society. The question of the ownership of these sums is left in doubt by the evidence, and under such circumstances we cannot hold that they were such moneys as the defendants as sureties are chargeable with under their contract. This sum of $3,800 was made up of sums of money lent, of which $2,000 was lent to I. H. Bostwick, $1,000 to C. Jones, and $800 to H. Nieman. The entire testimony as to these losses comes from the president of the society, and is as follows: "During the time that Hartmann was secretary, the custom in making 'building loans,' so-called, was when a loan was granted one or more payments were made on account, on the architect's certificate. Then, when we entered the amount of the loan in the ledger, we set aside the balance. We took the note and mortgage from the borrower in the first instance. We made these advances, and then, at a certain period, we charged up the whole loan, and put the balance of the whole loan, less the advances made, in a bag, and put it in the safe, with a tag showing the borrower's name. From that time he paid interest on it, and no further entries were made on the books. When any money was taken from the bags, a memorandum would be made on the tag attached to the bag." The witness testified to the absence of the amounts, already set out herein, from the bags of Bostwick, Jones, and Nieman, discovered after Hartmann's death; that nobody except himself and Hartmann had access to those bags; and that he did not take any of the money. The money has since been made good by the bank. Afterwards, in answer to the court, the witness gave an instance of money deposited in a bag in the safe, thus: "June 5th, Nieman gave his note and mortgage for $7,500; July 7th, he was given $500; again, in July, $1,500; and July 21st, $1,500, of which no entries were made; but on that day the balance of $4,000 was placed in a bag, with a tag on it giving Nieman's name, and the amount in the bag, and then an entry was made, and interest charged to him. The architect's certificate and Nieman's money order were our vouchers, which we filed with his note, but no entry was made in the books until the balance was placed in the bag, and then the whole was charged. The Court. Then it appeared on the books that he had received his money,—as if he had received $7,500, and taken it away with him? Yes, sir; set it aside. The Court. The fact that he left this money with you in your safe, in a bag,—special deposit,—would not be entered on the books at all?"

It seems to us that it might well be held that the money placed in the bags belonged to the borrowers, and not to the society.

It would be strange that the borrower should be paying interest to the society on money which he had borrowed, and the payment of which he had secured by note and mortgage, if it was not his own money. Further, no entries of such moneys in bags was made at all in the books of the bank. If the money was left as a special deposit, it seems to have been left as the money of the borrower, and no entry was allowed to be made of it as a special deposit by any one in the bank's books. The course of dealing with this money, as above stated, we infer from the testimony, was the course approved by the directors of the bank. If the bank became the custodian of specific sums of money in bags which were the moneys of other persons, we are of opinion that the defendants, as sureties, cannot, under the terms of this bond, be held responsible for them. We find no evidence of such negligence on the part of directors of the bank as to release the defendants from liability on the bond in suit. We find no other error in the record than the one above pointed out as to the sum of $3,800, but for such error the judgment must be reversed, and the cause remanded for a new trial. So ordered.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; FOX, J.; PATERSON, J.

WORKS, J., (*dissenting*.) I dissent. In my opinion, the judgment should have been for the defendants. None of the moneys received and misappropriated by Hartmann were received by him as secretary, nor were they in any way covered by the terms of the bond of the defendants. To hold them liable for any part of these moneys is to render the defendants liable beyond the plain terms of their contract.

I concur in the above: BEATTY, C. J.

(81 Cal. 604)

BARNUM v. BRIDGES. (No. 12,582.)

(*Supreme Court of California.* Dec. 4, 1889.)

SCHOOL LANDS—APPLICATIONS TO PURCHASE.

1. Pol. Code Cal. § 3498, provides that all applications to purchase school land, filed in the surveyor general's office, must be retained by him 90 days before approval, and must be approved by him (when there is no conflict) at the end of six months, subject to the requirements of sections 3406, 3407, which relate to the acceptance by the United States of the land as part satisfaction of the grant to the state; and all applications not approved after six months, where approval has not been demanded, or the contest referred to the court, or demand for reference made, as provided for by section 3414, shall be null and void. *Held*, that the provision invalidating applications six months after filing, when no demand for approval is made, refers to applications in contest cases only, as no demand for approval is necessary where there is only one application.

2. In a trial by the court, the opinion of one shown to have ordinary knowledge as a farmer and logger, as to what it would cost to clear land and prepare it for the plow, is not necessarily improper, as the court understands the extent of the witness' knowledge, and can fairly estimate the weight of his evidence.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

Pol. Code Cal. § 3398, provides that the surveyor general is the agent of the state for the location in the United States land-offices of the unsold portion of the 500,000 acres, and the sixteenth and thirty-sixth sections granted to the state for school purposes, and lands in lieu thereof. Sections 3406, 3407, provide that the surveyor general must, when application is made to him for lands mentioned in section 3398, communicate with the United States land-office, and ask that the lands described in the application be accepted in part satisfaction of the grant under which it is sought to be located; and, when the acceptance of the register of the United States land-office is obtained, he must give the party applying a copy of his approval. Section 3414 provides that when a contest arises concerning the approval of a survey before the surveyor general, or concerning a certificate of purchase or other evidence of title before the register, the officer may, where the contest involves a question of fact, proceed to hear and determine it; but where a question of law is involved, or either party demands trial in the state courts, the officer must make and enter an order referring the contest to the district court of the county in which the land is situated.

Chamberlain & McGowan and *A. W. Hanna*, (*Wilson & Wilson*, of counsel,) for appellant. *J. H. G. Weaver* and *G. D. Murray*, for respondent.

FOOTE, C. This action was brought to determine whether Barnum or Bridges had the better right to purchase a certain half section of school land from the state, the same being a part of the thirty-sixth sections of land donated to the state of California by the congress of the United States for school purposes. Judgment was rendered in favor of the defendant, from which, and an order denying a new trial, the plaintiff appeals.

The first ground claimed to militate in favor of the appellant's contention seems to be that the evidence, viewed in the light of the principles enunciated by the appellate court of the state in the case of Manley v Cunningham, 72 Cal. 240, 13 Pac. Rep. 622, is plainly, and without conflict, conclusive of the fact that the land was suitable for the cultivation of ordinary crops, and was therefore agricultural, and not timber, land; which latter kind the decision of the trial court defined and adjudicated it to be. The evidence on the one side, as it seems to us, is contradictory to some extent, at least, to that given in favor of the adverse party, and the decision of the lower court upon the point should be upheld.

But the further contention is made by the appellant that the respondent could not be permitted to succeed in the controversy, because his application to purchase the land was made more than six months before any demand for the surveyor general's approval of such demand had been made. The trial court seems to have been of the opposite opinion, even conceding, as was the fact, that no such demand had been made within the statutory period just adverted to; the basis of the conclusion being, that the statute in question did not intend to visit the penalty it provided for upon those about whose application to purchase there was no contest, that tribunal being of the opinion "that the section (Pol. Code, §3498) does not apply in a case where only one application is on file, where no approval could be had by reason of the land being covered with pre-emption filings, and but for which it is made the duty of the surveyor general to approve without other demand than is implied in the application itself." The section of the Political Code, supra, is: "All applications, under whatsoever act, filed in the office of the surveyor general, must be retained ninety days before approval, and must be approved (when there is no conflict) by the surveyor general at the expiration of six months, subject, however, to the provisions of sections 3406 and 3407 of this Code, and all unapproved applications which have been on file over six months, wherein the approval has not been demanded, and wherein the contest has not been referred to court, or a demand made for an order of reference, as provided in section 3414 of the Political Code, shall be null and void." We think that the learned judge below was right in his conclusion. The duty of the surveyor general seems to be clearly defined. In the first clause of the statute, in cases where there is but one application to purchase school lands, the title to which has passed to the state from the United States, and which are subject to be granted to purchasers from the state, he is obliged by law to approve the application, without reference to any further demand than that contained in the application to purchase. The other part of the statute requires that, when there is a contest, "all unapproved applications which have been on file over six months, wherein the approval has not been demanded, and wherein the contest has not been referred to court, or a demand made for an order of reference, as provided in section 3414 of the Political Code, shall be null and void." Thus a marked distinction is drawn between the necessity for a demand for an approval of the application to purchase in cases where there is only one applicant and no contest, and those where there is more than one application, where a contest exists as to the right to purchase, and where either there has been no order of reference, or a demand made for such an order. In the instances last mentioned, if more than six months elapse from the date of filing, before a demand for approval is made, the application becomes null and void. In the case in hand no other demand for approval was necessary beyond the application to purchase.

It is further urged that the court below committed error in allowing the witness Mr Dahle to answer this question: "In your judgment, what would it cost an acre to clear this land off, take the timber off, stumps and roots, and put it in a condition to run a plow through?" the objection being that the witness was not an expert in clearing this kind of land. While the witness may never have actually cleared any land just like that in dispute here, yet his testimony shows that he had an ordinary knowledge, as "a farmer and logger," of land and its qualities; and the court, being possessed of the extent of his knowledge upon the general subject of the qualities of various kinds of lands, was in a position fairly to estimate the weight which should be given to his evidence, and should not have excluded it altogether. It tended to show some knowledge of the subject about which the witness was called on to testify, and whether weak or conclusive in its nature was for the court to consider and determine, but it was not necessarily improper for that tribunal to hear. For these reasons we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(82 Cal. 1)

QUAY v. PRESIDIO & F. R. Co. (No. 12,595.)

(*Supreme Court of California.* Dec. 9, 1889.)

PRINCIPAL AND AGENT—POWER OF ATTORNEY—RATIFICATION.

1. A power of attorney authorized the agent, among other things, "to exchange [the principal's] old issues or certificates of stock, and to receive new issues or certificates in lieu thereof;" but it nowhere gave any authority to sell or mortgage the principal's property. It concluded with the general words: "And, generally, to manage and control to my best interest and advantage * * * all my property, and to transact all business * * * which may be requisite or proper to effectuate all or any of the premises," etc. *Held*, that this created a special agency, within the meaning of Civil Code Cal. § 2297, defining "special agents," and did not authorize a corporation, on the presentation of a certificate of stock indorsed by the agent, to cancel it, and issue a new one in the name of a third person.

2. Nor is the act of the corporation justified by Civil Code Cal. § 2317, which provides that "ostensible authority is such as a principal, * * * by want of ordinary care, causes or allows a third person to believe the agent to possess," since more than ordinary care was taken to define the powers of the agent.

3. The connection in which the word "exchange" is used in the power of attorney shows that it was limited to an exchange of old certificates for new ones, and did not authorize a transfer of the property represented by the certificates.

4. The fact that the principal afterwards told another of his agents that he would not hold him responsible for delivering the certificate to the first agent does not amount to a ratification of the transfer by the corporation.

5. The principal having received no benefit from the act of his agent, the case does not come within Civil Code Cal. § 2310, providing that, where an oral authorization would suffice, a ratification can be made by accepting or retaining the benefit of the act.

Department 1. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Action by John M. Quay, executor, etc., of John G. Kellogg, deceased, against the Presidio & Ferries Railroad Company, for the unlawful conversion of 100 shares of decedent's stock. From a judgment in plaintiff's favor, and an order denying its motion for a new trial, defendant appeals. Civil Code Cal. § 2297, provides: "An agent for a particular act or transaction is called a 'special agent.' All others are 'general agents.'" Section 2310 provides that, where an oral authorization would suffice, a ratification can be made by accepting or retaining the benefits of an agent's act, with notice thereof.

Jarboe, Harrison & Goodfellow, for appellant. *E. J. Pringle*, for respondent.

FOX, J. John G. Kellogg, respondent's testator, was the owner of 200 shares of the stock of the corporation defendant, evidenced by certificate No. 27, issued in the name of said Kellogg, May 3, 1882. On June 17, 1884, Kellogg was absent from this state, and A. W. Bowman and Joseph M. Quay each held powers of attorney from him, in full force, and each was acting as his attorney in fact in the conduct of his business. When he went away Kellogg left this certificate in possession of Quay, and on or about the said 17th of June Bowman went to Quay and asked Quay to let him have the certificate, as "he wanted to sell 100 shares, and he did not want to have it appear on the books that he was selling his own stock." Quay delivered the certificate to him, as requested, and thereupon Bowman indorsed the certificate, "JOHN G. KELLOGG, by A. W. BOWMAN, his Attorney in Fact," and sent it to the office of the company, where, in pursuance with his request, two new certificates were issued in lieu thereof, each for 100 shares, one in the name of said Kellogg, and the other in the name of George F. Bowman, trustee. The new certificate issued in the name of Kellogg was delivered to A. W Bowman, and by him delivered to Kellogg after the latter's return. The certificate issued in the name of George F. Bowman, trustee, was delivered to him, and by him sold to one Bradley, for the benefit of A. W. Bowman, the certificate therefor being numbered 363. After Kellogg's return he had a conversation with Quay, in which the latter informed him of the transaction between himself and Bowman, when Kellogg said: "Personally, Quay, I don't hold you responsible. Had Bowman asked me to loan him the stock, my relations were such with him that I would have let him have it." This action was brought by Kellogg against the corporation defendant for the sum of $6,500 damages, for the unlawful conversion of the hundred shares of stock, part of the said 200 shares, so represented by said certificate No. 363. Kellogg died pending the suit, and Quay, his executor, was substituted as plaintiff. Plaintiff had judgment, motion for new trial made and denied, and defendant appeals from both the judgment and order.

On the appeal two points are made:

First, that the court erred in denying defendant's motion for nonsuit. The case upon this point depends upon the construction to be given to Bowman's power of attorney. The by-laws of the company, as is usual in such cases, provided that stock could be transferred on the books of the company by the delivery of the old certificate, properly indorsed, and the issue of new certificate or certificates therefor, the old certificate to be at the same time canceled. The certificate in this case was delivered, as before stated, indorsed, "JOHN G. KELLOGG, by A. W. BOWMAN, his Attorney in Fact." Before canceling that certificate, and issuing new ones in its place, it was the duty of the corporation to know whether it was properly indorsed; in other words, to know whether Bowman held a power of attorney authorizing him to make such indorsement, and, if he did, whether there was any limitation as to the purpose for which he was authorized to make it. An inspection of the power of attorney shows that it was not general, but special. It created, not a general, but a special, agency, within the meaning of section 2297, Civil Code, cited by appellant. Under it he had authority to do many things, but no authority to do anything except such as was therein specially mentioned, or those things necessarily incident to the execution of the powers specially mentioned. So far as relates to the powers granted in dealing with corporations, and with the stocks thereof, it reads: "For me, and in my name, and on my behalf, * * * at any and all meetings of stockholders of companies or corporations in which I now have or may hereafter have stock, to appear and vote on such number of shares as I may at such time be entitled to vote; to exchange old issues or certificates, and receive new issues or certificates in lieu thereof." And it gives like special power in reference to many other things, among them to the recovery of the possession of and leasing of lands, collection of rents, the payment of taxes, and the like. But it nowhere, either in express words or by implication, gives any power to sell, mortgage, or hypothecate, or otherwise transfer, any of the property of his principal. It does conclude with these general words: "And generally to manage and control, to my best interest and advantage, all my property, real and personal, to transact all business, make, execute, acknowledge, and deliver all contracts, deeds, writings, assurances, and instruments which may be requisite or proper to effectuate all or any of the premises, with the same power, and to all intents and purposes with the same validity, as I could if personally present." It will be observed that these words, although general in form, and full as to the designation of papers which may be executed, expressly limit the execution of such papers to such as "may be requisite or proper to effectuate all or any of the premises." What premises? It can be none other than such as were thereinbefore mentioned. These included, among other things, not before mentioned, the power to make compromises and releases in certain cases, but none of them included power of sale or transfer of property, real or personal. When, therefore, certificate No. 27 was presented to the defendant, it was properly indorsed to authorize its cancellation, and the issue of new certificates in lieu thereof, but it was not properly indorsed to authorize the transfer of the stock which it represented to any other person. The only authority which that indorsement gave to the company was to cancel that certificate, and issue one or more new ones, representing the same number of shares, to John G. Kellogg; and it was just as incumbent upon the corporation to know this fact as it was to know that Bowman had authority to indorse for any purpose.

Section 2317, Civil Code, is cited in justification of the company in acting as it did in allowing that transfer of the hundred shares of stock, but we do not think it covers the case. It reads: "Ostensible authority is such as a principal, intentionally, or by want of ordinary care, causes or allows a third person to believe the agent to possess." In this case more than ordinary care was taken to define the powers of the agent, and the company, with that written limitation of his powers before it, (for it must be presumed to have seen and examined the power, else it would not have acted at all,) aided and assisted the agent in exceeding his powers, and allowed a transfer of stock which it was wholly unauthorized to do.

A point is made on the use of the word "exchange," as found in the power of attorney; but the very connection in which it is used shows that it was limited to an exchange of old certificates for new ones, and did not authorize an exchange or transfer of the property represented by the certificate. The cases cited in this connection are therefore not in point. It must be held that this power, while it authorized the exchange of old certificates for new ones, did not authorize a transfer of the property. Lord v. Sherman, 2 Cal. 498; Billings v. Morrow, 7 Cal. 171; Treat v. De Celis, 41 Cal. 202.

The remaining point is that the transfer was ratified by Kellogg, when he told Quay that he would not hold him responsible, etc. We cannot so regard the effect of that conversation. In it no reference was made whatever to the act of either Bowman or the company in transferring the stock. The sole subject of consideration at that time was the act of Quay in delivering the certificate to Bowman. The act of Quay for which Kellogg said that he would not hold Quay responsible, was simply the act of delivering certificate No. 27 to Bowman, another attorney in fact of Kellogg's, and one who, as shown by the two powers of attorney, both of which are given in the transcript, had more ample powers than Quay himself; for the powers of both were limited, and those of Quay were limited to a less number of subjects than those of Bowman; in fact, Quay had no power except that of making collections, and giving receipts and acquittances for moneys collected. The conversation had no relation whatever to the disposition which had been, or might have been, made by Bowman of the stock, or to Bowman's power in the premises, or to the act of the company in making a transfer of the stock on its books not authorized by the owner thereof, either in person or by attorney.

It cannot be held that there was an implied ratification by acts *in pais*, for the principal received no benefit from the act of his agent. The case does not come in any sense within the provisions of section 2310, Civil Code, on the subject of ratification. The case of Treadwell v. Davis, 34 Cal. 605, cited by appellant, is not in point. That is the case of two lienholders, each holding as security for debt. The holder of the first lien received his money from the holder of the second lien, and assigned over his claim, so that the latter held the property for both amounts. Afterwards the debtor said it was all right; he was glad the arrangement had been made; and that was held to be a sufficient ratification of the assignment. There the debtor lost nothing, but rather gained an advantage by the transaction, in the way of forbearance on the first debt. So with the other cases cited by appellant; they do not seem to have any application to the facts of this case. Nothing in the record in this case implies a ratification of the unauthorized act of Bowman, or of the act of the defendant, done in contravention of law, and of its own by-laws, in transferring on its books, to a stranger, the title to 100 shares of its stock, without proper indorsement and surrender of the old certificate for the same shares. Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.

82 Cal. 160

In re OHM'S ESTATE. (No. 13,232.)

(*Supreme Court of California.* Dec. 20, 1889.)

APPEALABLE ORDERS.

No appeal lies from an order that the administratrix of an estate allow her name to be used as plaintiff in an action to recover property alleged to have been fraudulently conveyed by decedent in his life-time, though Code Civil Proc. Cal. § 963, subd. 1, provides for an appeal from a final judgment in special proceedings; as Const. Cal. art. 6, § 4, provides that "the supreme court shall have appellate jurisdiction * * * in all such probate matters as may be provided by law," and Code Civil Proc. Cal. § 963, subd. 3, providing for appeals in probate matters, makes no provision for an appeal from such an order.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Petition by Susan E. Judge against Anne A. Ohm, administratrix, etc., praying that the administratrix be compelled to allow her name to be used as plaintiff in an action to recover property conveyed by decedent in his life-time in fraud of the petitioner, one of his creditors. From an order granting the prayer of the petition the administratrix appeals. Code Civil Proc. Cal. § 963, subd. 1, provides: "An appeal may be taken to the supreme court * * * from a final judgment entered in * * * special proceedings commenced in a superior court."

W. C. Belcher, for appellant. *J. M. Kinley*, for respondent.

VAN CLIEF, C. This is a proceeding in the probate department of the superior court of the city and county of San Francisco, on the petition of Susan E. Judge, based on sections 1589, 1590, and 1591 of the Code of Civil Procedure, and stating, substantially, that the deceased, in his life-time, owned a large amount of valuable real estate, which was community property of himself and his wife, Augusta L. Ohm, and which he had conveyed to his wife without consideration, for the purpose of defrauding his creditors, of whom the petitioner was one, in the sum of $5,000; that the petitioner, in due time, presented to the administratrix of the estate, for allowance, her claim for said sum of $5,000, which was rejected by the administratrix, and that petitioner had commenced an action in the superior court against the administratrix for the recovery of the same, which action is still pending and undetermined, that there are not sufficient assets of said estate to pay the claim, if judgment shall be recovered therefor; that the petitioner requested said administratrix to commence and prosecute an action against Augusta L. Ohm to recover said property so fraudulently conveyed, offering to defray all expenses of such action, and that the administratrix refused to commence such action. The prayer of the petition is that the court order the administratrix to allow her name to be used as plaintiff in an action against Augusta L. Ohm to set aside said fraudulent conveyance made to her by the decedent in his life-time, and to have the property so conveyed adjudged to be the property of the estate, subject to the payment of its debts. On the hearing the court "ordered that said petitioner, Susan E. Judge, be, and she hereby is, allowed to sue for said real estate in the name of Anna A. Ohm, said administratrix; and said Anna A. Ohm, administratrix, is hereby ordered to allow her name to be used in any such suit for the recovery thereof for the benefit of said estate, and the creditors thereof, and any such suit to be prosecuted to final judgment, on the condition that said petitioner, Susan E. Judge, defray all expenses and costs of such suit, and save the said administratrix harmless therefrom." From this order the administratrix appeals, and the only point made by counsel for respondent is that the order is not an appealable order. The appellant's counsel contends, however, that the order appealed from was made in a "special proceeding commenced in a superior court," and is the "final judgment entered" therein, in the sense of the first division of section 963 of the Code of Civil Procedure, and is therefore appealable. Whether this proceeding is a "special proceeding" or not, it certainly is a "probate matter." Its purpose is to control the official action of the administratrix in the matter of collecting and applying alleged assets of the estate. The constitution provides that "the supreme court shall have appellate jurisdiction * * * in all such probate matters as may be provided by law." Article 6, § 4. The only provisions of law, as to appeals in probate matters, are contained in the third sudivision of section 963 of the Code of Civil Procedure, in which is to be found no provision for an appeal from such an order as that appealed from in this case. In Estate of Montgomery, 55 Cal. 210; Estate of Sbarboro, 70 Cal. 147, 11 Pac. Rep. 563; and Estate of Keane, 56 Cal. 407,—it was decided that an appeal does not lie from an order denying a petition for the revocation of letters of administration, because such order is not included in the section 963 of the Code of Civil Procedure. In Estate of Carpenter, 73 Cal. 202, 14 Pac. Rep. 677, it was held, for the same reason, that an appeal does not lie from an order appointing a special administrator; and in Estate of Poten, 72 Cal. 576, 14 Pac. Rep. 209, that an appeal does not lie from an order refusing to compel the clerk of the court to pay over money in his hands, belonging to the estate, to a special administrator. Were not the proceedings in which the orders appealed from were made, in all the cases here cited, special proceedings in the same sense that the proceeding in the case at bar is a special proceeding?

This question, however, need not be answered here, further than to say that the construction by this court of the constitutional provision above quoted excepts final orders in special probate proceedings, if any such there be, from the operation of the Code rule, that appeals lie from "a final judgment entered * * * in a special proceeding commenced in a superior court;" and this construction was probably given in view of the maxim, *expressio unius, est exclusio alterius*. The constitutional expression that appeals lie "in all such probate matters as may be provided by law" excludes appeals in probate matters not provided for by law. At all events, this is the effect of the cases above cited, and upon their authority I think the appeal should be dismissed.

We concur: HAYNE, C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the appeal is dismissed.

83 Cal. 623

CITY OF EUREKA v. ARMSTRONG. (No. 12,565.)

(*Supreme Court of California.* Dec. 4, 1889.)

DEDICATION—ACCEPTANCE—ABANDONMENT.

1. A deed given by defendant to a third person, wherein the description recites that the boundary lines of the property conveyed were to run "to and along Twelfth street," which was then an open public street to the east of, but not extended westerly through, defendant's property, constitutes a dedication of, or an offer by defendant to dedicate, land for the purpose of a street.[1]

2. An order of the common council that "all streets * * * which have been dedicated by the owners thereof * * * are hereby accepted and declared to be public streets," is sufficient acceptance of streets which have been dedicated by duly-recorded deeds, without specifying them by name.[1]

3. The mere fact that an official map, adopted after the dedication of a street, has a line drawn across the mouth of the extension of such street, does not deprive the public of their right thereto.

Commissioners' decision. Department 2. Appeal from superior court, Humboldt county; J. J. DE HAVEN, Judge.

McQuaid & Wheeler, for appellant. *J. N. Gillett* and *J. H. G. Weaver*, for respondent.

HAYNE, C. This was an action of ejectment brought by the city of Eureka to recover a portion of an alleged street called "Twelfth Street," of which the defendant was in possession. The trial court gave judgment for the plaintiff, and the defendant appeals.

It may be doubted whether ejectment is the proper action for the assertion of a right to an easement; but the appellant has not made any objection on this ground, and we infer that he desires to waive questions of form in order to have the question as to the existence of a street determined on its merits. Twelfth street was an open public street for some distance to the east of the property in controversy, which would be covered by the street if extended westerly In order to prove that it was so extended the plaintiff put in evidence a deed to one Bowman made in 1883 by the defendant, who was then the owner of the property The description in this deed was as follows: "Beginning at the S. W. corner of Twelfth and F streets, running thence S., along the W. line of F street, 55 feet; thence W., parallel with Twelfth street, 120 feet, thence N., parallel with F street, 55 feet, to Twelfth street; and thence E., along the S. line of Twelfth street, 120 feet, to the place of beginning." The portion of "Twelfth street," to and along which those lines were run, was the extension claimed by the plaintiff here. If the deed did not constitute a dedication, (see Kittle v. Pfeiffer, 22 Cal. 489,) it was at least an offer to dedicate; and the offer must be construed to relate to the whole block, and not merely to 120 feet thereof, for it will not be presumed that the intention was to make a *cul-de-sac*.

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[1] In general, as to what constitutes a dedication of land to public use as a street, and its acceptance by the public, see Baker v. Vanderburg, (Mo.) 12 S. W. Rep. 462, and note; City of Eureka v. Croghan, (Cal.) 22 Pac. Rep. 693; note to City of Eureka v. Croghan, (Cal.) 19 Pac. Rep. 485.

The appellant contends that an acceptance was necessary to complete the dedication; and we so understand the law. People v. Reed, 22 Pac. Rep. 474. But we think that there was such acceptance. In 1885, which was less than two years after the deed above mentioned, the city council passed the following order. "All streets and alleys within the corporate limits of the city of Eureka, which have been dedicated by the owners thereof for the use of the public, are hereby accepted and declared to be public streets of the city of Eureka." We are unable to see why this was not a sufficient acceptance. The common council must be the proper body to accept a dedication. If not, who is there that can give a formal acceptance? And if the order had in terms applied to Twelfth street there could have been no doubt. The only questions that can be raised are whether it was necessary to mention by name the street to be accepted, or whether a general reference to it is sufficient, and whether this is a sufficient reference. We think that a general reference is sufficient, and that, inasmuch as the deed in question was recorded, the municipal authorities must be presumed to have been aware of it, and to have intended the general reference to apply to it. The case of Harding v. Jasper, 14 Cal. 649, is not in conflict with the foregoing. In that case there was no dedication, or offer to dedicate, by the owners. There was therefore nothing for the supervisors to accept. And as a matter of course they could not by their mere fiat make a road without reference to the rights of the owners. In the case before us there was a dedication, or offer to dedicate, and the acceptance was within a reasonable time, and before any attempt at revocation by the owner.

The land having been duly dedicated, and accepted as a public street, the subsequent adoption of an official map, having a line across the mouth of the extension of the street, is not sufficient to divest the public of their right. Even if the local board had power to effect such a result, the mere drawing of a line upon a map is not an exercise of the power. There was no material error in the admission or rejection of evidence. Nor do we see any error in the instructions; but, if there had been, it would have been immaterial, for, the above facts being uncontradictable, the court might properly have instructed the jury to find for the plaintiff. We therefore advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; VAN CLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

THORNTON, J. I concur in the judgment, and generally in what is said in the opinion, but do not wish to be understood as approving what is said in People v. Reed, referred to in the opinion.

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82 Cal. 339

In re AH YOU. (No. 20,586.)

(*Supreme Court of California.* Jan. 1, 1890.)

MUNICIPAL CORPORATIONS—POLICE COURTS—CONSTITUTIONAL LAW.

St. Cal. 1865–66, p. 193, (Act March 10, 1866,) established a police court in the city of Oakland, and provided for the election of a police judge. St. 1885, p. 213, (Act March 18, 1885,) vested the judicial power of cities having 30,000, and less than 100,000, inhabitants (Oakland being such city) in a police court to be held by the city justices, or by one of them, to be designated by the mayor. On February 14, 1889, a charter framed and adopted in accordance with Const. Amend. No. 16, approved March 10, 1887, (St. 1887, p. 88,) became the organic law of Oakland, under which charter a police court was organized, and a judge thereof duly elected. *Held*, that under Const. Cal. 1879, art. 11, § 6, providing that "cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws," the act of March 18, 1885, was a "general law," was intended to embrace the city of Oakland within its provisions, and was an implied repeal of the act of March 10, 1866; and that the charter of February 14, 1889, was subject to said act of 1885, and therefore the police court organized under such charter had no legal existence. Following People v. Henshaw, 18 Pac. Rep. 413. Fox, J., dissenting.

Application for *habeas corpus*.

M. C. Chapman and *E. C. Chapman*, for petitioner. *Geo. W. Reed*, (*J. E. McElrath*, of counsel,) for respondent. *Harvey S. Brown*, *amicus curiæ*.

PER CURIAM. This is a proceeding upon *habeas corpus*. The facts out of which the case arises are stipulated as follows: "(1) That on the 14th day of February, 1889, a charter framed and adopted in accordance with Const. Amend. No. 16, approved March 10, 1887, (St. 1887, p. 88,) became, and ever since has been, and now is the organic law of the city of Oakland. (2) That at a muncipal election duly and regularly held in the city of Oakland, under the provisions of said charter, one Alexander Laidlaw received certain votes, being a majority of all the votes cast for police judge, was thereafter, by the muncipal council of the said city of Oakland, declared elected police judge of the police court provided for in said charter. Thereupon the said Alexander Laidlaw filed a bond as such police judge as required by the said charter, took the oath of office, and has ever since been, and now claims to be, the police judge of the police court provided for in said charter. (3) That on the 24th day of July, 1889, the said Ah You was brought before the said police court, so as aforesaid created and organized, and before the said Alexander Laidlaw, so as aforesaid claiming to be judge thereof, and was, by said court and judge, tried and convicted of a misdemeanor, and thereafter, on the said 26th day of July, 1889, was, by the said court and by the said judge thereof, sentenced to imprisonment in the city jail of the said city of Oakland for the period of six months, and adjudged to pay a fine of $500, and, under commitment issued from said court by said judge thereof, was and is imprisoned in said city jail. (4) That said police court, and said judge thereof, derive whatever of power, jurisdiction, or authority they, or either or both of them, possess solely or wholly from, and pursuant to, the provisions of the said charter of the said city of Oakland. (5) That said police court, established, organized, existing, and set in operation under, and in pursuance of, the provisions of said charter, is not a police court provided for or existing and in pursuance of the general act of March 18, 1885, and said Alexander Laidlaw, the police judge aforesaid, is not now, and never has been, either a judge *de jure* or *de facto* of any police court established or organized under and in pursuance of said act of March 18, 1885, in said city of Oakland." These being the facts, the only question to be decided is whether the police court established by the freeholders' charter of the city of Oakland (see Appendix to St. 1869, p. 535) has a legal existence. If it has no legal existence, it is conceded that its judgment is void and that the petitioner must be discharged. The city of Oakland was a municipal corporation prior to the adoption of the constitution of 1879. It had a police court established by act of March 10, 1866, (St. 1865–66, p. 193.) Section 6, art. 11, of the constitution of 1879, is as follows: "Corporations for municipal purposes shall not be created by special laws; but the legislature, by general laws, shall provide for the incorporation, organization, and classification, in proportion to population, of cities and towns, which laws may be altered, amended, or repealed. Cities and towns heretofore organized or incorporated may become organized under such general laws whenever a majority of the electors voting at a general election shall so determine, and shall organize in conformity therewith; and cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted by authority of this constitution, shall be subject to and controlled by general laws." March 18, 1885, the legislature passed an act entitled "An act to provide for police courts in cities having 30,000, and under 100,000, inhabitants, and to provide for officers thereof." St. 1885, p. 213. By this act it was provided that one of the city justices, to be designated by the mayor, should be the judge of the police court, and the powers and the jurisdiction of the court were prescribed and regulated. Notwithstanding the passage of this act, a police judge (Daniels) was elected under the provisions of the act of 1866, and he assumed, and undertook to exercise, the duties of the office, upon the theory that the act of 1885 was unconstitutional, or, if constitutional, that it did not supersede the act of 1866; that act being, as it was contended, a part of the old city charter, and, as such, exempt from the operation of any special or general law relating to the government of municipal corporations. At the same time one Henshaw claimed to be police judge, by virtue of the provisions of the act of 1885.

In this state of the case an action entitled People v. Henshaw was instituted for the purpose of testing the right to the office, wherein it was held by this court (76 Cal. 436, 18 Pac. Rep. 413), that the act of 1885 was a general law; was in all respects constitutional; that it repealed the act of 1866, and in so far superseded the old charter of the city Oakland. If that case was correctly decided,—if the old charter was superseded by the law of 1885,—there can be no question that the freeholders' charter, since adopted, is also subject to the same act. The last clause of section 6, art. 11, of the constitution, will admit of no other construction. "Cities and towns heretofore or hereafter organized, and all charters thereof framed or adopted, by authority of this constitution, shall be subject to and controlled by general laws." The freeholders' charter of Oakland was "framed and adopted by authority of this constitution," (article 11, § 8, as amended,) and is not only subject to and controlled by general laws, according to the express terms of section 6, art. 11, but was also required by the section (8) in pursuance of which it was framed to be "consistent with and subject to the constitution and laws of this state." There is therefore no escape from the conclusion that if the old charter was superseded by the act of 1885, the new charter is subject to and controlled by it; and the police court which the freeholders' charter attempted to establish must be held to have no legal existence, unless we are prepared to squarely overrule the decision in People v. Henshaw. This is conceded by counsel for respondent, and we are asked to review and reverse that decision. The court, however, has decided to abide by the conclusions there announced, for the, reasons and upon the considerations there stated. It follows that the prisoner must be discharged and it is so ordered.

FOX, J. I dissent. I think the court erred in its decision in the case of People v. Henshaw, 76 Cal. 436, 18 Pac. Rep. 413, and that the decision in that case ought to be reconsidered. No property rights have grown up under it, and no injury can result from a correction of the error then made, if it was an error. The act of the legislature then under consideration—"An act to provide for police courts in cities having 30,000, and under 100,000, inhabitants, and to provide for officers thereof," approved March 18, 1885, commonly called the "Whitney Bill," (St. 1885, p 213)—was, at the time of its passage, as clearly a special law as any ever passed by a legislative body, and, under the constitution, should have been declared void. But, whether that decision was right or wrong as the laws then stood, it is, to my mind, most clear that the act then under consideration is not now a law of the state applicable to the city of Oakland. At that time the city of Oakland was a municipality existing under special act passed long before the adoption of the present constitution; and, if the Whitney bill was a general law, the charter was subject to amendment, and was amended by such general law, according to the interpretation which has several times been given to the constitution by this court. But the city is no longer a municipality under that special charter; nor is it a municipality organized under general law, as is provided by the constitution may be done. But it is a municipality organized under a charter prepared and adopted by its own people, in a manner specially and expressly provided for in the constitution itself,—a charter approved by the legislature, and made by the constitution itself, when so prepared, adopted, and approved, inviolable at the hands of the legislature; an instrument which the legislature has no power to alter or amend, either by general or special law. See section 8, art. 11, Const., as amended, (St. 1887, p. 88.) Nothing in that charter is in conflict with the constitution, or with the general laws of the state. The legislature by general law has provided for the establishment of police courts in the muncipalities of the state as the constitution provides it may do, (article 6, § 1;) and it has prescribed their jurisdiction. Under and in conformity with such general law the charter has provided for the establishment of a police court in this municipality, and prescribed its jurisdiction the same as it is prescribed in the general law. But it is claimed that the legislature may amend the charter by general law, because of the provision found in section 6, art. 11, of the constitution, which reads: "Cities or towns heretofore or hereafter organized, and all charters thereof framed or adopted, by authority of this constitution, shall be subject to and controlled by general laws."

It is the duty of courts, in construing constitutions, to so construe them as to make the different provisions harmonize with each other, and to give force and effect to every part, if it is possible to do so. This provision of section 6 seems, at first sight, to be in conflict with that provision of section 8 which prescribes how a charter framed and adopted by the people and approved by the legislature may be amended, and, of course, by so prescribing a special mode, excludes all other modes. But a careful examination of the two provisions, each in connection with its own context and special subject-matter, it seems to me, will enable us to understand the intent and will of the framers of the constitution, and to so construe them as to give force and effect to both provisions, and to do violence to neither. Section 6 deals with the municipal corporations of the state as it finds them,—organized under special laws,—preserves their autonomy under existing charters, until the people themselves shall elect to change, but says to the people: "If you do continue to act under your old charters after general laws are framed, under which you may organize, your charters shall be subject to the general laws of the state." It also changes the former rule, and provides that thereafter municipal corporations shall not be formed by special laws, but the legislature shall by general law provide for the incorporation, organization, and classification of such corporations; that when such general laws have been provided cities and towns theretofore organized may, upon a vote of the people, organize under such general laws, and then follows with the provision which I have above quoted. Not until we reach section 8 is there a word in the constitution from which an inference could be drawn that under any circumstances could a special charter be framed or adopted for any municipality. But when we reach that section we find the constitution itself making a provision which it has forbidden the legislature to make,—a provision for special charters for municipalities having a population of 10,000 or more,—and in it has specially provided the only mode for their amendment. So that now municipalities have the option to organize under general law, and leave the law of their organization subject to such amendment as the legislature may, from time to time, see fit to make applicable to all corporations so organized, or under a special law framed and adopted by their own people, and which, while at the time of its adoption, and at all subsequent times, it must be subject to such general laws as affect the people of the state at large, can only be amended, in the matter of local government, as they themselves shall see fit to amend it. In my judgment, the words "shall be subject to and controlled by general laws" refers to such general laws as affect all the people of the state,—such as the laws relative to crimes and punishment, jurisdiction and methods of procedure in the courts, the laws affecting rights and remedies, and the like,—and not to those provisions pertaining specially to the administration of local affairs. If there is any one thing more manifest than another in this constitution, it is an intent to commit to the people of municipalities the management of their own local affairs, but in such form as not to interfere with, or create confusion in, the administration of the general laws of the state.

But, above and beyond this, the question discussed in the leading opinion, and so far discussed in this, does not arise in this case, except as it is forced upon us by an attempt to stipulate for the court what the law is, as well as the facts of the case. It is not necessarily true, as stated in the stipulation, that the powers and jurisdiction of the police court are derived from the charter proposed, and adopted by the people. Even under the act of 1885 referred to, and under any and every law that can be referred to, bearing on the question, provision is made for a police court, in such a municipality, having the same jurisdiction as that provided for in the charter. It follows that in any event, and under any law that can be cited in the premises, there is a *de jure* police court in that city, and the case simply resolves itself into an attempt to procure a judgment of this court, in a case of *habeas corpus*, as to the validity of certain provisions of the charter of Oakland, involving the title of Alexander Laidlaw to the office of police judge. The question ought not to be determined upon *habeas corpus*, and it is not necessary that it should be. There being a *de jure court*, even if Laidlaw is an intruder, there does not appear to be any other person claiming the office, and his acts as judge *de facto* are as valid and binding upon third parties as if he held by strict law. Westbrook v. Rosborough, 14 Cal. 180. For this, if for no other reason, the writ in this case should be dismissed, and the prisoner remanded.

82 Cal. 42

Sindlinger v. Kerkow *et al.* (No. 13,146.)

(*Supreme Court of California.* Dec. 10, 1889.)

Mechanics' Liens—Contracts—Decree of Foreclosure—Arbitration.

1. Code Civil Proc. Cal. § 1183, (as amended in 1887,) provides, as to mechanics' liens under building contracts, that "all such contracts shall be in writing when the amount agreed to be paid thereunder exceeds $1,000," and recorded; otherwise they shall be void, and no recovery had thereon. Section 1184 provides that no part of the contract price shall, "by the terms of any such contract," be payable before commencement of the work, but shall be payable in installments after work is commenced, with a provision for retaining 25 per cent. until completion, and that, if any "such contracts" shall not conform "to the provision of this section," the work done and materials furnished shall be deemed to have been done and furnished at the personal instance of the owner. *Held* that, where the contract price is less than $1,000, the contract need not be in writing, nor 25 per cent. of the price reserved until after completion of the contract.

2. Where the court finds that plaintiff is entitled to a lien for work done, consisting of "certain improvements, additions, alterations, and repairs, to-wit, painting and papering of walls, entrances, ceilings, partitions, and other portions of the basement story of said building, and certain structures or articles affixed and appurtenant thereto, and placed thereon," it will be presumed that the evidence supported the finding, though some of the work was spoken of as "counters, sideboard, shelving, ice-box, partitions, and wainscoting," there being nothing to show that they were not among the articles "affixed and appurtenant thereto."

3. A decree foreclosing a mechanic's lien is not invalid by reason of the failure of the court to define the exact amount of land necessary to the use of the building.

4. Submission in arbitration, which contains no stipulation that it may be made an order of court, may be revoked under Code Civil Proc. § 1283, providing that, "if the submission is not made an order of the court, it may be revoked at any time before the award is made."

Department 1. Appeal from superior court, Los Angeles county; A. W. Hutton, Judge.

Gottschalk & Luckel, for appellants. *Herdon, Cain & Garrison*, for respondent.

Paterson, J. This is an action to recover the sum of $519 for work and labor upon a certain building owned by the defendant Amestoy, in the city of Los Angeles. The amount claimed includes the sum of $300 as a balance under an express contract to perform certain work, the contract price being $600; and the sum of $219 for extra work, alleged to have been performed at the special instance and request of the defendants Kerkow & Shurtz. The action is also to foreclose a mechanics' lien for the sums mentioned. Plaintiff had judgment in the court below, and defendant has appealed therefrom on the judgment roll alone.

The first point made by appellant is that the contract between the plaintiff and defendants was void because it did not provide that 25 per cent. of the contract price should be payable 35 days after the completion of the contract. Section 1183, Code Civil Proc., (as amended 1887,) provides: "All such contracts shall be in writing when the amount agreed to be paid thereunder exceeds $1,000, and shall be subscribed by the parties thereto; and the said contract, or a memorandum thereof, setting forth the names of all of the parties to the contract, description of the property to be affected thereby, together with a statement of the general character of the work to be done, the total amount to be paid thereunder, and the amounts of all partial payments, together with the times when such payments shall be due and payable, shall, before the work is commenced, be filed in the office of the county recorder of the county, or city and county, where the property is situated; * * * otherwise they shall be wholly void, and no recovery shall be had thereon by either party thereto; and in such case the labor done and materials furnished by all persons aforesaid, except the contractor, shall be deemed to have been done and furnished at the personal instance of the owner, and they shall have a lien for the value thereof." Immediately following this provision of section 1183 is the following provision of section 1184: "No part of the contract price shall, by the terms of any such contract, be made payable, nor shall the same or any part thereof be paid in advance of the commencement of the work, but the contract price shall, by the terms of the contract, be made payable in installments at specified times after the commencement of the work, or on the completion of specified portions of the work, or on the completion of the whole work: provided, that at least 25 per cent. of the whole contract price shall be made payable at least thirty-five days after the final completion of the contract. * * * In case such contracts and alterations thereof do not conform substantially to the provisions of this section the labor done and materials furnished by all persons, except the contractor, shall be deemed to have been done and furnished at the personal instance and request of the person who contracted with the contractor, and they shall have a lien for the value thereof." Reading these two sections together we think it quite clear that the legislature did not intend to provide that 25 per cent. of the contract price should be payable thirty-five days after the completion of the contract in any case except "when the amount agreed to be paid thereunder exceeds one thousand dollars." The use of the phrase "any such contract" in the clause of section 1184 immediately following the provisions of section 1183, quoted above, indicates, we think, that the legislature intended to refer to the contracts which had just been spoken of in section 1183, namely, contracts in which "the amount agreed to be paid thereunder exceeds one thousand dollars." That such contracts were referred to is made evident from the peculiar language of the last clause quoted from section 1184, namely, "in case such contracts and alterations thereof do not conform substantially to the provisions of this section," etc.

It is not essential to the validity of a lien for work done under a contract, the contract price of which is less than a thousand dollars, that it should be in writing. Contracts only in which the contract price exceeds $1,000 are required by section 1183 to be in writing, giving the names of the parties, description of the property, statement of the character of the work, total amount to be paid, amount of partial payments, time of payment, etc. It was not intended, we think, that, in order to preserve the right of lien, a laborer or contractor should be put to the trouble of entering into a written contract, and reserving 25 per cent. of the contract price for 35 days after the completion of the work, in cases where the contract price is less than $1,000. The rule contended for would be a harsh one in cases where the contract price was less than $1,000,—small amounts.

It is contended, further, that the lien is for work done upon personal property. The court found that the improvements and repairs consisted of "certain improvements, additions alterations, and repairs, to-wit, painting and papering of walls, entrances, ceilings, partitions, and other portions of the basement story of said building, and certain structures or articles affixed and appurtenant thereto, and placed thereon." It is true some of the work performed is spoken of as "counters, sideboard, shelving, ice-box, partitions, and wainscoting;" but there is nothing to show that they were not among the articles "affixed and appurtenant thereto." We must presume, of course, that the evidence supported the decision.

It is claimed that the findings and judgment are indefinite and uncertain as to what property should be sold by the sheriff. The failure of the court to define the exact amount or extent of the land necessary for the building does not invalidate the decree. It may be that the purchaser would acquire no land beyond that covered by the building, but the judgment is good. Tibbetts v. Moore, 23 Cal. 213.

There was no provision in the stipulation submitting the matters in controversy to arbitration by which an order of the court could have been made upon it. No action whatever has ever been taken upon the stipulation. "If the submission is not made an order of the court, it may be revoked at any time before the award is made." Section 1283, Code Civil Proc. Judgment affirmed.

We concur: Fox, J., McFarland, J.

(81 Cal. 584)

McCarthy v. Mutual Relief Ass'n of Petaluma. (No. 12,171.)

(*Supreme Court of California.* Dec. 4, 1889.)

Contracts—Estoppel.

1. Plaintiff and defendant entered into a written agreement for the building of a party-wall, but made no provision therein as to how the face of the wall should be finished. Afterwards a verbal agreement was made as to the first story, which agreement was carried out. Plaintiff then proceeded to finish his half of the face of the wall above the first story in a certain manner, and, to defendant's remonstrance, replied that if defendant did not like the appearance of the finish when it was done, he (defendant) could tear it down, and fix it to suit himself. Plaintiff afterwards recalled his permission to change the wall as he had finished it. *Held*, that the evidence sustained a finding that there was no special agreement as to finishing the face of the wall above the first story.

2. When expenditure on the faith of a license is relied on as an estoppel, evidence of the facts constituting such estoppel should be clear, and the expenditure should not be trivial in amount.

Commissioners' decision. Department 2. Appeal from superior court, Sonoma county; John G. Pressley, Judge.

E. S. Lippitt, for appellant. *Albert G. Burnett*, for respondent.

Hayne, C. This was an action for the recovery of damages for an injury to the face or end of a party-wall, and to recover possession of the plaintiff's half thereof. The trial court gave judgment in favor of the plaintiff for the recovery of the possession of half of the wall and for $30 damages, and the defendant appeals from the judgment, and from an order denying a new trial. The parties to the suit, being the owners of adjoining lots, and being each about to erect a building on their respective lots, made a written agreement for a party-wall, which agreement is set out in the findings. The wall was accordingly constructed. The dispute was as to how the face or end of the wall should be finished. It appears that the plans for the defendant's building were originally drawn upon the idea that it was to stand wholly upon the defendant's own lot; and the wall was to be only 13 inches thick. With this view the pilasters, or coverings for the face of the walls, were ordered 13 inches wide. The party-wall, however, was 17 inches wide for the first two stories; and, when the 13-inch pilaster came to be applied to the 17-inch wall of the first story, it looked so out of proportion that the plaintiff himself suggested that a wider one be made for the first story, and promised to pay, and did pay, the difference in the price of that pilaster. The plaintiff then went on with the construction of his building, and made his upper story to correspond with his opposite wall, which was also a party-wall with another building. In order to effect such correspondence, he made the pilaster for his upper story to cover only his half of the party-wall between his building and that of the defendant. The defendant, however, whose building was to be higher than that of the plaintiff, was by no means satisfied with this arrangement. Its officers remonstrated with the plaintiff, who at first said that he could not control his contractor, but that, if the defendant's officers should not be satisfied with the appearance of the wall as finished by his contractor, they could tear down his finish, and make it to suit themselves. The plaintiff's contractor thereupon completed the wall as he had commenced it, and the plaintiff thereupon recalled his permission to the defendant to change it. The latter, however, directed the brick-masons to carry up the brick pilaster for the second and third stories to correspond with the new iron pilaster of the first, and for the same width, and corbeled it out to form panels on the face of the pilaster to correspond with the others." And, in order to do this, the plaintiff's finish on his half of the wall had to be taken down, which was done by the defendant's workmen. The plaintiff complains that the result is that his two walls do not correspond, and that his building "looks like a cow with one horn." In our opinion the written contract contains nothing with reference to the question of the finish of the face of the wall. It did not give to defendant the right to put any particular finish or ornamentation on the plaintiff's half thereof. Each party owned the half of the wall which was upon his land, subject to an easement in the other. This easement was merely to use the wall as a party-wall between the two buildings. In the absence of a special agreement to that effect, the defendant had no more right to have the plaintiff's half finished in accordance with his views than the plaintiff had to have the defendant's half finished in accordance with his views.

The main question, therefore, upon which the case turned was whether there was such a special agreement. The trial court found that there was not, and we cannot say that this finding was not sustained by the evidence. It is admitted that there was an agreement with reference to the iron pilaster of the first story. But this did not necessarily extend to the brick and stucco work above it. It may be conceded that it would have been more symmetrical for the defendant's building, and more in accordance with the rules of architecture, to have the pilaster of the upper stories correspond in width with that of the lower. But this is not a sufficient ground to imply a contract therefor. As above stated, half of the wall belonged to the plaintiff, and he could finish it as he liked. The defendant had to show a contract allowing it to interfere with the plaintiff's half of the wall, and it failed to do this. There was no definite evidence of a contract, except as to the first story. The plaintiff swears that there was no contract, except as to the first story, and the testimony of the defendant's architect seems to corroborate this. Taking all the circumstances together, we cannot say that the finding that there was no contract except as to the first story should be set aside. The defendant, however, relies upon the parol license given by the plaintiff to tear down his finish, if it should not prove satisfactory. The finding in this regard is as follows: "The plaintiff told the defendant to wait until it was done, and then, if it did not like it, he would allow it to be taken down, and finish it to suit itself; but the court finds that before the defendant attempted to remove the finish placed upon the wall by plaintiff the plaintiff revoked said license." There was evidence to sustain this finding of revocation, and we see no room for the argument, made for the defendant, that the license was executed before it was revoked, even if it be assumed that, under the circumstances, this would make a difference. The license was to tear down the finish; and the revocation was before the tearing down began. The finish which the defendant put on in the place of the plaintiff's could not have been put on until after the plaintiff's was removed, which was after the revocation. The assumption of the defendant's counsel seems to be that there was some preliminary work done upon the faith of the license. But, assuming that the plaintiff's telling the defendant to "wait" authorized it to go on with the preliminary work, it is sufficient to say that the evidence does not show any preliminary work. One of the defendant's witnesses says: "When the plaintiff went on to finish the half of the party-wall, defendant had not commenced to cement. The brick-work was all laid out for it." We do not understand precisely what the "laying out" of the brick-work involved. But it seems, from the evidence, that the additional brick-work would only cost "two or three dollars extra."

When a party relies upon expenditure upon the faith of a license as an estoppel, the evidence of the facts constituting the estoppel should be clear, and the expenditure should not be trivial in amount. The learned counsel have not questioned that the acts of defendant amounted to a taking possession of the plaintiff's half of the wall, so as to warrant a judgment for the return of possession, and, following the lead of counsel, we have assumed that the judgment is proper in this regard; but we express no opinion in relation thereto. We therefore advise that the judgment and order appealed from be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

(82 Cal. 107)

PEOPLE v. MILLER *et al.* (No. 20,593.)

(*Supreme Court of California.* Dec. 16, 1889.)

CONSPIRACY—HUSBAND AND WIFE.

There being no legislation to indicate an intention to change the common-law rule, no prosecution for conspiracy can be maintained in California against husband and wife.

Department 2. Appeal from superior court, San Diego county; JOHN R. AITKIN, Judge.

W. H. C. Ecker and *N. H. Dodson*, for appellants. *George A. Johnson*, Atty. Gen., for the People.

SHARPSTEIN, J. Appellant and his wife were tried and convicted of criminal conspiracy. The information upon which they were tried states that "H. Miller and Minnie Miller, being then and there husband and wife, are accused by the district attorney of said county, [San Diego,] by this information, of the crime of criminal conspiracy." The minutes of the court show that after the defendants had been found guilty by the verdict of a jury, and their motion for a new trial denied, they appeared for sentence, when the following proceedings were had, (we copy from the minutes:) "The court at this time sentences Minnie Miller to a fine of $1, which the court will pay. The court at this time sentences H. Miller to be imprisoned in the county jail of San Diego county for a term of one year."

Defendant H. Miller appeals. His sole contention here is that the information does not accuse him of any offense, because a man and his wife, being in law but one person, no prosecution for a conspiracy can be maintained against them. That such was the rule of the common law we cannot doubt, and we find nothing in the Code or statute of this state to indicate an intention of the legislature to change it. The defendants could only be tried upon an indictment or information which accused them of a criminal offense. A trial upon an information which does not accuse them of a criminal offense was wholly unauthorized, and the judgment must be reversed. Judgment reversed, with directions to the court below to discharge appellant from imprisonment.

We concur: WORKS, J.; MCFARLAND, J.

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82 Cal. 153

SMITHERS v. FITCH *et al.* (No. 12,175.)

(*Supreme Court of California.* Dec. 20, 1889.)

HIGHWAYS—OBSTRUCTION.

1. In an action for an injunction and damages for entering on plaintiff's premises and removing his gates, a finding that the *locus* obstructed by plaintiff is not a public highway established under Acts Cal. 1861, p. 389 et seq., as amended by St. 1862, p. 525, as claimed by defendants, is proper, where they fail to prove compliance with the requirements of the statute as to notice and the report of the reviewers.

2. Pol. Code Cal. 1873, § 2619, provides that "all roads used as such for a period of five years are highways." Plaintiff's evidence, which conflicted with defendants', showed that he had kept the *locus* fenced for over 20 years prior to defendants' trespass; that for 6 or 7 years prior thereto he had maintained locked gates there, and had permitted no travel over the road without his consent; and that for over 20 years there had been an inclosure of part of the road, and bars across it, on the opposite side of his land. *Held*, that a finding that the road had not become a highway under the Code would be upheld.

3. Where the evidence indicates that the trespasses are likely to be repeated, an injunction will be granted, to prevent a multiplicity of suits.

4. A motion for a new trial was made on affidavits that lost papers had been found by which it was intended to show that notice of application for the establishment of the highway had been given, and that a petition therefor had been filed, signed by the person under whom plaintiff claimed, by which dedication was intended to be proven. The affidavits did not show that affiant knew as a fact that the signature was in the handwriting of such person, nor that the route of the road, if established, would have been over his land. The notice offered was not in compliance with the statute. *Held*, that the motion was properly overruled.

Commissioners' decision. Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

H. M. Barstow, Dist. Atty., *Spencer & Raker*, and *Henry Hogan*, for appellants. *Wallace & Johnston*, for respondent.

FOOTE, C. This action was for an injunction restraining the defendants from entering upon the plaintiff's premises, and taking down or removing his gates, or in any manner interfering with his premises, and for damages for acts of that kind already done. The case was tried before the court, without a jury, the plaintiff had judgment for an injunction as prayed for, and damages in the nominal sum of one dollar and costs. The defendants appeal from the judgment, and an order denying a new trial.

The contest arose over the right asserted by one of the defendants, Fitch, a road overseer or road-master, acting under the authority and by the direction of Gosling, as a member of the board of supervisors of Napa county, to remove the gates of the plaintiff from what was alleged to be a public highway, and which right so claimed had already been twice exercised by the road overseer. The defendants asserted that some time in the month of August, 1863, there was laid out and constructed over the lands now owned by the plaintiff a public road and highway, which for more than 20 years next ensuing from and after the year above mentioned was used as such by the public, with the acquiescence of the plaintiff and his predecessors. That about 1885 the plaintiff obstructed the road at a point where it runs over or upon his land, and the acts of taking down the gate complained of were to remove an obstruction from the public highway, which it was their lawful right to do. They defend the alleged trespasses on the grounds that the gate was an obstruction on a public road, which had been duly established by the board of supervisors, and had become a public road, if not so established, by the user of the public. It is claimed by the appellants—*First*, that the evidence shows, contrary to the findings of the court, that the road thus obstructed by the plaintiff was duly and legally declared a public highway by the board of supervisors of Napa county; *second*, that, even conceding it was not so declared, the evidence is conclusive that the road became a highway by the use of the public of it as such.

The statute under which it is asserted the board of supervisors attempted to declare a public highway is to be found in Acts 1861, p. 389 et seq., as amended May 12, 1862. St. 1862, p. 525. That act requires, in section 1 thereof, that three notices shall be posted in public places in the county, and one such notice shall be posted "on the door of the room in which the board of supervisors of the county hold their meetings, at least thirty days previous to the time of making such application, which application shall only be made at a regular meeting of" such board, and that in that notice there shall be specifically set forth "the place of beginning, the intermediate points, if any, a general description of the proposed route, the termination of said road, or the particular portion of said road proposed to be altered or vacated, and the time at which the application will be made." The defendants did not attempt to introduce any such notice, and there is nothing in the record to show that if one was given at all it complied with the statute. The appellate court said, in Sherman v. Buick 32 Cal. 256, with reference to a similar provision of law: "It is well settled that a party who claims a title or right of the character set up by the appellants must show a strict compliance with all the provisions of the statute." This notice so prescribed to be posted, and to contain certain specific things, is not shown to have been given; hence the board of supervisors did not have jurisdiction to establish the road as a public highway. And, even had a notice been posted as required, it was not shown that it set forth specifically the intermediate points, and this was necessary to its validity. Potter v. Ames, 43 Cal. 75–80. Again, there is no report of the viewers offered in evidence, and it is not known whether the report complied with the provisions of section 5 of the act of 1861, as amended in the act of 1862, supra. There is nothing to indicate that the viewers, in their report, concurred with the petitioners, if there were any such, as to the propriety of the establishment of the whole road, which, it may be here remarked, contemplated a road to be established in two counties; and this concurrence of viewers is held to be necessary in Brannan v. Mecklenburg, 49 Cal. 672–676. We conclude, therefore, that the findings with reference to the non-establishment of the road as a public highway by the board of supervisors are sustained by the evidence.

The question then recurs as to the establishment of the road by use for five years by the public. It is claimed that Markwood, under whom the plaintiff claims, and who owned a part of the land when the road was attempted to be established, signed a petition to that effect in 1863, and that by virtue of the statute as it then stood, his signing that paper was a dedication by him of the land as a public road, and binds his successors in interest. There was no petition introduced showing what kind of a petition he may have signed, or whether it complied with the statute, nor was there any statutory notice given, as before said; hence that contention is without force.

But it is urged that under section 2619 of the Political Code of 1873 "all roads, used as such for a period of five years, are highways," without reference to the consent of the owner. "This was not a right gained by prescription, but by the express terms of the Code." Hope v. Barnett, 78 Cal. 14, 20 Pac. Rep. 245. The evidence for the plaintiff shows that one William Markwood lived on a portion of the premises as early as 1861, and had these lands inclosed by a brush fence. In 1863 this same Markwood had a portion of the premises (where the gate stood which was removed by the defendant Fitch) inclosed, and sowed in grain. The brush fence remained until the plaintiff built a board fence in its place, in 1878 or 1879. There was an inclosure of a part of the road, and bars placed across it, on the east line of the lands of plaintiff, from 1863 to the time when the trespasses complained of were committed. After he built the board fence the plaintiff locked the gates, and has never allowed any travel over the road except with his consent. Where gates are established, as in this case, across a road to be opened and closed by parties passing over the land, in the absence of a statute providing that such gates may be maintained on a public highway, it "has always been considered strong evidence in support of a mere license to the public to pass over the designated way, and in rebuttal of a dedication to public use." Quinn v. Anderson, 70 Cal. 456, 11 Pac. Rep. 746. "The question of highway or no highway was one of fact, to be passed upon as such by the court, and was properly determined as such." Tait v. Hall, 71 Cal. 152, 12 Pac. Rep. 391, citing Harding v. Jasper, 14 Cal. 642. It is apparent that the court below resolved the conflict of evidence in regard to the user for five years by the public in favor of the plaintiff's contention that no such user as defendants contended for had taken place, and the findings upon the point should be upheld.

The evidence indicated that the trespasses already committed would probably be repeated indefinitely, and, to avoid a multiplicity of actions for damages, and perhaps breaches of the peace, an injunction was called for, and properly awarded.

The question asked the road overseer, Fitch, "I suppose, Mr. Fitch, acting under your office, you will open that gate as often as it is shut up?" is objected to as leading. Under the circumstances, we perceive no abuse of the discretion vested in the trial court in permitting it to be put, and answered: "I would, providing the board of supervisors directed me to."

Certain affidavits were read on the motion for a new trial, by which it was intended to show that a petition for the road had been filed and a notice had been given, and that they (on the trial shown to be lost papers) had been found. The defendants, in their brief, say that they attach importance to the petition only for the purpose of showing that William Markwood was the person owning the land at that time, had signed it, and therefore must be held, under section 2 of the act of 1861, supra, to have dedicated the land. But the affidavit does not pretend to declare that the affiant knows as a fact that Markwood signed the petition, or that the signature purporting to be his is in his handwriting. There is no proof whether the name appended to the petition is the real or fictitious signature of Markwood. There is nothing shown by the affidavit, or the petition attached as being found among the records of the county, that the route the road was to take, if established, was over any of Markwood's land. The petition appended to the affidavit of Deweese does not show that the "most eligible route through Wild Horse valley, across the mountains," was ever to go over Markwood's land.

Upon the question of notice, that which is produced as being the one given and posted, shows that it was not posted "on the door of the room in which the board of supervisors hold their meetings" but "on the court-house door in Napa City." The notice, also, was to the effect that the application for the establishment of the road was to be made on the 8th of June, 1863, and the affidavit proving the posting shows that it was done on the 11th of May, 1863, less than 30 days before the application was to be made, and in violation of section 1 of the act of 1861, supra.

Upon the whole case, perceiving no prejudicial error, we advise that the judgment and order be affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

82 Cal. 139

McINTYRE v SHERWOOD. (No. 12,585.)

(*Supreme Court of California.* Dec. 20, 1889.)

SWAMP LAND—ACTUAL SETTLERS.

1. Const. Cal. art. 17, § 3, provides that "lands belonging to this state which are suitable for cultivation shall be granted only to actual settlers." The term "actual settlers," which has been construed to mean "actual residents," is repeated in Pol. Code Cal. § 3495, which relates to land suitable for cultivation, but the word "actual" is omitted in the provision as to swamp land. *Held*, that actual residence is not essential to a settlement on swamp land, as it is not land "suitable for cultivation."

2. Nor is actual residence required by the word "settlers," as used in Pol. Code Cal. §§ 3442, 3443, which provide that "settlers upon swamp and overflowed lands belonging to the state, who occupy the same for farming or grazing purposes, and whose occupation is evidenced by actual inclosure, or by ditches or monuments showing the actual extent thereof, are preferred purchasers for such lands for six months after segregation;" and that the applicant therefor shall make affidavit that he "knows, of his own knowledge, that there are no settlers thereon, or, if there are, that the land has been segregated more than six months, by authority of the United States."

Commissioners' decision. Department 2. Appeal from superior court, Lake county, R. McGARVEY, Judge.

E. W. Britt and *Bond & Fishback*, (*R. C. Horne*, of counsel,) for appellant. *R. W. Crump*, for respondent.

HAYNE, C. This was an action to determine a contest over the right to purchase from the state certain swamp and overflowed land. The trial court gave judgment for the plaintiff, but subsequently made an order granting a new trial, from which order the plaintiff appeals. The plaintiff's proceedings in the land-office were in proper form; and the evidence showed, without conflict, that he took possession of the land "fifteen or twenty" years ago, when "it was mainly a tule swamp, on which the water stood a great part of the year;" that he dug ditches to drain the land, fenced it, and has ever since been in possession, and has cultivated most of it, but has never resided on it. He resided in a house upon an adjoining tract, about a quarter of a mile from the land in controversy; the whole being "inclosed in a general inclosure embracing about one hundred acres, and constituting one farm.' Upon this evidence the court instructed the jury that it was not necessary that the plaintiff should reside upon the tract in controversy; and under this instruction the jury found that the plaintiff was a "settler" upon the land at the time the defendant's application was made. The court filed findings of its own, repeating the facts found by the jury, and expressly finding that the defendant, "in his affidavit, stated, among other matters, that at the time of making his said affidavit there were no settlers on said land; that such statement was and is false and untrue." The court further found that the affidavit of the defendant "contained no allegation or statement showing that said land had been segregated more than six months, by authority of the United States."

Upon these findings there can be no question that the judgment against the defendant was right; for the statute requires that the affidavit of the applicant shall state either that there are no settlers upon the land at the time of the application, or, if there are, that more than six months has elapsed since segregation by authority of the United States. Pol. Code, § 3443. And it is settled that if a material statement in an affidavit for the purchase of public land be false the applicant acquires no right. McKenzie v. Brandon, 71 Cal. 211, 12 Pac. Rep. 428; Plummer v. Woodruff, 72 Cal. 31, 11 Pac. Rep. 871, and 13 Pac. Rep. 51; Harbin v. Burghart, 76 Cal. 119, 18 Pac. Rep. 127; Taylor v. Weston, 77 Cal. 535, 20 Pac. Rep. 62.

It appears, however, that the court granted the new trial upon the ground that the evidence showed that the plaintiff was not a "settler," within the meaning of the provisions of the Political Code in relation to the matter, and that, therefore, the affidavit of the defendant was not false. And the court arrived at this last conclusion through its interpretation of the case of Mosely v. Torrence, 71 Cal. 318, 12 Pac. Rep. 430. In that case the appellate court construed section 3 of article 17 of the constitution, which provides that "lands belonging to this state, which are suitable for cultivation, shall be granted only to actual settlers;" and the decision was that the phrase "actual settlers," as used in the provision, meant "actual residents." The language of the court was that "'actual settlement' means 'actual residence.'" But the provision of the constitution construed in that case is restricted in terms to lands "which are suitable for cultivation." Swamp lands are defined to be those which are not suitable for cultivation. Rev. St. U. S. § 2481. Hence the constitutional provision above referred to does not apply, and the decision in Moseley v. Torrence is not in point. It is argued, however, that the opinion defines the phrase "actual settlers," and that such definition ought to apply here. "It is too plain to admit of argument," says the learned counsel, "that, if 'actual settlement' means 'actual residence' then 'settlement' simply means 'residence.'" But we do not quite see the force of this argument. In the first place, a word or phrase may mean one thing in one connection and another thing in a different connection; and, in the second place, not only is the connection different, but the phrase itself is different. The phrase construed in Mosely v. Torrence is "actual settlers." This occurs not only in the constitutional provision referred to, but also in the statute which deals with lands which are suitable for cultivation. See Pol. Code, § 3495. When, however, the statute comes to provide for swamp lands, it omits the word "actual" and speaks simply of "settlers." This word "actual" is not unusual in legal phraseology, and is used as the opposite of "constructive." Thus we speak of actual possession, actual notice, actual fraud. But, whatever may be the strict and literal signification of the word, it is not to be unnecessarily assumed that in such documents as constitutions and Codes, or even decisions, words are used without meaning. Therefore, it is fair to presume that the law-givers meant something by the use of the word "actual;" that they supposed it added something to the meaning of the word "settlers;" that when they omitted it they intended something different; and that when the court said that "actual settlement means actual residence" it implied that there might be a residence or settlement which was not actual. We do not think, therefore, that the respondent can build a satisfactory argument upon the word "settlers" alone; and we think that a consideration of the nature of the case and the provisions of the statute will show that his position cannot be sustained.

Swamp and overflowed land, as we have seen, is *ex vi termini* land which is not suitable for cultivation. It is still less fitted for residence. Consequently, neither the constitution nor the Code requires that the applicant shall reside or "settle" on it before he can purchase. This is conceded by counsel. Nevertheless, although a man is not required, and may not choose, to reside in a swamp, he may have expended time and money in draining and fencing it, so as to render it fit for future cultivation or residence; and, when one has done this, it was not intended that another should be allowed to appropriate the improvements of the former merely because he has managed to get in his application first. Accordingly it is provided that one who has made such improvements shall have a preferred right of purchase for a certain time. The provision in this regard is as follows: "Settlers upon swamp and overflowed lands belonging to the state, who occupy the same for farming or grazing purposes, and whose occupation is evidenced by actual inclosure, or by ditches or monuments showing the actual extent thereof, are preferred purchasers for such lands for six months after segregation." Pol. Code, § 3442. It seems plain that the preferred right of purchase given by this section does not depend upon residence. There would be no sense in requiring residence as a condition of a preferred right of purchase, when it is not a condition of a general right of purchase. The purpose, simply, was to give the man who makes improvements upon swamp lands a reasonable chance to purchase it, and to prevent his improvements from being appropriated by others. This purpose does not require that he shall actually reside on the land; and the language of the provision does not indicate anything of the kind. The "settlers" spoken of in the section are those who "occupy the same for farming or grazing purposes." "Occupation" is ordinarily synonymous with "actual possession," (Lawrence v. Fulton, 19 Cal. 690; McKenzie v. Brandon, 71 Cal. 211, 12 Pac. Rep. 428;) and, as there may be actual possession without residence, it would seem to follow that there may be occupation, and consequently settlement, without residence. Moreover, the section expressly states that the occupation is to be "for farming or grazing purposes," and is to be evidenced in a specified way. We conclude, therefore, that the word "settlers," as used in section 3442, does not require residence upon the land.

The provision of the next section, which is the one upon which the respondent bases his argument, provides that the applicant to purchase swamp land shall make affidavit that he "knows, of his own knowledge, that there are no settlers thereon, or, if there are, that the land has been segregated more than six months, by authority of the United States." The word "settlers" here is evidently used in the same sense as in the preceding section. The purpose of the affidavit was merely to show that no other person had a preferred right of purchase; and we have seen that actual residence is not necessary to such preferred right. No other question has been discussed by counsel. It results that the learned judge erred in granting a new trial. We therefore advise that the order appealed from be reversed.

We concur: Belcher, C. C.; Van Clief, C.

Per Curiam. For the reasons given in the foregoing opinion the order appealed from is reversed.

82 Cal. 7

Gruwell *et al.* v. Seybolt *et al.* (No. 12,072.)

(*Supreme Court of California.* Dec. 9, 1889.)

Vacating Decree—Waiver—Homestead.

1. Under Code Civil Proc. Cal. § 963, subd. 3, which makes appealable an order confirming or refusing to confirm a report of an appraiser setting apart a homestead, a decedent's heirs by failing to appeal from a decree setting apart a homestead to the widow absolutely, as her separate estate, out of decedent's separate property, lose their right to have the decree set aside where they had notice of the application, the estate has been fully administered, and it does not appear that they have been prevented by fraud from making the required proof.

2. The law in force at the time of death of a person, and not that in force at the time of a previous declaration of homestead on his land, governs as to homesteads and rights of survivors.

Appeal from superior court, Santa Clara county; David Belden, Judge.

Action by J. D. Gruwell and others against George L. Seybolt and others. Judgment for defendants, and plaintiffs appeal.

Louttit, Woods & Levinsky and *Archer & Bowden*, for appellants. *T. H. Laine*, for respondents.

Paterson, J. Judgment was entered in favor of defendants on demurrer to the complaint, and plaintiffs have appealed therefrom. The complaint alleges that plaintiffs are the heirs at law of Robert Gruwell, who died intestate on July 17, 1881, leaving surviving him, besides these plaintiffs, a widow, Eliza V. Gruwell. That after the death of Robert, his widow, Eliza V., in a petition praying for letters of administration, falsely alleged that the land in controversy was community property, and that the appraisers falsely returned it in their inventory as community property. That in 1871 said Eliza V. made and filed a declaration of homestead on the premises. That, upon a petition falsely alleging that the property was community property, the superior court, by its order, set aside the premises for a homestead, absolutely, as her sole and separate estate. On June 12, 1882, said Eliza V. conveyed all her right, title, and interest in and to the premises to one Barnes, who afterwards conveyed to defendants Seybolt and wife. That on June 6, 1883, Seybolt and wife mortgaged to defendant Shafter, and that defendant Summers claims to be the owner of said mortgage by assignment. That plaintiffs are the owners in fee-simple of the property, and entitled to the possession thereof. The prayer is that defendants may be required to set forth the nature of their claims to the property; that the decree setting apart the homestead be vacated; for a judgment that defendants have no right, title, or interest in the property; and that plaintiffs are entitled to the possession of the premises, and to costs of suit.

Appellants contend that the allegations of plaintiffs' ownership, and that defendants have no right, title, or interest in the property, but that they are wrongfully in possession, claiming adversely, are sufficient to show a cause of action, and that the demurrer, therefore, ought to have been overruled. Where, however, the pleader sets forth specifically the links in his chain of title, a general allegation of ownership will be treated as a mere conclusion from the facts stated, and will not cure any defect in the chain relied upon. It will be presumed that every fact has been alleged which can be proved. Turner v. White, 73 Cal. 300, 14 Pac. Rep. 794; Heeser v. Miller, 77 Cal. 192, 19 Pac. Rep. 375.

But the principal contention of appellant is that the homestead declaration of the wife alone on the separate property of the husband did not affect the title of the heirs to the property; that, notwithstanding such declaration, the property vested in them on the death of the husband, subject only to the right of the court to set aside the homestead to the surviving wife and children for a limited period. In support of this contention he cites the following sections of the Codes: Sections 1465, 1468, 1474, Code Civil Proc., and 1265, Civil Code. The authorities cited by both parties show that the law in force at the time of the death, and not that which was in force at the time of the declaration, controls on the subject of homesteads and rights of survivors. Tyrrell v. Baldwin, 78 Cal. 470, 21 Pac. Rep. 116; Herrold v. Reen, 58 Cal. 443. If, therefore, the provisions of the Codes just cited were in force at the time of the death of Gruwell, and it be true that it was selected from separate property of the husband by the wife alone, appellants are right in their contention, for all of the sections cited support it. The only answer respondents make to this point is that "the marriage was under the provisions of the homestead act of May 12, 1862, and so was the declaration of homestead. That being so, the heirs could have no part nor lot in the same. It went absolutely to the widow. This is the settled law of the state. Rich v. Tubbs, 41 Cal. 35; Herrold v. Reen, supra." If the homestead act of 1862 had been in force at the time of the death of Gruwell, the answer would be satisfactory, but as he died on July 17, 1881, at which time the provisions of the Code above referred to were in force and effect, the authorities cited by respondents bear directly against them.

The only question remaining is whether, conceding the facts alleged to be true, appellants have lost their right to have the decree set aside by failure to appeal therefrom. We think they have. The order setting apart the homestead is appealable. Code Civil Proc. § 963, subd. 3;[1] Estate of Burns, 54 Cal. 223. The heirs had notice of the application for a homestead, the estate has been fully administered, and the complaint fails to show "that any fraud or device was resorted to by defendants whereby plaintiffs * * * have been prevented from making proof in reference to" the character of the property from which the homestead was selected. Kearney v. Kearney, 72 Cal. 591, 15 Pac. Rep. 769. The judgment is affirmed.

We concur: WORKS, J.; FOX, J.

(80 Cal. 505)

RICHARDS *et al.* v. TRAVELERS' INS. CO.

(No. 13,111.)

(*Supreme Court of California.* Sept. 12, 1889.)

INSURANCE POLICY—PLEADING—AIDER BY VERDICT.

1. A complaint, in an action for the breach of a contract of life insurance, which contains neither an allegation of non-payment of the policy, nor one from which the non-payment can be implied, is fatally defective.

2. The fact that defendant submitted a general demurrer to the complaint without argument is not a waiver of the defect, as the objection is raised by the demurrer, and not by the argument.

3. There being an entire absence of a material allegation, the defect is not cured by a verdict in plaintiffs' favor.

In bank. Appeal from superior court, Nevada county.

T. M. Osment and *Fred Searls*, for appellant. *C. W. Cross* and *P. F. Simonds*, for respondents.

WORKS, J. This is an action on a policy of life insurance. There was a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action. The demurrer was overruled. The defendant answered, denying the material allegations of the complaint, and setting up some affirmative matters. There was a trial by jury, verdict for the plaintiffs, and judgment accordingly. The defendant appeals on the judgment roll.

The only point made in this court is that the demurrer to the complaint was improperly overruled, for the reason that there was no allegation in the complaint that the policy was unpaid, or any allegation showing a breach of the contract. A party suing upon a contract to pay money must show a breach of the contract, or his complaint states no cause of action. Therefore it is held that the complaint must, in such cases, allege the non-payment of the money claimed under the contract. Du Brutz v. Jessup, 70 Cal. 75, 11 Pac. Rep. 498; Morgan v. Menzies, 60 Cal. 341. Numerous other decisions of this court might be cited; but the question is too well settled in this state to render such citations necessary. The complaint was fatally defective in this respect. It contained no allegation of non-payment; nor is there any allegation from which such non-payment can be implied.

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[1] This section provides, *inter alia*, that an appeal may be taken from an order confirming, or refusing to confirm, a report of an appraiser setting apart a homestead.

Counsel for respondent attempt to meet the objection on two grounds, viz., that the demurrer appears, from the record, to have been submitted without argument, which should be taken as a waiver of the point, and that the defect was cured by the verdict in favor of the plaintiffs. Neither of these grounds can be maintained. We know of no reason for holding that a party who submits a demurrer without argument thereby waives any objection raised by the demurrer. The objection is taken by the demurrer, and not by the argument; and it points out to the court and the opposite party every objection to the complaint that is raised by such a demurrer. It is the duty of the opposite party to look to his pleading, and see that it is sufficient to withstand such a demurrer; and it is equally the duty of the court to examine the pleading, and determine as to its sufficiency, whether the demurrer is argued or not.

The doctrine that a defective pleading may be cured by verdict has no application, where there is an entire absence of a material allegation. Barron v. Frink, 30 Cal. 489; Morgan v. Menzies, supra. Judgment reversed.

We concur: BEATTY, C. J.; THORNTON, J.; PATERSON, J.; SHARPSTEIN, J.; FOX, J.

(81 Cal. 608)

SOMERS v. SOMERS. (No. 13,169.)

(*Supreme Court of California.* Dec. 4, 1889.)

APPEAL—RECORDS—AUTHENTICATION.

The certificate of a trial judge which simply recites that the affidavits of certain persons were used and considered, but fails to show that the affidavits set out in the transcript on appeal from an order after judgment are the same or true copies of the ones used on the hearing, is insufficient, and the appeal should be dismissed. BEATTY, C. J., and THORNTON and SHARPSTEIN, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; JAMES G. MAGUIRE, Judge.

Matt I. Sullivan, for appellant. *R. B Mitchell*, for respondent.

WORKS, J. This is an appeal from an order, made after judgment, allowing the appellant an attorney's fee for services to be rendered in defense of a motion for a new trial and an appeal to this court. The respondent moves to dismiss the appeal on the ground that there is no bill of exceptions, and that none of the proceedings and papers used on the hearing are properly authenticated. There is a certificate of the judge of the court below, which will be noticed hereafter, that certain papers named were used on the hearing.

In the case of Herrlich v. McDonald, ante, 299, it was said: "It is also a matter of serious question whether any of the papers claimed to have been used on the alleged motion are properly authenticated. As we have said, there is no bill of exceptions. The only authentication is by the certificate of the judge of the court below, at the close of the transcript. * * * Formerly it was expressly provided that, on motion for a new trial, affidavits used might be identified by indorsement by the judge or clerk, at the time, as having been read or referred to on the hearing. St. 1861, p. 590; Hayne, New Trials & App. 790. The present Code has no such provision. It is simply provided that 'on appeal from a judgment rendered on an appeal or from an order, except an order granting or refusing a new trial, the appellant must furnish the court with a copy of the notice of appeal, of the judgment or order appealed from, and of papers used on the hearing in the court below.' Code Civil Proc. § 951. We are of the opinion that, without a statutory provision authorizing the authentication of copies of papers in some other way, the only proper way that they can be brought into the record and identified is by a bill of exceptions. There are decisions of this court, however, in which it has been rather taken for granted that a certificate of the judge is sufficient. Walsh v. Hutchings, 60 Cal. 228; Nash v. Harris, 57 Cal. 243; Larkin v. Larkin, 76 Cal. 323, 18 Pac. Rep. 396. And in one case it was held in department that, as the statute prescribed no mode in which such papers should be authenticated, 'this court had power to prescribe by rule how such papers shall be brought before it on appeal; and, if it has power to make such a rule in advance, it has the power to ratify the mode adopted by the court below;' and upon this proposition was founded the decision in that case that the certificate of the judge of the court below was sufficient. Pieper v. Land Co., 56 Cal. 173. But the Code does provide, in express terms, how all papers, proceedings, and exceptions, not otherwise a part of the record, may be made such, viz., by a bill of exceptions or statement. Code Civil Proc. §§ 646, 649–651. In case of an appeal from any decision made after judgment, a bill of exceptions is the proper, and, in our opinion, the only proper, mode of authentication. Id. § 651. But the respondent has not asked us to affirm the order on the ground that the question is not properly presented; and in view of this fact, and considering the state of uncertainty in which the question is left by the decided cases, we prefer to decide this case on its merits. We must say, however, that if this court has the power to determine that papers to be used on appeal may be authenticated in a way not provided for by statute, when a different way is provided for, which we very much doubt, it should be done by a rule adopted in advance, and made applicable to all cases, and not be left for the court to say in each case whether or not the mode adopted in that case is sufficient."

In the early history of Code practice, it was the tendency and inclination of the judges who had been educated under the common-law practice to construe the Codes strictly. The reaction has come, and the courts of the present day have, in many instances, gone to the other extreme. The judge who, at the present time, disregards the plainest provisions of the Codes relating to the practice, with a view of reaching and deciding a case on its merits, is regarded as a man and a judge of "broad views." The one who is in favor of administering the law as it is written is "narrow-minded." Judicial legislation is, as a rule, the worst of legislation. It is almost invariably the offspring of some real or supposed hardship which may result from the decision of the particular case in hand in accordance with existing laws or well-established rules of procedure. An attorney who has a plain statute before him has not followed it, but has resorted to some other means of presenting his case. The court, rather than deny him a hearing on the merits, approves his course, and thereby establishes a rule of practice unknown to the Code, and hitherto unheard of, and brings uncertainty and confusion into the practice. Such infractions of the rules of practice make bad laws, poor lawyers, and unreliable courts. Lawyers come to believe that all they have to do is to satisfy the liberal mind of the court not to comply with the law. We believe it to be a wrong to competent attorneys, an injustice to the court, and an injury to litigants.

The decided cases on the question we are now considering present a strong example of this good-natured, but mistaken, policy of extreme liberality. If the plain provisions of the Code had been followed, this case would have been presented to the court as follows: "In the superior court of the city and county of San Francisco. Isabel M. Somers, Plaintiff, vs. Calvin F. Somers, Defendant. Divorce. Be it remembered that on the 23d day of November, 1888, at 10 o'clock A. M., the plaintiff in this cause, pursuant to notice previously given, moved the court for an order allowing the plaintiff the sum of $100 attorney's fee in said cause, and requiring the defendant to pay the same into court for said purpose, and, in support of said motion, introduced the following evidence: 'Affidavit of R. B. Mitchell, as follows,' etc. The defendant offered no evidence in his behalf. And the court having heard the evidence, and being advised in the premises, sustained said motion, and made the order prayed for, to which the defendant at the time excepted, and now presents this, his bill of exceptions, and asks that the same be allowed and settled. The foregoing bill of exceptions is settled and allowed as correct, this —— day of ——, 1888. JAMES G. MAGUIRE, Ex-Judge of the Superior Court." What more simple or convenient means of presenting the case could be devised? Instead of this, we have the following: "I, James G. Maguire, judge of the superior court of the city and county of San Francisco on the 28th day of November, 1888, hereby certify that upon the hearing of plaintiff's motion on said 23d day of November, 1888, for order requiring defendant to pay to plaintiff, or her attorney, the sum of $100 as counsel fee and costs on defendant's motion for new trial, the following papers were used and considered by the court, to-wit: Affidavit of R. B. Mitchell, made upon plaintiff's said motion, and attached to the notice of said motion; the notice of said motion; and affidavit of Frank T. Cusack of service of said notice. JAMES G. MAGUIRE, Ex-Judge of the Superior Court."

As was said in Herrlich v. McDonald, supra, there is no authority whatever in the Codes for any such authentication of papers. This court adopted it as sufficient in the case of Pieper v. Land Co., supra, but not on the ground that there was any law authorizing it. On precisely the same theory, if the papers presented by appellant were verified by the affidavit of his attorney, we might say we are entirely satisfied that the papers are correct copies, and we will not stand on technicalities, and deprive the appellant of the benefit of his appeal. But we think the conclusion reached in the case referred to was based upon an erroneous view of the law. The ground taken was that, as no means were provided by statute for authenticating the papers, the court might provide a mode by rule, and, not having done so by a general rule, it could approve a mode adopted in that case. As we have seen, the Code does provide a mode of authenticating papers on appeals of this kind, and therefore the conclusion reached in the case cited has no foundation to rest upon.

It is well said that counsel and their clients should be protected where they have followed the practice approved by this court, and we acknowledge the force of the suggestion. Strangely enough, courts of justice are expected to perpetuate their errors, instead of correcting them. There is a legitimate reason for this in some cases; for example, where property rights have grown up under a decision which is subsequently ascertained to have been erroneous. But such a doctrine has no application to decisions affecting mere questions of practice. If the matter were one which could be controlled by rules of court, and was not governed by positive law, we should be in favor of adopting a rule that hereafter all cases must be presented by bill of exceptions, but that cases now pending should not be affected thereby. But, as we do not believe that this court has any authority to regulate the mode of presenting papers on appeal where one is provided for by statute, we feel constrained to dismiss the appeal on the ground that the papers could only be presented to this court by bill of exceptions. But, if we are wrong in this, the certificate in this case is entirely insufficient. There is nothing in it to show that the papers set out in the transcript are true copies of the ones used at the hearing. The certificate simply recites that the affidavits of certain persons were used and considered, but it is not certified that the affidavits set out are the same that were used, or true copies of them. For aught we can tell, these same parties may have made other and different affidavits, or the copies furnished us may not be correct copies, and other evidence may have been used and considered at the hearing. In other words, the affidavits set out in the transcript are not authenticated as true copies of the ones used at the hearing; nor is it shown in any way that the ones set out were all that were used. For these reasons the appeal is dismissed.

I concur: Fox, J.

Paterson, J., (*concurring*.) I concur in the judgment on the last ground mentioned by Justice Works, viz., that the affidavits are not shown to be the ones which were used on the hearing. The question how such papers shall be authenticated I take to be one of very little importance. It is better that a rule of practice—mere practice—be steadily adhered to, even if it has arisen out of an erroneous construction of some provision of the Code. Nothing disturbs and annoys practitioners more than judicial vacillation from one rule of practice to a different one on the same matter. Furthermore, it would be manifestly unfair to now change the rule and dismiss appeals —and the right of appeal is property of a high order sometimes—which have been perfected upon a rule sanctioned by this court. A rule ought to be adopted for future cases as suggested.

I concur: McFarland, J.

Beatty, C. J., (*dissenting*.) If the question involved in this motion were a new one, I should feel little hesitation in concurring in the opinion of Mr. Justice Works; but since the appellant has pursued the practice approved in Pieper v. Land Co., 56 Cal. 173, in bringing up certified copies of the papers used at the hearing in the superior court, I do not think we are justified in reversing our former ruling, and dismissing his appeal. I think, however, it would be well to make a rule to operate prospectively in accordance with the views of Justice Works.

Thornton, J. I dissent. The practice pointed out in Pieper v. Land Co., 56 Cal. 173, is correct, and in accordance with the statute. It has been frequently approved, notably in People v. Jordan, 65 Cal. 648, 4 Pac. Rep. 683, where six judges concurred, and no one filed a dissent. It settled the practice, and has remained undisturbed until this case, and unchallenged until the *dictum* in Herrlich v. McDonald appeared. This court has also said that it would accept a bill of exceptions under the like circumstances, and has accepted and acted on it. I see no ground for disturbing the settled practice, and am not willing to do so, whether laid down by a broad-minded or a narrow-minded court. It would be unjust to litigants to change it now. The certificate of Judge Maguire that Mitchell's affidavit was used on the hearing of the motion is sufficient, and the appeal should not be dismissed. The appellant is entitled to a hearing on his appeal. As to the objection that the judge's certificate does not show that the affidavit of Mitchell appearing in the record is a true copy, it need only be said that this is not the duty imposed on the judge. There was but one affidavit of Mitchell, and this the judge certifies was used on the hearing. The certificate of the clerk states that the papers contained in it are true and correct copies of these originals, and that said copies have been compared by him with said originals. This certificate authenticates the affidavit appearing in the transcript as a correct copy. It is said in the opinion of Mr. Justice Works: "As was said in Herrlich v. McDonald, supra, there is no authority whatever in the Codes for any such authentication of papers. This court adopted it as sufficient in the case of Pieper v. Land Co., supra, but not on the ground that there was any law authorizing it." It is a very strange assertion that this court would adopt any rule when not authorized by law. The law authorizing this court to adopt such rule is found in the Code of Civil Procedure, § 187. Under this section a most important rule was adopted in Mawson v. Mawson, 50 Cal. 539. In this case the party was entitled to a homestead, and no mode of setting it apart by the probate court was provided by law, and it was held under this section that the court might itself establish a rule of doing so. The section above cited is applicable to this court. Further, this court can frame and issue all writs, and make all rules necessary to the exercise of its appellate jurisdiction, where the statute has not provided one. Section 51, Code Civil Proc.; People v. Jordan, supra. The power was ample to make the rule in Pieper v. Land Co. It was not alluded to in the opinion for the reason that it was so well known to the members of the court that it was considered unnecessary to extend the opinion by inserting it. The motion to dismiss the appeal should, in my judgment, be denied.

Sharpstein, J. I concur in the dissenting opinion of Thornton, J.

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85 Cal. 39

People v. Sevine. (No. 20,572.)

(*Supreme Court of California.* Dec. 5, 1889.)

Arson—Evidence—Experiments in Court.

1. On a trial for arson, it appeared that the fire started at about 1 o'clock at night in an hotel basement, occupied as a saloon by defendant, who was not at that time doing a prosperous business. Defendant's fixtures were insured for $2,500, and a few days before the fire he had tried to sell them at auction, but had failed to receive a bid of $2,000 for them. The proprietor of the building testified that defendant had said, if he could not sell for $1,600, he would have to sell out to the insurance company. The fire was discovered behind the bar, and on effecting an entrance into the room the bar was found to be all ablaze, and the room stifling with the smell of coal oil. Rags, straw, and other refuse matter, saturated with coal oil, were found near the fire, and the walls, counters, and floor were in a like condition. A small piece of candle was found burning in a locker under the counter, with some of the refuse satu-

rated with oil near it, while two other small pieces were found under the counter not burning. An experiment was made, the result of which was given in evidence, which demonstrated that it took an hour and 42 minutes to burn a candle down to the point to which these had burned. *Held*, that the evidence was sufficient to warrant a conviction, though defendant's evidence was to the effect that after closing his saloon, about 11 o'clock, he went home, where he remained until notified of the fire.

2. Evidence showing the amount of defendant's loss, and the value of stock remaining, as ascertained in the course of an adjustment of the loss, in the presence and with the assistance of defendant, is admissible on the question of motive.

3. The trial judge is not bound to stop proceedings in order to try an experiment in open court as to the length of time it would take a candle to burn down to the point of those discovered in defendant's saloon after the fire; but, in his discretion, he may admit proof of such an experiment.

Department 1. Appeal from superior court, Los Angeles county; J. W. McKinley, Judge.

Paxton & Grant and *Max Lowenthal*, for appellant. *George A. Johnson*, Atty. Gen., for the People.

Fox, J. Information against the defendant for the crime of arson; verdict of guilty; motion for new trial made and denied; and judgment of imprisonment. Defendant appeals from the judgment, and from the order denying his motion for new trial. Defendant's points are nowhere stated separately, or with any degree of clearness, and we are left to fish them out, as best we may, from a general argument as to the character and weight of the evidence, and alleged errors of the court, in the course of the trial, in the admission and rejection of evidence. On the night of January 24, 1888, a fire broke out in the basement of the New United States Hotel, at Los Angeles; the fire being discovered, and the alarm sounded, at 12.45 o'clock. Said basement was at the time occupied by the defendant as a saloon. The evidence leaves no possible doubt that the fire was incendiary, and that fact is not disputed; but it is claimed that the evidence was insufficient to show that the defendant committed the act, and that several errors occurred, during the trial, in the admission and rejection of evidence, and in the charge to the jury.

It is established by the evidence that the defendant was the lessee of this basement, and in it was carrying on a saloon, which was not at the time a prosperous concern. A few days before the fire, he had made an effort to sell it at auction, but could not realize at the sale the limit which he had placed upon it, and the sale was not made. The limit fixed was $2,000. The stock and fixtures were insured for $2,500. When the fire was first discovered, it was seen through a window, and was located behind the bar. When an entrance was effected, the bar was all ablaze, and the room was stifling with the smoke of coal oil. Even after the fire was extinguished, persons could not remain in the place long at a time, because of the strong smell of coal oil. A coal-oil measure and a five-gallon coal-oil can were found in the room, near where the fire started; also, rags, straw, and other refuse matter were found near the fire, and at several points in the room, saturated with coal oil, as also were the walls, counters, and floors. According to defendant's testimony the only use defendant had for or made of coal oil in the premises was to supply his cigar lighter. A few days before the fire, a plumber, who had been engaged in making some repairs in the premises, had left three half candles there. There were several lockers under the counter. In one of these a small piece of candle was found, still burning, with some of the refuse saturated with coal oil near it. Two other small pieces of candle were found under the counter, but not burning when found. An experiment was afterwards tried in the burning of half candles, and it was found that it took an hour and 42 minutes to burn one down to the point to which these had been burned, and the result of this experiment was given in evidence. The piece found still burning was shorter than the others. The owner of the building testified, among other things, to a conversation had with the defendant, some time before the fire, in which defendant said he could not pay the rent, and desired to sell out; saying that, if he could not sell out for $1,600, he would "have to sell out to the insurance company." The evidence on the part of the defense shows that the defendant closed up the saloon at about 11 o'clock that night; that during the evening several persons had been in the saloon, and noticed no smell of coal oil; that some of them remained until the saloon closed, and saw the defendant when he locked up and left the place, and they observed no smell of coal oil, or other unusual occurrence or proceedings about the saloon. According to the testimony of the defendant, he went almost directly home, and went to bed. Other evidence shows that he did, not long after the time when it is proved the saloon was closed up, go home and go to bed, where he remained until notified of the fire.

Under this evidence, the defendant relies upon proof of *alibi*, and want of proof of motive. We have given but a brief summary of the principal points in the evidence, but we have examined all the testimony with great care, and, on the evidence, we cannot say that the jury were not justified in coming to the conclusion which they did. The evidence seems to us sufficient to justify the verdict, and we cannot disturb that verdict on the ground of insufficiency of evidence.

Exception is taken to the ruling of the court in admitting the testimony of the witness Rhodes. The objection was taken to his evidence as a whole; the counsel refusing to make specific objections to particular parts of it. The court did not err in overruling that objection.

Nor was there any error in the rulings of the court in reference to the admission of the testimony of the witnesses Wheeler and Kinnie. That evidence was entirely with reference to the adjustment of the loss, and was introduced as showing the amount of loss as agreed upon, and the value of the stock remaining, as ascertained in the course of adjustment, in the presence of and with the assistance of the defendant. It tended to prove motive, and was admissible for that purpose. It was not conclusive, and did not preclude the defendant from introducing other evidence as to value.

The rulings of the court in sustaining the objections to the questions put to the witness Mesmer on cross-examination were not erroneous. Counsel had already drawn out from the witness that the hotel was mortgaged for $50,000, and that it, with its contents, was insured for $65,00 . The questions objected to were irrelevant and incompetent, and not calculated to prove overinsurance or motive in Mesmer to set the fire.

It was a matter resting entirely in the discretion of the court to admit proof of the candle experiment. It would probably have admitted similar proof on the part of the defendant, if any had been offered; but the court was not bound to stop the proceedings of the court, and try the experiment in open court, as proposed. In this connection, we notice a point made by associate counsel for the defense, who made the closing argument, and prepared the closing brief. It seems he made a candle experiment, after the case was appealed, in which he practically verified the testimony of the witness on that subject as to the length of time it would take a half candle to burn down to the point reached by those discovered at the time of the fire. From that result, and from the fact that it was half to three-quarters of an hour after the fire was discovered before the candle which was found still burning was found, he argues that it was impossible that these trains could have been laid, and those candles lighted, until at least a half an hour after the defendant left the place. It will be remembered that the candle found burning was found in a closed locker or drawer. It was because it was so closed in that it was not earlier discovered. The fact that it was so shut out from the air, and in a confined space, will of itself account for that candle holding out so much longer than the others; and, if counsel will try the experiment, he will probably find that a half candle burning under such circumstances will last fully half to three quarters of an hour longer than a similar one burning in the open air of the room.

It is claimed that the court erred in giving the eighth and ninth instructions. We fail to perceive anything in either of which the defendant can complain. Both state the law correctly and clearly, and counsel fails to show any reason why they should not have been given.

There was nothing in instruction No. 10½ of which the defendant can complain. The court correctly laid down the law as to the effect of the proof of *alibi*, and, in cautioning the jury as to the propriety or necessity of carefully scrutinizing such evidence, adopted language which has several times met the approval of this court. People v. Wong Ah Foo, 69 Cal. 180, 10 Pac. Rep. 375; People v. Lee Gam, 69 Cal. 552, 11 Pac. Rep. 183.

The court did not err in refusing to grant a new trial on the ground of newly-discovered evidence. The affidavits failed to disclose any newly-discovered evidence which would be competent or admissible for any purpose. Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.

Rehearing granted.

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81 Cal. 625

HERMON v. PARIS. (No. 12,317.)

(*Supreme Court of California.* Dec. 5, 1889.)

APPEAL—REVIEW.

On an appeal from a judgment and an order denying a new trial, the fact that the court refused to order the sheriff to amend his return to a writ of attachment issued in the case cannot be considered, as the attachment papers in no way affect the validity of the judgment or the order appealed from.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

W. H. H. Hart, for appellant. *I. B. L. Brandt*, for respondent.

HAYNE, C. This was an action upon two promissory notes alleged to have been made by the firm of O. M. Paris & Co., which was composed of the defendant Paris and one Hutchinson. The court below gave judgment against both defendants for the amount of one of the notes only, and the defendant Paris appeals from this judgment and from a order denying a new trial.

It is contended that the court erred in refusing to order the sheriff to amend his return to a writ of attachment, which had been issued in the case, so as to show certain facts in relation to the service of the attachment papers. But the attachment papers in no way affected the validity of the judgment or order denying a new trial, and the questions in relation to them cannot be considered on the appeals taken. Allender v. Fritts, 24 Cal. 447. It is next contended that the evidence shows that the partner who signed the note had no authority to give a note in the name of O. M. Paris & Co. The facts in relation to this point are that, some time prior to the formation of the said firm, the defendant Hutchinson was doing business for himself under the style of T. R. Hutchinson & Co., and was indebted to W. & J. Steinhart & Co. in a sum of money, for which they held his promissory note, which circumstances were known to the defendant Paris. In this condition of affairs Paris & Hutchinson formed a partnership under the old name of T. R. Hutchinson & Co., and by the articles it was agreed that "said copartnership hereby agrees to and does assume the payment of all the liabilities of T. R. Hutchinson & Co," and the Steinhart note was thereupon entered upon the books of the firm as one of its liabilities. Thereafter the name of the firm was changed to O. M. Paris & Co., without any change in its membership. The old Steinhart note was retired, and a new one given in the new firm name. The learned counsel for the appellant says that "probably Hutchinson would have had the right to execute a note to W. & J. Steinhart & Co. for said debt in the name of T. R. Hutchinson & Co., but certainly not in the name of O. M. Paris & Co." If such a course had been taken the defendants would have certainly been bound, for the payment of the old note had been assumed by the same individuals under a different name. The objection, therefore, goes merely to the way the note was signed. But the court finds that the giving of the note in the name of the firm of O. M. Paris & Co. was "with the authority and consent of the said defendant O. M. Paris," and there is evidence to sustain this finding. The only objection to the judgment is that by a clerical error it was entered for $4.09 too much. We therefore advise that the judgment be modified by striking off the sum of $4.09, and that as modified it be affirmed, without costs of appeal to the appellant.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is modified by striking off the sum of $4.09, and that as modified it be affirmed, without costs of appeal to the appellant.

(81 Cal. 627)

DAVIS *et al.* v. CHALFANT. (No. 12,049.)

(*Supreme Court of California.* Dec. 5, 1889.)

JUDGMENT—EQUITABLE RELIEF—PLEADING.

A complaint to have a judgment, and an order denying a motion for a new trial, set aside, which alleges that, owing to the negligence, fraud, or mistake of plaintiffs' attorney in not having an undertaking on appeal filed within the time required by law, the appeal from the judgment and order was dismissed, and that the judgment and order were and are unjust, inequitable, and contrary to law, but which makes no charge of fraud against defendant, nor of collusion between defendant and plaintiffs' attorney, does not state a cause of action, where there is no allegation that there was not a fair trial in the action, and plaintiffs' motion for a new trial, exhibited in the complaint, shows no error in point of fact.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. MCGARVEY, Judge.

Scrivener & Boone, (*Bert Schlessinger*, of counsel,) for appellants. *T. L. Carothers*, for respondent.

VANCLIEF, C. In April, 1882, John E. Chalfant, the defendant herein, commenced an action against the plaintiffs herein (Davis and Jones) to foreclose a mortgage executed by Jones to Aaron Chalfant, and assigned to the plaintiff in that action. Davis was made a defendant therein, as a purchaser of the mortgaged premises, subsequent to the mortgage. Jones failed to answer, and his default was duly entered. Davis answered, and upon his answer alone the cause was tried, and the trial resulted in a decree for the plaintiff, foreclosing the mortgage, entered July 21, 1882. From that decree, and from an order denying a new trial, appeals were taken to this court; but, because the undertakings on appeal were filed more than one month before the filing of the notice of appeals, the appeals were dismissed on the 26th day of January, 1885. 5 Pac. Rep. 626. The object of the present action (commenced October 26, 1885) is to set aside and vacate the decree of foreclosure, and the order denying a new trial of the action of Chalfant v. Davis and Jones, and to obtain a new trial of that action. The complaint, and exhibits thereto attached, occupy 55 pages of the transcript, the exhibits consisting of the judgment roll, and the statement on motion for new trial, in the foreclosure action. To this complaint the defendant demurred on the ground "that it does not state facts sufficient to constitute a cause of action against him." The demurrer was sustained, and, upon failure of plaintiffs to amend their complaint, final judgment was rendered in favor of the defendant. From this judgment the present appeal is taken, and whether or not the demurrer should have been sustained is the only question to be decided.

The *gravamen* of the complaint is that through and by the negligence, fraud, or mistake of James T. Rogers, the attorney for the defendants in the foreclosure suit, (plaintiffs here,) the undertakngs on appeal from the decree and order in that suit were not filed at or within the time required by law, in consequence of which said appeals were dismissed; "that the dismissal of said appeal by the supreme court aforesaid was wholly and entirely caused by the false representations, statements, and erroneous advice and instructions to plaintiffs" by their attorney; "that, but for said false representations, statements, and erroneous advice and instructions, plaintiffs could have filed, or caused to be filed, at said time, said undertakings on appeal, and the said appeal could and would have been perfected in accordance with law, and the same would have been heard and decided by said supreme court according to its merits; * * * that the judgment and order denying the motion for new trial, made and entered in said cause, were and are unjust and inequitable and against law, and, as plaintiffs are informed and verily believe, would have been reversed by the supreme court of the state of California, had the appeal therein been properly perfected;" that the said false representations, statements, and erroneous instructions and advice given to plaintiffs, as aforesaid, were made and uttered by the said Rogers with the intention of depriving plaintiffs herein of their remedy of appeal from the judgment and order denying motion for a new trial entered in said cause; "that, immediately after the rendition of said judgment and order, said Rogers was well aware of plaintiffs' wish and desire to have the same reviewed by the supreme court of the state of California, and constantly and repeatedly promised that an appeal therefrom would be legally taken and perfected; that plaintiffs, in reliance on said promises, made no attempt or effort to discover the real facts concerning said appeal, but up to the 2d day of September, 1884, or thereabouts, fully supposed and believed that an appeal from said judgment and order had been taken in accordance with law." But the complaint makes no charge of fraud against the defendant, and no charge of collusion between defendant and plaintiffs' attorney.

It is not alleged that Davis did not have a fair trial in the foreclosure action, nor that judgment was not properly and fairly rendered therein against Jones by default, according to his intention; and as there appears to be no error on the face of the judgment roll in that action, as exhibited here, the judgment by default against Jones should be regarded as conclusive against him in this action. The allegations "that the judgment, and order denying motion for a new trial, made and entered in said cause, were and are unjust and inequitable and against law," are too general and too indefinite, as they neither indicate nor imply any fraud on the part of the defendant or his assignor; since a judgment may be unjust, inequitable, and erroneous without being fraudulent, or subject to be set aside by a court of equity. Murdock v. De Vries, 37 Cal. 527; Ross v Wood, 70 N. Y. 8. Neither does the statement on motion for new trial, as exhibited in the complaint herein, show any error in point of fact. The most that can be reasonably claimed is that the evidence as to some of the material issues was substantially conflicting, and conceding that, in point of law, the court erred in refusing to allow Aaron Chalfant to be cross-examined by defendants in that action as to the items of accounts between him and Jones at and before the time the mortgage note was made, for the purpose of impeaching the consideration of the note, yet there is no averment of what the witness would have testified, had the cross-examination been permitted, as there should be in a complaint in equity, the object of which is to impeach a judgment and to obtain a new trial on the ground of fraud, accident, or mistake. In cases of this class it should be made to appear, with reasonable certainty at least, that a new trial would result in a judgment more favorable to the party asking it than the judgment sought to be set aside. The following cases bear, more or less directly, on the general question as to the sufficiency of the complaint in this case: Long v. Smith, 39 Tex. 160; Seay v. Hughes, 5 Sneed, 155; Crim v. Handley, 94 U. S. 652; Kern v. Strausberger, 71 Ill. 413; Brown v. Wilson, 56 Ga. 534; Nicholson v. Patterson, 6 Humph. 394; Newman v. Morris, 52 Miss. 402; Quinn v. Wetherbee, 41 Cal. 247; Boston v. Haynes, 33 Cal. 31; Mastick v. Thorp, 29 Cal. 445; Zellerbach v. Allenberg, 67 Cal. 296, 7 Pac. Rep. 908. I think the demurrer to plaintiffs' complaint was properly sustained, and that the judgment should be affirmed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is affirmed.

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3 Cal. Unrep. 187

LEHMANN v. SCHMIDT. (No. 12,547.)

(*Supreme Court of California.* Dec. 5, 1889.)

FACTORS—LIEN—CONVERSION.

Defendant agreed to sell plaintiff's wine at a certain net price, the excess to be divided equally between them. After receiving a part thereof, and making advances to plaintiff thereon, and paying freight, in accordance with the agreement between them, defendant refused to receive any more; and, before any of the wine had been sold, plaintiff demanded a return of that which defendant had received, without offering to pay back the money which defendant had advanced and expended for freight. *Held*, that under Civil Code Cal. §§ 2026, 3051, 3053, defining a factor, and giving him a lien on the property placed in his hands for money advanced and expended, defendant was a factor, and had a lien on the wine, and a right to retain it, so that his refusal to comply with the demand did not constitute a conversion.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JAMES G. MCGUIRE, Judge.

Action by Ernst Lehmann against R. Schmidt for goods sold and delivered. Judgment for plaintiff, and defendant appeals.

Chapman & Slack, for appellant. *A. Heyneman*, for respondent.

BELCHER, C. C. The case presented for consideration is this· One E. B. Smith was the owner of about 100,000 gallons of wine, which he desired to sell The wine was stored in a cellar at Cordelia, and was in an unsalable condition. Smith met the defendant, Schmidt, and, as he testifies, Schmidt said "he thought he could make a proposition to me, and that, if I would name the standard price that I would be willing to receive for the wine, that he thought he could bring it to the city and treat it, and whatever could be got more than the amount that I would be willing to sell it for after treating it would be divided between us." The parties then entered into a written agreement, as follows: "San Francisco, March 3, 1886. Agreement made between E. B. Smith, of Martinez, and R. Schmidt, of San Francisco, as following: (1) The said E. B. Smith, having at his cellars at Cordelia about 50,000 gallons Malvasia and Mission, 30,000 gallons Zinfandel, and 22,000 Malvasia, agrees to sell his wines through the agency of the said R. Schmidt at the standard price of 20 cents (twenty cents) per gallon, net. (2) The said R. Schmidt agrees to prepare these wines into a marketable condition at the rate of 1 cent (one cent) per gallon, and to outlay freight on these wines to this city, amounting about to 1 cent (one cent) per gallon. It is further agreed between the parties hereto that all the profits arising out of the sale of these wines over and above the standard price of 20 cents per gallon, and the additional expenses, about 2 cents per gallon, shall be divided in equal shares between the parties hereto; and the said R. Schmidt agrees to furnish the necessary advances of money, in case E. B. Smith is in want of any, the latter giving the proper time of notification to procure the money. No commissions to be deducted, as the one-half of the profit is considered equivalent for all charges and commissions." Under and in pursuance of this agreement, Smith sent to defendant, on the 20th day of March, 1886, 5,802 gallons of the wine, and, on the 8th day of May following, 2,179 gallons more; and defendant received the wine, and paid the freight thereon. On account of the wines so delivered, and under the agreement, defendant advanced and paid to Smith several sums of money, aggregating $678.50. Defendant also delivered to Smith some casks, which Smith says he ordered, and defendant says "were sold to Smith at his request, and the charges made against him as advances under said contract." For some reason not clearly stated, defendant became dissatisfied, and refused to receive the balance of the wine under the contract; and thereupon, on the 30th day of May, 1886, Smith sold all the wine remaining at Cordelia to other parties for 11 cents per gallon. Subsequently, on the 17th day of June, 1886, Smith demanded from defendant a return of the wines delivered to him under the contract, but defendant refused to give them up, or make any accounting. No offer was made at the time of this demand, or subsequently, so far as appears, to pay defendant the money he had advanced on the wines and expended for their freight and improvement, or any part thereof, nor to return to him the casks which he had furnished. In this condition of things, Smith, on the 17th day of July, 1886, sold and assigned to the plaintiff all his "interest and claim, of whatever kind and nature, in and to those 10,000 gallons of wine, more or less, now held by R. Schmidt, or sold by him for my account;" and thereafter, on the 23d day of the same month, the plaintiff commenced this action, alleging in his complaint "that on or about the 18th day of June, A. D. 1886, in the city and county of San Francisco, state of California, E. D. Smith sold and delivered to the defendant, and at his instance and request, those certain goods, wares, and merchandise, to-wit, 9,000 gallons wine, at 20 cents a gallon, amounting in the aggregate to the sum of eighteen hundred (1,800) dollars;" that defendant agreed to pay for the same, but had not paid the said sum, or any part thereof, though often requested so to do; and that Smith, on the 17th day of July, assigned, set over, and transferred to plaintiff "the aforesaid indebtedness and claim against said defendant."

The court below found, among other things, that Smith delivered to defendant, under the agreement, and at the times above stated, 7,981 gallons of wine, and that this wine was, at all the times mentioned, worth the sum of 20 cents per gallon, amounting to $1,596.20; that defendant advanced for and on account of the wines, under the agreement, the sum of $678.50 in money, and that he "made no further advances of any kind, or incurred liabilities of any kind, chargeable to said E. B. Smith under said agreement;" that defendant refused to proceed further under the agreement, and on the 17th day of June, 1886, Smith made a demand upon him for the return of said wines, and for an accounting of any wine sold by him under the contract, but that he refused to return the said wines, or to give any account of the same, or any part thereof; "that no part of said 7,981 gallons of wine had been sold by said defendant prior to said 17th day of June, A. D. 1886, and that the whole of said 7,981 gallons of wine was then and thereafter converted to the use and benefit of said defendant;" that on the 17th day of July, 1886, Smith, "by an instrument in writing, assigned, set over, and transferred to the plaintiff the indebtedness and claim against the defendant sued on in this action;" and, as a conclusion of law, that plaintiff was entitled to judgment against the defendant for the sum of $917.70, and legal interest thereon from the 17th day of June, 1886. Judgment was accordingly so entered, and from that judgment the defendant has appealed.

It is contended for the appellant that the judgment was erroneous, and that there are several sufficient reasons for its reversal. We think it necessary to consider only one of the objections urged. It is unquestionably settled law, as claimed by respondent, that, when one person takes and converts to his own use the personal property of another, the owner may waive the tort, and sue in *assumpsit* for the value of the property converted. Fratt v. Clark, 12 Cal. 89; Roberts v. Evans, 43 Cal. 380; Berly v. Taylor, 5 Hill, 577; 2 Greenl. Ev. § 108. But this rule does not apply to the case in hand. Here the defendant was employed by Smith as his factor to sell wine. Civil Code, § 2026. Some of the wine was shipped to him, and he paid the freight, and expended other money upon it. He also advanced to Smith a considerable sum of money. For the money so paid, expended, and advanced he had a valid lien on the wine placed in his possession. Id. §§ 3051, 3053. And, when demand was made that he return or account for the wine, it was all still in his possession unsold, and there was no offer to pay back to him any of this money. Under these circumstances, he had a right to retain the wine, and his refusal to comply with the demand did not constitute a conversion. From this it necessarily follows that the plaintiff had no cause of action in *assumpsit* for goods sold and delivered. His remedy, if he had any, was by some other action or proceeding. We therefore advise that the judgment be reversed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed.

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81 Cal. 652

In re WOLFE. (No. 11,944.)

(*Supreme Court of California.* Dec. 9, 1889.)

INSOLVENCY—DISCHARGE—STIPULATIONS.

An order discharging an assignor in insolvency will be vacated where, after the time for hearing the petition for discharge has been set, it is ordered, in pursuance of a stipulation filed, that the matter go off the calendar, to be reinstated and set for hearing on stipulation or on notice by petitioner, and thereafter, on a day subsequent to that originally set, petitioner, without notice or stipulation, procures the order of discharge.

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

Daniel Titus, for appellant. *W. R. Daingerfield*, for respondents.

WORKS, J. This is an appeal from an order vacating an order discharging the appellant in insolvency. The appellant filed his petition for a discharge, and gave the necessary notice to creditors of the time set for hearing. The petition for discharge was filed February 15, 1886, and the time for hearing fixed for the 22d of March, 1886. Between the time of filing the petition and the time fixed for the hearing a stipulation was entered into, to the effect that the matter go off of the calendar, to be reinstated and set for hearing upon stipulation or by notice by the attorney for the petitioner, and it was so ordered by the court. Without having the matter reset, or giving any notice, the petitioner came in, and on the 17th day of September following procured an order for his discharge. These facts were shown on the motion to vacate the order of discharge, and it was also shown that the petitioner had fraudulently omitted certain items of property from his inventory, by reason of which it was claimed that he was not entitled to his discharge. As to these charges of fraud there was evidence on the part of the petitioner tending to show that the same were not true, but upon this point the evidence was conflicting. As to the other facts relied upon they were not disputed. The court below correctly vacated the order of discharge. To allow a petitioner in insolvency to put his creditors off their guard by such a stipulation as was made in this case, and then come in, without any notice of a renewal of his proceeding, and procure his discharge on a day not named in his original notice, would be to countenance a course that might result in gross fraud and injustice. It is claimed by the appellant that his attorney could not bind him under section 283 of the Code of Civil Procedure, except by his agreement filed with the clerk, or entered upon the minutes of the court. But, conceding this to be so in a mere matter of procedure in court, the stipulation appears by the record before us to have been in writing and filed, and if it were not the petitioner could not act upon it by delaying his application until after the day fixed by the court for the hearing, and named in the notice, and come in afterwards and procure an order for his discharge on a day for which no notice had been given. It is also claimed that the time for filing objections to the discharge had passed, and therefore the objecting creditor had no standing in court for any purpose. But the time for contesting the discharge had not expired when the stipulation was entered into. The objection may have been, and probably was, prevented by the making of the stipulation. If the notice provided for in the stipulation had been given, the creditors would have had an opportunity to come in and contest the discharge by filing the necessary specifications. They were deprived of this opportunity by the failure to give such notice. Order affirmed.

We concur: FOX, J.; PATERSON, J.

(82 Cal. 36)

PEOPLE v. STONE. (No. 20,558.)

(*Supreme Court of California.* Dec. 12, 1889.)

JUSTIFIABLE HOMICIDE.

Where defendant, being in the actual and peaceable possession of land under a claim of title, is opposed in his entrance thereto, for the purpose of harvesting grain sown by him, by one whose wife has actual title thereto, and is, on advancing, fired at and wounded, as is also his son, who seized the opposing party when he drew his pistol, the killing of the opposing party by the defendant in firing at him is justifiable homicide. BEATTY, C. J., dissenting.

In bank. Appeal from superior court, San Benito county; JAMES F. BREEN, Judge.

Montgomery & Scott, *W. H. Webb*, and *T. H. Laine*, for appellant. *George A. Johnson*, Atty. Gen., *N. C. Briggs*, Dist. Atty., *M. T. Dooling*, and *J. H. Campbell*, for the People.

WORKS, J. The appellant was charged with the crime of murder, convicted of murder in the second degree, and sentenced to the state-prison for 10 years. The main contention on this appeal is that the evidence was insufficient to warrant a conviction for any offense. We have examined the evidence carefully, and find the facts, as shown by the undisputed evidence for both the people and the defendant, to be that the defendant was in the possession, and had been for a number of years, of a certain tract of land, and claimed to own it; that the wife of the deceased also claimed a part of it as government land on which her grantor had filed and received a certificate of purchase, it being a part of a larger tract the balance of which was in the preemptor's possession under his claim; that shortly before the killing of the deceased the party under whom she claimed had run a wire fence across the land without the knowledge of the defendant, thereby cutting off the part of the land claimed by the deceased from the balance of the land in possession of the defendant; that this piece of land, so cut off, had been sown in grain by the defendant, which was about ready to harvest; that the defendant and the deceased had each made threats against the life of the other if he attempted to enter upon the land and cut the grain; that on the day of the shooting the defendant was about to enter upon the land through said wire fence, and had cut the same for the purpose of passing through with his header wagon; that the deceased met him at the gap, and forbade him passing through, and told him if he did it was at his peril, and defendant told deceased he would pass through, that the header was coming, and that if he stood there until it came up he did so at his peril; that the deceased stepped forward, and stooped down as if in the act of closing up the gap, when the defendant moved forward within a few feet of him, and forbade it; that the deceased at once drew his pistol, when a son of the defendant jumped between the parties, and seized the deceased around the body, when the deceased fired, inflicting a severe wound on the defendant, and then turned his pistol on the son, who was still struggling with him, and fired two shots at him, wounding him first in the leg, and then in the eye; that after the deceased had drawn his pistol the defendant drew his, and fired several shots at the deceased, some of which took effect and caused his death. Whether the first shot fired by the defendant was immediately after the first shot of the deceased, or after he had shot and wounded the son, is not clear. The defendant and his son both testified that the former did not fire until after the former was wounded, and the latter was twice shot and wounded. A number of other eye-witnesses, some of whom were called for the prosecution, testified that the deceased drew his pistol first, and fired first, but they could not tell who fired the following shots, or at what times, or by which one of the shots either of the parties was wounded. There was evidence tending to show that the defendant had, both before and after the shooting, used language indicating ill will towards the deceased. There was also evidence admitted tending to show that the wife of the deceased had title to the land in dispute, and that the defendant had not.

We have been unable to discover any evidence in the record which would warrant a conviction of murder in the second degree, or any other offense. The defendant was in the actual and peaceable possession of the land, and had a crop growing on it that he was about to harvest. This the deceased attempted by force to prevent. This he had no right to do, conceding that his wife had a valid title to the land. He was therefore the aggressor from the beginning. He had put the lives of both the defendant and his son in imminent peril before he was fired upon. However deplorable the result may have been, he alone was responsible for it. The evidence shows conclusively that he had gone there for the purpose of preventing the defendant from going on the land. The acts of the defendant were strictly in the defense of himself and his son, and as a matter of law he was justified. The fact that the defendant had gone there armed was wrong in itself, and a circumstance against him, but it could not overcome the undisputed facts showing his acts to have been justifiable. There are other questions presented, but they are of minor importance, and need not be considered. Judgment and order reversed, and cause remanded.

We concur: Thornton., J.; Sharpstein, J.

Fox, J., (*concurring.*) I concur in the judgment. The evidence clearly shows that the 15 or 16 acres which the wife of deceased claimed as being a part of her preemption was within the inclosure of defendant; that defendant had been in the actual possession of it, in a common field with other lands held by him, for 18 years; that he had sown it and the whole field with grain, which was nearly ready to harvest, when some one ran a fence, consisting of two wires, stretched upon pickets set 15 or 18 feet apart,—a mere sham of a fence,—through his field, cutting off from the rest the 16 acres claimed by the wife of deceased. It further shows that when defendant had finished heading the balance of his grain he undertook to go through this wire fence with his headers, to harvest that 16 acres. He was as fully in possession as he had ever been, and had a right to harvest that crop. When he had reached the fence, and his header was about to pass through, the deceased came up on a gallop, and undertook to prevent it. In the combat which ensued, (which in one sense may be called a mutual combat,) the evidence is clear and positive that the deceased was the assailant. He had drawn his pistol and fired at least two shots, one at the defendant and one at his son, both of which took effect, before the defendant fired upon him. The firing then became mutual, and both fired until their pistols were empty. When defendant commenced firing he was already smarting under the sting of a severe and dangerous wound, and saw the blood flowing from a wound in the head of his son, (whose whole effort in the case had been to prevent a collision,) and an effort being made to again fire upon the son. Not being the aggressor, the defendant was not bound to retreat or decline further struggle. He was an old man, 70 years of age, at first acting in defense only of his own property, without the use of deadly weapons, and when attacked acting in defense of his own life and of that of his son. In my judgment, it is clearly a case of justifiable homicide, under section 197 of the Penal Code.

Beatty, C. J., (*dissenting.*) I cannot concur in the view that the verdict of the jury in this case is wholly unwarranted by the evidence. It is not clear that the defendant, at the time of the homicide, was in the peaceable and exclusive possession of the disputed premises. Deceased, or those he represented, had at least a scrambling possession. Not such a possession, certainly, as would have justified him in resorting to extreme measures in the attempt to defend it, but certainly a show of possession, backed by a claim of right. He was standing on the land, at a gap in the fence, where he had gone armed with a deadly weapon, determined to prevent the defendant from entering. The defendant, equally armed and equally determined, accompanied by his son, approached with the manifest purpose of going on the land to harvest the crop. The parties were bitter and open enemies. Each had insulted and threatened the life of the other, and each at the time plainly declared to the other what his present purpose was,—the one to enter, the other to resist his entry. Each also plainly notified the other that he would act at his peril. Immediately ensuing these mutual threats pistols were drawn on both sides, and the firing commenced. The preponderance of the evidence certainly is that deceased drew first, though this is not perfectly clear, and all the evidence is that he fired first, though not until defendant's son was in the act of seizing him. After the struggle commenced neither party had an opportunity to withdraw, or to notify his adversary that he declined further contest, and probably neither party desired to do so. The natural and inevitable result was the death of one of the combatants. Under these circumstances, it seems to me that the jury may well have found that the case was one of mutual combat, voluntarily entered upon under circumstances insufficient to justify either party, and therefore that the defendant's plea of self-defense, or defense of his son, could not avail him; he and his son having entirely failed to manifest the slightest wish to withdraw from the combat before its fatal termination.

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82 Cal. 24

Phillips v. Day. (No. 13,351.)

(*Supreme Court of California.* Dec. 11, 1889.)

Specific Performance—Title—Dedication.

In an action for specific performance, it appeared that the land had, at one time, been laid off into streets, lots, and blocks, but that the streets had never been accepted by the public authorities; that, after the recording of a map showing the streets, the land had been twice conveyed in a body, without reference to the streets; that several individuals had purchased lots before the recording of the map, and all of them except two had reconveyed to the original grantors; that one of the two who had not reconveyed had expressly waived any right to the streets on which his property fronts, and the other did not purchase on the faith of the map, nor does his property touch any of the streets; and that the land had been fenced and occupied by the vendor and his grantors for more than five years before the making of the contract. *Held*, that as no right to the alleged streets had ever vested in the public, and as whatever rights individual purchasers possessed had been cut off by the statute of limitations, the vendor's title was good.

In bank. Appeal from superior court, Sonoma County; JOHN G. PRESSLEY, Judge.

George Lezinsky, for appellant. *J. A. Barham* and *McGee & Barham*, for respondent.

WORKS, J. The facts of this case and the questions presented and tried in the court below are thus stated in the opinion of the learned judge of the court below, which is set out in the transcript: "In this case the plaintiff and defendant, on the 31st day of August, 1887, entered into a contract in writing, by which defendant bound himself to sell to plaintiff, and plaintiff bound himself to purchase, a tract of land, known as the 'John Fulkerson Place,' for the sum of $8,000,—'$500 to bind bargain, and $2,000 at expiration of sixty days, the balance in one or two years,' secured by note and mortgage on the property. Upon the making of the contract the plaintiff paid to the defendant the sum of $500, and on the 20th day of September thereafter paid the further sum of $700. An abstract of the title was furnished to the plaintiff, and, upon submitting the same to his attorney, plaintiff declined to perform his part of the contract, on the ground that defendant could not give him a perfect title, and, after such refusal, commenced this suit to recover the money which he had paid. Defendant answers, and, by way of cross-complaint, insists on plaintiff's specifically performing his contract. It appears from the evidence that the land bargained for is a part of a larger tract, once the property of Richard Fulkerson, who got title from the grantee of a Mexican grant. The property was fenced and cultivated by Fulkerson for more than thirty years. He conveyed it to James B. Armstrong, and put him in possession. Armstrong laid it off into streets, blocks, and lots. The streets were marked on the ground, and the one on which the land bargained for is situated was graded and graveled, but the fence inclosing it with the rest of the larger tract was never removed by James B. Armstrong, or Walter Armstrong, his successor in interest. Where this graveled street intersects the public highway leading from Santa Rosa to Healdsburg a gate was put in, but kept closed, and the inclosure, by means of the gates and fences, was maintained. No opening of any kind was made where the street north of the property in question intersects the highway. There were two gates on two other streets. James B. Armstrong, while he was owner, sold three of the lots, but none of them on the graded and graveled street. He afterwards sold and conveyed the balance of the tract to Walter Armstrong, who conveyed several of the lots; four, at least, of them being on the graveled street. After these conveyances were made Walter Armstrong filed in the office of the county recorder a map or plat of the tract which was called 'Norwood,' showing streets, blocks, and lots, and on the same day conveyed all of the tract which he had not sold to Richard Fulkerson. The conveyances from James B. Armstrong to Walter Armstrong, and from Walter Armstrong to Richard Fulkerson, recognize the map, but include the streets. The latter conveyance was filed for record about two hours after the filing of the map. A. W. Riley, who purchased from Walter Armstrong, went into possession and erected a fence on the south line of the graveled street. It does not appear how many of the other purchasers from the Armstrongs went into possession, or to what extent they used the streets. John Fulkerson testified that some of them went into possession and used the streets to get to their lots; that there were three gates, and that they had to pass through one of these gates to get to their premises. All of the lots which had been sold by the Armstrongs came back by regular conveyances to Richard Fulkerson or John Fulkerson, except that portion of the tract which had been conveyed to J. H. Abshire, which, as delineated on the map offered in evidence by the plaintiff, consists of a part of lots 28, 29, 30, 31, and 32. It appears from this map that no part of his claim extended to or touches the graveled street, but does include the whole of so much of a street as ran near its westerly boundary, and takes a strip off the lots on the west side of that street. The evidence does not show that the general public ever used any of the streets, nor does it appear that there was any acceptance on the part of the county authorities. Richard Fulkerson, after he got the title back in himself, conveyed to John Fulkerson. In this conveyance no reference is made to streets. John Fulkerson conveyed a right of way over the south thirty feet of the graveled street to G. H. Abshire, and moved his fence, which had marked the south line of lot 3, which is a part of the land in controversy, to the middle of the street, and the north 30 feet of the graveled street was thereafter within the inclosure surrounding the land in dispute. This fence is now standing, and had been maintained for more than five years before the contract of sale was made. On the 14th of August, 1886, John Fulkerson conveyed to the defendant, by metes and bounds, making no reference to streets or to the map. This conveyance included a triangular piece of land on the north side of the Day tract, having the north-east corner of the tract for its apex, and about three feet on the Healdsburg road for its base, which had been previously conveyed by Fulkerson to Joseph Viles; but it appears from the testimony that Day had no actual knowledge, nor had Fulkerson, that the deeds overlapped. The triangle was within the inclosure of Day. On the north side of the tract described in the complaint is another street as laid down on the Armstrong map, and which, if it is a public highway, would take off another strip of 30 feet from the land bargained for. The plaintiff contends that both of the platted streets, north and south of the land, are public streets, and that, if compelled to purchase, he would lose a strip of thirty feet on the south and one of the same width on the north, and for this reason, and because the title to the triangle (which contains one-fiftieth part of an acre) is not in Day, he should not be compelled to purchase." The court below found for the defendant, and decreed in his favor that the plaintiff specifically perform the contract. There was a motion for a new trial, which was denied, and the plaintiff appeals.

The contention of the appellant in this court is that there was a dedication of a part of the land to the public, to be used as public streets, or that the facts were such as to raise a reasonable doubt as to the defendant's title to so much of said lands as was covered by these alleged streets, and that for that reason he was not bound to accept a conveyance and pay the purchase money for the land. We have had occasion very recently to consider fully the question as to what is necessary to constitute a dedication of lands to the public for street purposes, by platting and selling lots by reference to the map thereof. People v. Reed, 22 Pac. Rep. 474. Much that is said in the opinion in that case is applicable to this, and need not be repeated. The decision in the case referred to is conclusive against the appellant as to the alleged dedication to the public. There has never been any acceptance by the public authorities, and the offer to dedicate, if there ever was one, was clearly withdrawn by the subsequent sale of the property in a body, including that part designated on the map as streets. As to the right of individual purchasers, it appears that they purchased before the map was filed; that all of them, except two, have reconveyed to the original grantor, or his grantees, under a conveyance of the whole property included in the map, except the parts previously conveyed; that the property here in controversy was and always remained fenced, and was in that condition conveyed by Armstrong, who had the same platted in a body, including the alleged streets, more than a year before the map was filed; that one of these purchasers who has not reconveyed has expressly waived any right to have the streets on which his property fronts kept open, and the other did not purchase on the faith of the map, and his property does not touch any street that runs though or in any way affects the property in controversy. The question of dedication is purely one of intention, and the intention of the owner or owners of the land must be gathered from his acts and conduct in respect to the property. Harding v. Jasper, 14 Cal. 647; People v. Reed, supra.

In this case the owner of the land at the time it was platted did not file the map. The land was not within the limits of any city or town. It was at that time, and continuously thereafter remained, fenced, and no part of it was used by the public as a highway. The filing of the map was, as we have said, after the conveyance of the lots was made, and after the property had been conveyed in a body to a third party. The map was filed on the very day that the property was conveyed a second time in a body. As to that part of the lands involved in this litigation the court finds "that thereafter, in 1879, R. Fulkerson conveyed all of the lands reconveyed to him as aforesaid by metes and bounds, ignoring the designations of streets and lots as marked upon said map to J. Fulkerson, and he thereupon entered into the possession of the whole thereof under said deed, claiming title thereto, exclusive of other right; and, more than five years prior to the date of the agreement between plaintiff and defendant, inclosed the premises in the pleadings described with a good and substantial fence, and the same has continued closed ever since." Fulkerson conveyed the property to the defendant, August 14, 1886. The agreement to convey to the plaintiff was made August 31, 1887, and this suit was commenced January 12, 1888. No right to the alleged streets having vested in the public, and the property having been conveyed in a body, including the streets, and fenced and occupied for more than five years before the agreement to convey the property to the plaintiff, the right of any and all purchasers, conceding that they had any, was cut off and barred by the statute of limitations, and could not have been enforced. The defendant having proved a clear paper title to the property, the burden of proving a defect in the title for the reason relied upon in this case was upon the plaintiff; and if there were any circumstances which would have prevented the running of the statute, as against any of these purchasers, it was incumbent upon the plaintiff, in order to avoid a specific performance of his contract, to prove their existence. Shriver v. Shriver, 86 N. Y. 575. We think the facts show such a title in the defendant as that the plaintiff was bound to accept a conveyance and pay the purchase money. In Hellreigel v. Manning, 97 N. Y. 59, it was said: "The whole evidence left the case free from any reasonable doubt that the plaintiff's deed would convey a good title, and hence, notwithstanding the apparent defect in the chain of title as shown by the records, the defendant could not justly refuse to perform his agreement. A purchaser cannot justify his refusal to perform his contract by a mere captious objection to the title tendered him; nor is it sufficient for him, when the jurisdiction of an equity court is invoked to compel him to perform his contract, merely to raise a doubt as to the vendor's title. Before he can successfully resist performance of his contract on the ground of defect of title there must be at least a reasonable doubt as to the vendor's title,—such as affects its value, and would interfere with its sale to a reasonable purchaser, and thus render the land unmarketable." There is nothing in the evidence in this case sufficient to raise a reasonable doubt as to the defendant's title to the property. There was, in our judgment, no dedication of the streets, as to the purchasers, which could have been enforced by them at any time, but, if there was, they had lost such rights by lapse of time. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.; McFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.

I concur in the judgment: THORNTON, J.

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82 Cal. 77

OVERACRE v. BLAKE *et al.* (No. 12,146.)

(*Supreme Court of California.* Dec. 16, 1889.)

NOTARY PUBLIC—NEGLIGENCE—ESTOPPEL—PRINCIPAL AND AGENT.

Code Civil Proc. Cal. § 1962, subd. 3, provides that whenever a person has, by his own declaration or act, intentionally and deliberately led another to believe a particular thing true, and to act on such belief, he cannot, in any litigation arising out of such declaration or act, be permitted to falsify it. *Held*, that where a person executing a mortgage has been introduced to a notary by the mortgagee's agent, and the notary sees the person so introduced execute the mortgage by signing it with the name given him by the mortgagee's agent, who witnesses the signature, the mortgagee cannot, on discovering that the mortgage was not executed by the owner of the land, maintain an action against the notary's sureties for his alleged negligence in taking and certifying to the acknowledgment of the pretended owner.

Department 1. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Action by Margaret A. Overacre against Francis Blake and others, sureties of William K. Rowell, a notary public, for the notary's alleged negligence in certifying the acknowledgment to a mortgage. From a judgment in plaintiff's favor, defendants appeal. Code Civil Proc. Cal. § 1962, subd. 3, provides: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it."

Nye & Richardson, *Gray & Haven*, and *B. McFadden*, for appellants. *Fred. L. Button*, for respondent.

FOX, J. This was an action against a notary public and his bondsmen for damages for alleged negligence in certifying the acknowledgment to a mortgage. The notary died pending the suit, and by stipulation a dismissal was entered as to him, and the action continued against his sureties. The court found in favor of plaintiff, and judgment was entered against the defendants for $1,309.30 damages, and for costs, from which defendants appeal. The case comes up on the judgment roll. The important question in the case is whether the findings are sufficient to support the judgment.

The court found that on the 30th day of June, 1884, William K. Rowell was a notary public, duly commissioned, qualified, and acting as such, and that the present defendants were the sureties on his official bond; also that on that day one Alexander Wilson was the owner of a half interest in a certain tract of land described in the complaint, and that the value of such interest was $2,000. It then further finds as follows: "(4) That on said June 30, 1884, a person other than Alexander Wilson, the owner of said land, came before said Rowell, and in his presence signed the name of Alexander Wilson to the note and mortgage set out in the complaint; and the said Rowell then and there signed his name as a witness to the signing, sealing, and delivery of the said mortgage. That O. C. Logan and W. R. Savage, composing the firm of Logan & Savage, were the persons who negotiated on behalf of said plaintiff said loan. That, prior to the execution of said mortgage and note, said plaintiff, at the office of said Logan & Savage, but not in the presence of said defendant Rowell, met said person pretending to be Alexander Wilson, the owner of said interest in said land; and thereafter said Savage appeared with said person, pretending to be the owner of said land, at the office of said notary, and introduced him to said notary as Alexander Wilson, and thereupon said note and mortgage were executed as aforesaid, and said Savage signed his name as a witness to the execution of said mortgage; and said Rowell, as such notary, then and there took and certified to the acknowledgment of said person pretending to be Alexander Wilson, the owner of said realty, to the execution of said mortgage, which certificate was in form as set out in paragraph V of the complaint. That said certificate was and is untrue, and that the signature of Alexander Wilson thereto was and is a forgery; and at the time of taking said acknowledgment no person was by said Rowell sworn as to the identity of said person so signing; and said Rowell had no other knowledge of the identity of said person whose acknowledgment was then by him taken than the said introduction by said Savage. (5) That said Alexander Wilson, who owned said interest in said realty, did not sign said mortgage, and was not known to said Rowell, and did not appear before said Rowell, and did not acknowledge that he executed said mortgage; but what the name of the person is who executed and acknowledged said mortgage the proofs in this case do not show. (6) That on June 30, 1884, the plaintiff, believing that the person who signed said note and mortgage was Alexander Wilson, the person who owned said interest in said realty, loaned and paid over to said person executing said mortgage the sum of $1,100, and he then repaid to plaintiff $44, the interest on said principal sum for six months in advance; but nothing further was ever paid thereon. (7) That on August 29, 1885, plaintiff commenced an action in this court against said Alexander Wilson, the owner of said interest in said realty; that said Wilson appeared therein and answered, and said action resulted in a finding and decree of this court that said Alexander Wilson did not execute said note or mortgage, and that the defendants to said action should recover costs, taxed at $32.15, which plaintiff paid; that there was due by the terms of said note and mortgage, at the time of the commencement of this action, the sum of $1,189, exclusive of attorney's fees and costs; that in the attempted foreclosure of said mortgage, plaintiff incurred further expenses necessary and proper in such prosecution, to the amount of $75 for attorney's fees, and $13.15 for costs of court. (8) That since the commencement of this action defendant Rowell has died. Wherefore the court finds as conclusions of law: (1) That the defendant Rowell was negligent in taking the acknowledgment of said mortgage, and certifying the same, and that plaintiff's loss arose from such negligence. (2) That plaintiff was not chargeable with any negligence in the matter of said loan. (3) That plaintiff is entitled to a judgment against defendants Francis Blake, F. K. Shattuck, and Galen M. Fisher for the sum of $1,309.30, besides costs of this action." Defendants demurred to the complaint in the action, but, in the view which we take of the case upon the findings, it is unnecessary to discuss the point made against the order of the court overruling the demurrer.

We are clearly of opinion that the facts found do not justify the conclusions of law, or support the judgment. There is nothing in all the facts found to justify the deduction found at the close of the fourth finding of fact,—that the signature to the mortgage was a forgery, or that the certificate of the notary was untrue. The notary did not certify, and the law never requires him to certify, that the person executing the instrument is the same person who owns the realty in the instrument described, and there is an utter failure to show that the person who signed the mortgage, and who is certified by the notary to be known to him to be the person whose name is subscribed to the instrument, is not in truth and in fact named Alexander Wilson. He was so introduced to the notary by the agent of plaintiff, who was acting in that transaction on her behalf, and he had the same right to act upon the faith of that introduction as if it had been made by the plaintiff herself. It is true that the person who executed the mortgage was not the owner of the land, and, whether named Alexander Wilson or not, he personated the owner for the time being, and successfully committed a fraud; but, under the facts found, we do not see how the notary or his sureties can be held liable for the damages sustained through that fraud. There can be no doubt, under the facts found, that Savage was the agent of plaintiff in the making of that loan, and seeing that the loan papers and securities were properly executed. See Civil Code, §§ 2295-2300. The rule that a principal is responsible to third persons for injury occasioned by the negligent acts of agents, and by their own wrongful acts as part of their business as such, is not only elementary, but has been frequently upheld and applied by the courts. So held in Kline v. Railroad Co., 37 Cal. 400, and in Taylor v. Railroad Co., 45 Cal. 323. And in the case of Bank v. Telegraph Co., 52 Cal. 280, it was so held in a case of false personation,—a case so nearly parallel to this as to make it almost conclusive of this case. In that case Crowell sent a forged dispatch from Colusa, where he was temporarily acting as telegraph operator, directing the Bank of California to pay to Crowley $1,200; and sent another dispatch, addressed to Crowley at the Occidental Hotel, telling him to call at the bank and get the money. He then followed the dispatches to San Francisco, himself applied for and received the dispatch addressed to Crowley, found a young man named Spencer, whose acquaintance he had made at Colusa, and went with him to the bank, and demanded the money. Spencer had not noticed the slight difference in name, and when asked if he could identify the applicant answered, "Yes; I know him,"—and certified to the correctness of Crowley's signature. When the fraud was discovered, a dispute arose between the bank and the telegraph company as to which was guilty of negligence,—or, rather, as to who must bear the loss; the telegraph company claiming that the bank was guilty of negligence, and must bear the loss. But this court held, without a dissent, that the bank was not guilty of neglect; that if Spencer was not sufficiently acquainted with Crowell to know that his name was not Crowley, it was his want of care, rather than that of the bank; and reversed a judgment which had been rendered below in favor of the telegraph company. If the neglect was Spencer's, and not that of the bank, in that case how can it be said that the neglect in this case was not that of Savage, instead of Rowell? And, if it was the neglect of Savage, it was the neglect of plaintiff, for whom he was acting as agent at the time.

The party executing the mortgage having been introduced to the notary by the plaintiff, through her agent duly acting for her in that behalf, she being the party to whom the mortgage was being given, and most likely of all persons to know with whom she was dealing, and the notary then seeing the person so introduced execute the mortgage by signing it with the name so given him by the agent of plaintiff, and said agent witness the signature, it cannot lie in the mouth of the plaintiff to say that the notary was guilty of negligence in certifying that such person was known to him to be the person who executed the same. Not only the doctrine of contributory negligence, but the doctrine of estoppel also, applies to close the mouth of plaintiff from asserting any claim against the sureties of the notary in such a case. If Savage did not know the name of the person he introduced to the notary by the name of Alexander Wilson, then the introduction was an act of deceit, (Civil Code, § 1710,) and if loss resulted therefrom to his principal, as between the principal and third persons she must bear the loss, for the act was hers in law, and "no one can take advantage of his own wrong," (Id. § 3517.) The plaintiff having, by her agent, introduced the person who executed this mortgage to the notary by the name of Alexander Wilson, and that, too, for the express purpose of making him known to the notary by that name, and having the notary take and certify his acknowledgment to the mortgage by that name, she cannot now be permitted to falsify that introduction, or the declaration thus made that he was Alexander Wilson. Code Civil Proc. § 1962, subd. 3.

Respondent claims that the issues in this case involve three questions, viz. (1) Was the defendant Rowell negligent? (2) Was the plaintiff negligent? (3) Did plaintiff's loss occur through her own negligence, or through that of the defendant Rowell? In discussing these questions, counsel insists that all the findings of the court, which are in the record designated as findings of fact, are mere recital of the evidence of facts, and that the real and only findings of fact are found in subdivisions 1 and 2 of the conclusions of law. And he claims that these two subdivisions constitute the only findings of fact into which this court can look, and are conclusive upon the court. We do not so understand the effect of these findings. When the facts are established, as in this case and on this record we must assume that they are, the question of negligence is a question of law, and the mere deduction as to whether there has been negligence or not is a conclusion of law. Flemming v. Railroad Co., 49 Cal. 253. It is to be decided by the court as a question of law when the facts are clearly settled. Fernandes v. Railway Co., 52 Cal. 45; Siemers v. Eisen, 54 Cal. 418; Nehrbas v. Railroad Co., 62 Cal. 320. Under these authorities (and many others might be cited to the same effect) the subdivisions referred to are properly designated as conclusions of law from the facts; and in our opinion they are not supported by the facts found. On the contrary, on the facts found, we think the answer to the first of the questions suggested by counsel for respondent must be answered in the negative, the second in the affirmative, and that the proper and only true answer that can be made to the third is that the negligence of the plaintiff's agent proximately contributed to the loss which she has sustained, and as against these defendants she cannot recover. Judgment reversed, and cause remanded, with instructions to the court below to enter judgment on the findings in favor of defendants.

We concur: WORKS, J.; PATERSON, J.

(81 Cal. 408)

In re JESSUP'S ESTATE. (No. 12,941.)

(*Supreme Court of California.* Dec. 20, 1889.)

APPEAL—REHEARING—CONSTITUTIONAL LAW—SUPREME COURT.

1. By virtue of its appellate jurisdiction, conferred on it by Const. Cal. art. 6, § 4, the supreme court has the inherent power, independent of legislative enactment, to grant a rehearing in cases on appeal until a *remittitur* is regularly issued; and as section 2 of the same article provides that a majority, consisting of four justices, may decide any matter within the jurisdiction of the court, Code Civil Proc. § 45, which provides that, where there has been no decision in one of the departments, an order granting a rehearing after a judgment in bank "shall be made in writing, signed by five justices," is unconstitutional.

2. The division of the supreme court into two departments made it necessary, in order to prevent conflicting decisions, that department decisions should be deemed conclusive only in case a rehearing in bank should not be ordered; and therefore Const. Cal. art. 6, § 2, providing for the rehearing of department decisions, does not by necessary implication prohibit rehearings after judgments rendered by the court in bank.

WORKS, J., dissenting.

In bank. On motion to vacate order for rehearing.

BEATTY, C. J. This cause was originally submitted to the court in bank, without any previous decision or hearing in either of the departments. On July 1, 1889, a decision was rendered, concurred in by a constitutional majority of the justices, affirming the decree of the superior court. 21 Pac. Rep. 976. On the 31st of July we decided to grant the petition of the appellants for a rehearing. No order in writing directing such a rehearing was signed by any of the justices, but the clerk was directed to enter the order in the minutes of the court, and on that day he made an entry in the minutes in the following form: "In ank. Estate of Jessup. (No. 12,941.) Rehearing granted. BY THE COURT." Subsequently, in pursuance of this order and without any objection to its sufficiency, the cause was reargued, and again submitted for decision. On November 30, 1889, a second decision was rendered, reversing the decree of the superior court and our own former judgment. Ante, 742. The respondent now moves to vacate and annul this second judgment, on the ground that it was "made improvidently, and without color of law," and demands the issuance of a *remittitur* upon the judgment of July 1st. His motion is based upon the ground that said judgment of July 1st became final and irrevocable on July 31st, by reason of the fact that no order granting a rehearing of the cause was made on or before that day in conformity to the requirements of section 45 of the Code of Civil Procedure, which reads as follows: "Sec. 45. The chief justice or any four justices may convene the court in bank at any time, and the chief justice shall be the presiding justice of the court when so convened. The presence of four justices shall be necessary to transact any business, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment of the court in bank: provided, that, if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument, but to render a judgment a concurrence of four justices shall be necessary; *and every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments, and in such cases the judgment of the court in bank shall be final, unless within thirty days after such judgment an order be made in writing, signed by five justices, granting a rehearing.*"

Most of this section, and several preceding sections, consist of a mere repetition, in substance, of express constitutional provisions, (article 6, §§ 2, 3,) but the part italicised is not contained in the constitution either in substance or in form. Nevertheless it may be valid and obligatory as a statute, and undoubtedly is so unless it conflicts with the constitution. Therefore, since it has not been complied with in granting the rehearing in this case, it becomes necessary to determine whether or not it is constitutional. The question is by no means a new one. The provision above quoted was adopted as an amendment to the Code, April 1, 1880, and naturally became the subject of consideration by the court, within a short time after its enactment. The court at that time was composed of the seven justices first chosen by the people of the state to administer the new constitution, and the laws passed in pursuance of it. They decided, without a dissenting voice, so far as the records of this court show, and so far as can be learned from any source of information accessible to me, that the provision in question was invalid, and they continued after the act, as before it, to grant rehearings by orders entered in the minutes of their proceedings. The same practice has been continued without change or interruption to the present time, and during the year that I have occupied a seat upon the bench its propriety has not been questioned until now by any member of the court, or by any party to a cause depending here. It has not, however, always passed unchallenged. Our records show that on at least two occasions formal objection has been made by the prevailing party to the order granting a rehearing, on the ground that it was not made in the form prescribed by this statute.

In the great case of Lux v. Haggin, decided in 1884, and reported in 69 Cal. 255, 10 Pac. Rep. 674, a case which directly involved interests of very great magnitude, and, as a precedent, affected the rights of a large portion of the land-holders of the state, the decision was made by the court in bank without a previous hearing in department. A bare majority of the members of the court concurred in reversing the decree of the superior court, and on petition of respondent a rehearing was granted by a minute order in precisely the same form as the one made in this case. Counsel for appellant in that case, without waiting for a reargument, promptly made the objection that the order granting the rehearing was void, and demanded the issuance of a *remittitur* upon the judgment already rendered. This motion was made and submitted to the court in February, 1885, and by the court overruled. It is true that no reasons were assigned by the court for its conclusion, but no member of the court, divided as it was and continued to be as to the merits of the case, dissented, and the point was clearly and necessarily decided that an order like that in question here was valid, and had the effect of putting the case in the same position as if it had never been decided or submitted. Again, in the case of Bull v. Coe, which was originally submitted to the court in bank, the judgment was affirmed in 1887. Subsequently a rehearing was granted by a minute order entered in identically the same form as the order here. Counsel for respondent in their printed argument on the rehearing made the objection that the judgment of affirmance had become final by reason of the failure of the court to file an order in writing signed by five justices. The court nevertheless proceeded upon rehearing to reverse the judgment appealed from and its own previous judgment, just as has been done in this case, merely remarking, in response to the objection to the order: "The positions as to the power of the court to grant a rehearing, and the sufficiency of the order granting it, do not require special notice." 77 Cal. 63, 18 Pac. Rep. 808. It is to be regretted that the court in deciding these motions did not set forth explicitly the grounds of its decision, as it would probably have prevented a recurrence of the question. The omission to do so was probably due to the fact that then, as now, the time of the court was so fully occupied in formulating opinions upon cases in which a statement in writing of the grounds of its decision was made obligatory by the constitution that it could with difficulty spare the time to state fully and at large its reasons for deciding a motion involving only a question as to the form of making its orders,—a question upon which no litigant could by any possibility need either information or caution for the purpose of any action to be taken by him. But, however that may be, it is plain that the question has been twice distinctly decided in determining contested motions. It has also been decided by the uniform and unvarying practice of the court in passing upon a great number of petitions for rehearing during the period of almost 10 years since the adoption of the amendment under consideration. If any course of construction could settle a question of practice, it seems to me that this must be regarded as settled, irrespective of any doubt that may now be entertained as to the correctness of the original decision. If the question was originally doubtful, it has been resolved too often in one way to admit of an opposite solution now, even if the opinion of the court should change. At least we should not visit the consequences of our inconsistency upon litigants, though we should feel constrained to change our practice. The rights dependent upon orders that we have made are protected by the rule *stare decisis*.

But I do not feel it necessary in this matter to rest upon the doctrine of *stare decisis*, or upon the mere authority of the former members of this court. There is certainly a sufficiently strong presumption that they were right in their decision, but, aside from such presumption, I think its correctness may be easily shown. The jurisdiction of this court is derived from the constitution, and can be neither enlarged nor abridged by the legislature. What it was in the beginning it remains, and it must remain until the constitution itself is changed. If the constitution has denied to this court the power to grant rehearings in causes that have been decided in bank, the legislature cannot confer the power. If the constitution has conferred the power, the legislature cannot take it away, or, by pretense of regulating its exercise, substantially impair it. And, whatever matters are by the constitution committed to the jurisdiction of the court, the court may by a constitutional majority—that is to say, by the voice of four of its seven justices—decide. The legislature has no more right to say that we shall not decide a matter within our jurisdiction unless five justices subscribe an order in writing than we should have to require all acts of the legislature to be subscribed by two-thirds of the members of each house. The constitution has conferred the power of deciding all matters within our jurisdiction upon a majority of the court; the legislature cannot require more than a majority.

If these propositions are true, it only remains to inquire whether under the constitution, and wholly independent of legislation, we have the power to grant rehearings in cases that have been decided by the court in bank.

The constitution of 1849 conferred certain appellate jurisdiction upon a supreme court composed of a chief justice and two associate justices. By the amendment of 1863 a slightly different jurisdiction was conferred upon a supreme court composed of a chief justice and four associate justices. By the present constitution,[1] adopted in 1879, substantially the same jurisdiction was committed, in substantially the same terms, to a supreme court composed of a chief justice and six associate justices. That is to say, certain cases were enumerated in which it was declared the supreme court should have appellate jurisdiction. This was all the framers of the constitution thought it necessary to say. They did not pretend to define appellate jurisdiction, nor did they undertake to prescribe in detail what orders and judgments the court in the exercise of its jurisdiction might make. They assumed, what was undoubtedly true, that the term "jurisdiction" had a well-defined and well-understood meaning. If this had not been so, the constitution would have been without meaning, and if, in the absence of any definite provision in the constitution, it had rested with the legislature to prescribe the powers and duties of the courts, as well as their mode of procedure, the judicial department, instead of being co-ordinate and independent, would have been entirely subject to the will of the legislature. No one, of course, contends at this day for such a proposition, and the only possible controversy is as to the extent of the power implied *ex vi termini* by the phrase "appellate jurisdiction." That this embraces the right to review the final judgments of the courts of original jurisdiction—the right, in other words, to reverse, affirm, or modify them, and to enforce by some appropriate mandatory process the judgment of the appellate tribunal—will scarcely be denied. And yet the legislature has assumed to confer upon this court by statute these identical powers. Code Civil Proc. § 53. This is only one of many instances in which provisions have been incorporated into the statutes which, either in express terms or by necessary implication, are contained in the constitution itself, and we cite it because it is referred to by counsel in support and illustration of their argument that powers conferred upon this court by the legislature may be by the legislature regulated, limited, and restricted. It may be conceded that, in so far as the legislature can confer upon the courts created by the constitution powers that they do not possess independent of legislation, such powers may be limited and restricted to any extent, but the fact that the legislature has assumed to confer a power upon a court does not prove that the power rests upon legislative authority. This will be more clearly apparent if we suppose a statute to have been passed which, instead of authorizing this court to affirm, reverse, or modify the judgments of the superior courts, had declared that we should not reverse or modify such judgments unless five justices concurred in the order. Would any one contend that such a law was constitutional? Certainly not. And why? Merely because this court derives from the constitution the power as a court, speaking by a constitutional majority of four of its members, to decide causes, and the power to decide includes the power to reverse or modify the judgment appealed from.

We need not, therefore, have been embarrassed by the fact, if it had been a fact, as counsel contend, that the legislature has undertaken to give this court the power to grant rehearings in causes that have been decided in bank. But in truth the legislature has not assumed to confer the power. On the contrary, the statute relied on (section 45, Code Civil Proc., above quoted) assumes the existence of the power, and merely attempts to restrict the court in the mode of exercising it. On this point the court and the legislature are at one. They agree that under the constitution, and independent of statute, the power exists. If so, what is its origin? Necessarily the constitution, and, as it is not expressly mentioned in the constitution, it must owe its existence to the principle that it is one of the inherent powers of every appellate court to revise, to modify, and to correct its judgments, so long as they are under its control.

There is abundant authority for this proposition. The practice of the supreme courts of many of our sister states, and of the supreme court of the United States, is in accord with it and rests upon no other foundation. But I need only refer to the decisions of the supreme court of this state under former constitutions, for it is in the light of these decisions that the new constitution must be read. In the case of Grogan v. Ruckle, decided in 1850, and reported in 1 Cal. 193, the judgment of the district court had been reversed, and before issuance of a *remittitur* a rehearing ordered. Afterwards, and notwithstanding the order for a rehearing, a *remittitur* was improperly issued, and sent to the district court. On the rehearing, counsel for appellant challenged the power of the court to grant a rehearing after judgment. In delivering the opinion of the court, Judge BENNETT said: "On the reargument of this cause the objection was taken by appellant that this court cannot, after its judgment has been pronounced, direct a rehearing. Section 280 of the practice act provides that, 'after an appeal shall have been heard and determined, the judgment or order of the supreme court therein, and all things concerning the same, shall be remitted to the district court of the proper county, and thereupon such further proceedings shall be had in that court as may be necessary to carry such judgment or order into effect.' Section 18 of the act organizing this court is to the same effect. It declares that 'the supreme court may reverse, affirm, or modify the judgment or order appealed from, and its judgment shall be remitted as soon as practicable, after judgment pronounced, to the court below, to be enforced according to law.' We are of opinion that this court loses jurisdiction of the cause when the *remittitur* has been sent to and filed in the court below, but that our control over the cause does not cease until that has been done;

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[1] Article 6, § 4.

and so are the decisions of courts the jurisdiction and powers of which are analogous to those of this court. Burkle v. Luce, 1 N. Y. 240; Martin v. Wilson, Id. 240; Delaplaine v. Bergen, 7 Hill, 591. In this cause the *remittitur*, it appears, was filed with the clerk of the district court, 'on or before' the 25th day of December last; but the order for a rehearing was made and entered on the 18th day of the same month, when the court had jurisdiction of the cause, and the power to make the order. The *remittitur* was improperly sent to the district court after the entry of the order granting a rehearing, and such act ought not to be permitted to supersede the order."

This decision was made under the constitution of 1849, which contained not one word on the subject of rehearings, and under statutes which provided, in substance, that when an appeal had been heard and determined the judgment or order of the supreme court should be remitted as soon as practicable to the court below. The only principle upon which it could be sustained was that above stated, viz., that the power to grant rehearings is inherent, —is an essential ingredient of jurisdiction, —and ends only with the loss of jurisdiction. And this principle so established in the jurisprudence of California was followed down to the adoption of the present constitution without deviation, not only in the numberless instances in which it was acted upon without express reference to its origin, but also in several cases in which it was more or less fully discussed. In all of the cases the doctrine consistently maintained is this: That from the time an appeal has been perfected until a *remittitur* has been regularly issued and transmitted to the lower court the jurisdiction of the case is in this court, and that we have the power to make any proper order concerning it, including an order for a rehearing. As the law did not fix a precise time after judgment for the issuance of the *remittitur*, the court at first made a standing rule that no *remittitur* should issue short of 10 days after judgment, except by consent, and this for the purpose of affording to the losing party an opportunity of moveing for a rehearing, or for an amendment or modification of the judgment. Blanc v. Bowman, 22 Cal. 26. After the reorganization of the court under the amended constitution of 1863, which, like the old constitution, was silent on the subject of rehearings,—substantially the same statutory provisions remaining in force,—the time for filing petitions for rehearing was extended by rule of court, and it was likewise provided that no *remittitur* should issue until the time for petitioning had expired, and that the filing of the petition should operate a stay of proceedings until the determination of the motion. Rules Sup. Ct., as amended Jan. 3, 1866, App. 28 Cal. 708, 709. See, also, Mateer v. Brown, 1 Cal. 231; Leese v. Clark, 20 Cal. 387; Rowland v. Kreyenhagen, 24 Cal. 52.

This being the uniform course of practice and decision in the highest court of the state for 30 years preceding the formation of the present constitution, it may safely be assumed that, if the framers of that instrument had intended to deny or qualify the long-asserted doctrine of the inherent power of the supreme court to order rehearings after judgment, they would have incorporated in the constitution some express provision clearly evincive of such intention. The force—the conclusiveness—of this argument has not been overlooked by counsel for the respondent, who meet it with the assertion that the new constitution has prohibited rehearings of causes decided in bank, not, they concede, in express terms, but, as they claim, by necessary implication. In support of this proposition they cite the provisions of section 2, art. 6, in regard to rehearings after decision in department, and they say this express provision that a cause decided in department may be reheard in bank is an implicit prohibition of any other rehearing. The trouble with this argument is that it proves too much. If the constitution has in any manner prohibited all rehearings except in cases decided in department, the legislature cannot authorize them; the legislature cannot confer a power inhibited by the constitution. We have seen, however, that not only has this court constantly assumed the right to grant rehearings after decision in bank, but the legislature itself has recognized the existence of the power in the very statute by which it has sought to limit and regulate it. And not only is this contention of counsel opposed to all authority, legislative and judicial, but it is wholly unsupported by any inference deducible from the section of the constitution upon which they rely. The framers of the constitution, in authorizing the supreme court to sit in two departments, made it absolutely necessary that the relations of the departments to the court, and the extent of their dependence upon it, should be exactly defined. Without express provision as to the effect and conclusiveness of department decisions, we should have had two independent supreme courts, following possibly two conflicting lines of decision. To prevent this inconvenience in the only way it could be prevented, department decisions were made conclusive only upon condition that a rehearing in bank should not be ordered. This regulation of a matter imperatively demanding regulation, in view of the powers conferred upon the departments, by no means implies an intention to deprive the court in bank of a power well understood to be inherent in it, and essential to a proper discharge of its functions.

But, conceding the power of the court to order rehearings after judgment in bank, counsel contend that the legislature has the undoubted right to regulate the exercise of such power, and that section 45, Code Civil Proc., does nothing more. We concede, to quote the language of Chief Justice WALLACE, (Ex parte Harker, 49 Cal. 467,) that "the mere procedure by which jurisdiction is to be exercised may be prescribed by the legislature, unless, indeed, such regulations should be found to substantially impair the constitutional powers of the courts, or practically defeat their exercise." We concede the power to regulate, but not the power to take away or defeat, the exercise of jurisdiction. And this, in our opinion, the legislature has, by the section referred to, attempted to accomplish. The law, by its very terms, assumes the existence under the constitution of the power to grant rehearings after judgment in bank, and then proceeds to prohibit its exercise in one class of cases, and in another to require for its exercise the concurrence of more than a constitutional majority of the court. That this is an attempt to impair the constitutional power of the court seems to admit of no doubt. The legislature may have the right to prescribe the time for the issuance of *remittiturs* upon the judgments of this court, and, if so, it could, by making provision on that subject, limit our power, as to time, to grant rehearings. But for 40 years the time of issuing the *remittitur* has been left to the court to regulate, and rules have been made fixing the period after judgment during which the *remittitur* should be retained. During such period it has been held without question that the jurisdiction of this court to make any proper order in the case was preserved. It would be very remarkable if it should now be discovered that this court has for 40 years been acting upon an erroneous view as to the proceeding by which its jurisdiction over a cause is terminated.

There is, moreover, no consideration of justice or expediency calling for a change of view in regard to this matter. Our rule and practice create no uncertainty or confusion as to when our judgments become final and conclusive. By a standing order, all *remittiturs* are directed to issue 30 days after judgment, and we had never heard that this has been found unreasonable delay. The losing party avails himself of the opportunity afforded by the rule to petition for a rehearing. If we are satisfied from the petition that, owing to any mistake of law or misunderstanding of facts, our decision has done an injustice in the particular case, or if the principle involved is important, and the decision will make a precedent establishing a rule of property or of right, and it is seriously doubted whether we have correctly decided, we grant a rehearing. The effect of this is no doubt to cause some inconvenience and delay to the parties interested, but this inconvenience is less to be dreaded than the greater inconvenience of making a bad precedent, or the injustice of allowing a decision to stand which we believe to be wrong. However, the question for decision here is not the expedience of the system, but the source of the power and the extent of the right to grant rehearings. As to that we have sufficiently stated the grounds upon which we hold—*First.* The perfecting of an appeal gives us jurisdiction of a cause, and that jurisdiction lasts until a *remittitur* is regularly issued. *Second.* While the cause remains subject to our jurisdiction we have the power derived from the constitution to grant a rehearing after judgment, just as we have the power, independent of legislative enactment, to reverse, affirm, or modify the judgment of the inferior court, and to enforce our own judgments. *Third.* By the constitution a majority, consisting of four justices, may decide any matter within our jurisdiction, and an act of the legislature requiring more than four justices to concur in a decision is unconstitutional.

These propositions are decisive of this motion, and they are sustained by many decisions of this court, and by its uniform course of practice since the organization of the state government. In one single case, (Hegard v. Insurance Co., 72 Cal. 535, 14 Pac. Rep. 180,) in an opinion by the court, after deciding that the record presented no ground for granting a rehearing, it is held that the right to petition for a rehearing will not be recognized in cases decided in department and afterwards in bank. Preliminary to this conclusion, some reference is made to the silence of the constitution on the subject of rehearings, and to the terms of section 45 of the Code of Civil Procedure. But this was only for the purpose of showing that the petitioner had no absolute right to be heard, a decision as to the power of the court to grant the rehearing being expressly reserved. This is the only evidence I have been able to discover in the reported decisions of the court that any member of it ever doubted its inherent power to grant rehearings. Since I became chief justice I have found that one or two of my associates entertained doubts as to the power of four justices to grant a rehearing after decision in bank, and for that reason no such order has been made without the concurrence of five justices, but this has happened simply because in all cases in which four justices have strongly favored a rehearing another justice has added his vote for the purpose of giving the order unquestioned validity, after which it has been entered as an order of the court. In this case the order was made with the concurrence of five justices, viz., Justices MCFARLAND, THORNTON, SHARPSTEIN, FOX, and myself, and it was an order eminently proper to be made. The case was of great importance, not only in the magnitude of the interests directly involved, but still more so as a precedent. It was originally argued before only six justices of the court, and submitted along with more than a hundred other cases, many of them of great importance, all requiring to be decided within a period of 90 days. The record of this case covers 444 printed pages, almost the whole of which consists of the condensed report of conflicting testimony upon the effect of which the correctness of the judgment depended. Besides the time required for the consideration of the conflict of the evidence, important questions of law were involved. The printed argument of counsel upon these questions of law and fact covered 439 pages, in which were cited numerous decisions of other courts. Such being the case, and considering the multiplicity of other demands upon our attention, the time allowed for its consideration was far from abundant. After such consideration as we were able to give the case, a majority of the court concurred in the decision that was made, the other members dissenting. Under such circumstances, no reasonable man can doubt the propriety of subjecting it to further examination and deliberation, and the fact that after reargument our former judgment was reversed, so far from proving that the order was improperly made, is a complete vindication of its propriety. If we are never to change our opinions after reargument, it would be difficult to suggest a reason for granting a rehearing. Motion denied.

We concur: McFarland, J.; Fox, J.; Thornton, J.; Sharpstein, J.

Paterson, J., (*concurring*.) I concur in the order, and in all that is said by the chief justice, except the reasons given in support of the order granting a rehearing. I did not think a rehearing should be granted, and therefore voted against it. As a matter of fact, five justices voted for a rehearing in this case, and the only thing really involved in the question debated at the bar is whether their official act was sufficiently authenticated without an order in writing signed by them, or by four of them; that is to say, whether it was sufficiently authenticated by an order purporting to emanate from the court. This question has been foreclosed by former decisions, claims to property of great magnitude have been established and denied upon the construction thus placed upon the power of the court, and, as all orders thus made would be rendered absolutely void by a judicial change of front on the proposition, and numberless judgments be set aside after it is too late to do justice between the parties, the exigencies of the case imperatively demand the application of the rule *stare decisis*.

Works, J., (*dissenting*.) I cannot concur in the conclusion reached by the majority of the court, nor in the reasoning upon which it is founded, and, considering the magnitude of the interests involved and the importance of the question presented, it is proper that I should give my reasons for this dissent. The Code of Civil Procedure provides: "Sec. 45. The chief justice, or any four justices, may convene the court in bank at any time, and the chief justice shall be the presiding justice of the court when so convened. The presence of four justices shall be necessary to transact any business, and the concurrence of four justices present at the argument shall be necessary to pronounce a judgment in the court in bank: provided, that, if four justices so present do not concur in a judgment, then all the justices qualified to sit in the cause shall hear the argument, but to render a judgment a concurrence of four justices shall be necessary; and every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments, and in such cases the judgment of the court in bank shall be final, unless within thirty days after such judgment an order be made in writing, signed by five justices, granting a rehearing." It will be observed that this section provides, in direct and unequivocal terms, that the "judgment of the court in bank shall be final unless, within thirty days after such judgment, an order be made in writing signed by five justices, granting a rehearing." The statute needs no construction. It cannot be misunderstood. If it is a valid statutory provision, this court should respect it and hold itself bound to comply with its requirements. But it is contended that it is invalid, and consequently not binding upon the court, for three reasons: (1) Because it is an attempt to interfere with and abridge the constitutional powers and jurisdiction of the court. (2) Because it attempts to limit the inherent powers of the court. (3) Because this court has uniformly held that it is not a valid enactment, and this construction of the statute has thereby become a part of the law of the state, and binding upon the court and litigants. I shall consider these propositions in their order.

A complete answer to the first of these contentions is that this court has no constitutional jurisdiction or power to grant a rehearing where a cause is heard in bank. The only provision of the constitution relating to rehearings is as follows: "The chief justice shall apportion the business of the departments, and may, in his discretion, order any cause pending before the court to be heard and decided by the court in bank. The order may be made before or after judgment pronounced by a department; but where a cause has been allotted to one of the departments, and a judgment pronounced thereon, the order must be made within thirty days after such judgment, and concurred in by two associate justices, and if so made it shall have the effect to vacate and set aside the judgment. Any four justices may, either before or after judgment by a department, order a case to be heard in bank. If the order be not made within the time above limited, the judgment shall be final. No judgment by a department shall become final until the expiration of the period of thirty days aforesaid, unless approved by the chief justice in writing, with the concurrence of two associate justices." Article 6, § 2, Const. The evident intention of this constitutional provision was to limit the right to grant rehearings to cases heard and decided in department. This is apparent, not only from the fact that a rehearing is provided for in such cases only, but because it is provided that such judgments shall not be final until 30 days after their rendition, leaving it to be understood that all other judgments of the court shall be final from the time they are pronounced. But it is enough for the purposes of this case to say that the constitution does not confer upon the court the right to grant rehearings of cases decided in bank. That it does not confer such power has been expressly decided in Hegard v. Insurance Co., 72 Cal. 535, 540, 14 Pac. Rep. 180, in which it was said: "The petition is denied for the reasons: (1) That an examination of the record shows no sufficient cause therefor; and (2) that the constitution does not provide for a rehearing of causes decided in bank, and the statute (Code Civil Proc. § 45) expressly provides that 'every judgment of the court in bank shall be final, except in cases in which no previous judgment has been rendered in one of the departments.'"

The rules of this court are now, and always have been, consistent with the idea that rehearings can only be had in cases heard in departments. They provide for the procedure in applications for rehearings in such cases, and none other. Rule 30.

Having thus demonstrated that the court has no constitutional authority to grant rehearings in this class of cases, I need not dwell further on this point. If such power were given by the constitution, and the provision of the Code under consideration would have the effect to take away, limit, or abridge such jurisdiction, it would be invalid beyond any question. Haight v. Gay, 8 Cal. 300. The case of State v. Noble, 21 N. E. Rep. 244, relied upon by the appellant, decides nothing more than this. Whether it would have that effect or not will be considered hereafter.

This brings us to the second question: Has this court the inherent power to grant rehearings, and if so can that power be limited, controlled, or regulated by the legislature? Inherent power is defined to be "an authority possessed without its being derived from another; a right, ability, or faculty of doing a thing without receiving that right, ability, or faculty from another." Bouv. Law Dict. 710. This court is as much a creature of the constitution and laws of the state as the lowest judicial tribunal in it. It cannot go beyond its constitutional jurisdiction, and that jurisdiction, as we have seen, is beyond the reach of the legislative department of the state government. But is this so of the inherent powers of the court? If the inherent power resting in the court is one necessary to the preservation of its existence as a court, or the performance of its constitutional duties and functions, it stands upon the same footing as the power expressly conferred by the constitution, and should be guarded against legislative encroachments for the same reason. If it is not of such a nature, in my judgment the power cannot stand as against an express statutory enactment. To that class of inherent powers which are necessary to the preservation and proper discharge of the duties of the court belongs the right to punish for contempt, a power that is uniformly upheld and jealously guarded by the courts. It is held that the legislature cannot deprive the courts of this power, or materially limit or abridge it. But it will be found, on an examination of the cases upholding this doctrine, that the power is maintained on the ground that its exercise is necessary to the existence and preservation of the courts and the proper discharge of their duties. Neel v. State, 9 Ark. 259; State v. Morrill, 16 Ark. 384; People v. Wilson, 64 Ill. 195; Ex parte Biggs, 64 N. C. 202; Clark v. People, Breese, 340; Little v. State, 90 Ind. 338.

The power of a court to vacate its judgments properly rendered, and not affected by fraud or mistake, does not belong to this class, if we admit the existence of the right as one inherent in the court. That courts have the inherent power to vacate or set aside their judgments which have been procured by fraud or mistake; correct their records to make them speak the truth; prevent the abuse of their authority or process, and enforce obedience to their mandates,—may be conceded. Freem. Judgm. §§ 99, 100. So they may, where jurisdiction is given them but no procedure is presented by which such jurisdiction may be exercised, provide such procedure. People v. Jordan, 65 Cal. 644, 4 Pac. Rep. 683. But, where a mode of procedure is provided by the legislature, this power is thereby taken away from the courts. All of these rest upon the same principle precisely. They are permitted and exercised as powers necessary to the proper exercise of the jurisdiction expressly conferred upon the court. I know of no authority or reason for the doctrine asserted in this case that a court has the inherent and uncontrollable power to vacate and set aside its judgment, rendered in accordance with the law, and not tainted with fraud or mistake. The ground, and the only ground, upon which the right is maintained, where the judgment is the result of fraud, mistake, or inadvertence, is that the judgment is not the judgment of the court. In such cases it is due to the court as well as to the parties that the pretended or apparent judgment be vacated. But this is not a rehearing in any proper sense. It is to relieve the party from a judgment rendered without a proper hearing, and is allowed because the injured party has no remedy by the ordinary course of appeal or writ of error, no error appearing on the face of the record. Freem. Judgm. §§ 99, 100; Sanders v. State, 85 Ind. 318–328; Nealis v. Dicks, 72 Ind. 374.

The reason for according to a court the right to vacate its judgments on this ground has no application to a case like this, where the cause has been fully and fairly heard, and decided on its merits. In such a case there is no ground for equitable relief, a rehearing cannot be demanded as a right, and the court has no inherent power to vacate the judgment, except in the manner provided by the statute. Nealis v. Dicks, supra. But let us concede, for the purposes of this case, that the power exists without constitutional or statutory authority. The question remains whether the statute is an infringement of the power. The statute contains three requirements: (1) Action must be taken in granting the rehearing within 30 days; (2) it must be by an order made in writing; and (3) be signed by five justices. Code Civil Proc. § 45. A part of this section may be valid and the balance invalid. As to the first of these requirements, that action must be taken within 30 days, its validity has never been questioned, and this court has acted in conformity to it from the time of its enactment until the present day. I regard it as a proper and reasonable limitation on the power of the court, conceding that the power exists, and it has been so regarded and acted upon by the court. As to the second requirement, it is eminently just and right that the action of the court should be put in some tangible form that will give evidence to the parties interested, and the public generally, that its duty has been properly and legally performed. A court of justice is not a star-chamber tribunal, that its action, or that of any one of its members, should be kept secret. The third requirement is open to more serious question. If the court had been acting in the discharge of a duty imposed upon it by the constitution, a majority of the court would have the right to act. If so, it may be claimed with much force that a statute requiring a greater number to concur in the action taken would be to limit and abridge the powers of the court, and if this statute related to such an exercise of jurisdiction it would, in my judgment, be unconstitutional for that reason. A statute of the state of New Jersey provided that no judgment of the supreme court should be reversed unless a majority of those members of the court of errors and appeals who were competent to sit on the hearing and decision of the case should concur in such reversal. This statute, which went directly to the jurisdiction and power of the court to render a judgment, and allowed a judgment to be rendered by less than a majority of the court, but denied it to the majority in certain cases, was held to be unconstitutional. But even in so strong a case the decision was by a bare majority, the court standing seven to six. Clapp v. Ely, 27 N. J. Law, 622. The reason for this rule is thus stated: "And as a court must act as an organized body of judges, and, where differences of opinion arise, they can only decide by majorities, it has been held that it would not be in the power of the legislature to provide that, in certain contingencies, the opinion of a majority of a court, vested with power by the constitution, should prevail so that the decision of the court in such cases should be rendered against the judgment of its members." Cooley, Const. Lim. (5th Ed.) 115. But as the action taken on the motion was not in pursuance of any constitutional authority vested in the court, and was not necessary to the proper discharge of its constitutional duties, I am of the opinion that the legislature had the power to say that more than a bare majority of its members should be necessary to set aside its judgment duly rendered by a constitutional majority of the members competent to sit in the case. The supreme court of the United States exercises the right to grant rehearings, but ordinarily a rehearing is never granted in that court unless it is moved for by a justice who concurred in the decision, and not then, except by a majority of the court. If not so moved for, it is denied as of course. Brown v. Aspden, 14 How. 25; Public Schools v. Walker, 9 Wall. 603; Ambler v. Whipple, 23 Wall. 281.

With respect to the requirement of the statute that the order for a rehearing shall be made in writing and signed by the justices voting in favor of it, there can, in my judgment, be no question as to its validity and binding force. It neither takes away nor abridges the jurisdiction of the court, but provides for the procedure, and determines what shall be sufficient evidence that the rehearing has been granted. If the legislature cannot require this, it has no power to say to a superior court that its judgments shall be in writing, and entered of record; that it shall make its findings of facts and conclusions of law in writing; that it shall charge a jury in writing; or in any other way control the manner in which it shall act or the mode of its procedure. It cannot say that the verdict of a jury shall be in writing, signed by its foreman, or otherwise provide for the conduct of a case. The right of the legislature to control and provide for the procedure of the courts, in respect even to their inherent powers, as in the matter of contempt, has always been recognized by this court and by the courts of other states. Warner v. Hall, 1 Cal. 90; Railroad Co. v. Harlan, 24 Cal. 336; Ex parte Harker, 49 Cal. 466; Fabretti v. Superior Court, 77 Cal. 305, 19 Pac. Rep. 481; Batchelder v. Moore, 42 Cal. 414; Galland v. Galland, 44 Cal. 478; Johnson v. Superior Court, 63 Cal. 578; Ex parte Henshaw, 73 Cal. 486, 496, 15 Pac. Rep. 110. But the legislature cannot take away the power to punish for contempt, or declare that any act which amounts to a contempt shall not be punished as such. Little v. State, 90 Ind. 338; Holman v. State, 105 Ind. 515, 5 N. E. Rep. 556.

In Ex parte Harker, supra, this court said: "The powers of the district court, whether sitting in equity or at law, to arrest a defendant on a civil action, are defined by the Code, and the writ by which and the proceedings upon which such an arrest is to be effected are therein prescribed, and the writ of *ne exeat* is not one. Nor is there any force in the suggestion made at bar that it was not competent to the legislature to abolish the writ, because jurisdiction in equity cases is conferred upon the district courts by the constitution. Jurisdiction is also conferred by the constitution upon those courts in certain cases at law; but it is apparent, in equity no less than at law, that the mere procedure by which jurisdiction is to be exercised may be prescribed by the legislature, unless, indeed, such regulation should be found to substantially impair the constitutional powers of the courts, or practically defeat their exercise." There can be no pretense that the provisions of the statute under consideration could "substantially impair the constitutional powers of the courts, or practically defeat their exercise." "The filing of a petition for a rehearing is not a matter of right. It is a privilege given by the court, governed and limited entirely by its rules. The power to make these rules is given and controlled by the statute. The court, equally with the suitor, is bound by them, until they are abrogated. We must construe them as statutory provisions would be construed." Hanson v. McCue, 43 Cal. 178. But, as I have observed, there are no rules of the court affecting or authorizing petitions for rehearings in cases decided by the court in bank, and, if there were, such rules must conform to and would be controlled by the statute. Code Civil Proc. § 129; People v. McClellan, 31 Cal. 101.

As to the wisdom of these restrictions upon the power of the court there should be no two opinions. The liberality of the court in granting rehearings needs some check, and while the court has, with a sincere and conscientious desire to do justice to litigants, added largely to its labors by hearing cases more than once, I am of the opinion that it would be much better for the court and litigants if the right to a rehearing were denied in all cases decided in bank where the cause had been fully and fairly heard on its merits. The wisdom of this statutory provision, and the expediency of a too liberal exercise of the power to grant rehearings, are fully exemplified in the proceedings in this case and their results. When the case was submitted on oral argument the court consisted of six members, who alone were competent to participate in a decision. The cause was affirmed, the court standing four to two. In the mean time a newly-appointed justice had become a member of the court. He was incompetent to participate in the decision of the case, although a member of the court at the time the decision was rendered, because of the fact that he was not present at the argument. Const. art. 6, § 2. His competency to act upon a petition for a rehearing is a matter of serious question. But, conceding his competency, he did not hear the argument. The petition for a rehearing must, under the practice of this court, be heard *ex parte*. The respondent could not be heard, and need not be notified of the application. As to a part of the court, therefore, the judgment was vacated and set aside without any opportunity given him to be heard, and, in my judgment, in a manner not authorized by law. The positive hardship, not to say injustice, of such a proceeding, must be apparent. The judgment having been set aside, a rehearing was had, and the cause was reversed, the court standing four to three; so that, so far as mere numbers were concerned, the decision was weaker than before, there being the same number in favor of the conclusion reached, and a greater number dissenting, than on the former hearing.

But they say that all this may be so, but this court has always acted to the contrary, and has twice decided this statute to be invalid. So far as the past conduct of the court is concerned, it could not repeal a valid statute by disregarding it, and as to the decisions referred to they do not decide that the statute is invalid. They simply overrule motions made to set aside orders made granting rehearings. On what grounds we are not informed. It is not held that the court is not bound by the statute. If the statute was unconstitutional, the point should have been decided in order to bind the court in the future. Perhaps the court decided the motions on the same ground that is urged now, viz., that, as the court had uniformly acted upon the theory that the statute was invalid, therefore it was invalid. If so, I think the court should not hesitate to overrule those cases; but, as they neither lay down a rule of law nor attempt to pass upon the construction of the statute or declare its invalidity, there would seem to be no necessity for overruling them. The only case in which this statute has been even mentioned by the court has recognized the validity of the statute, and left the question whether the court has the inherent power to grant a rehearing an open one. Hegard v. Insurance Co., 72 Cal. 535, 14 Pac. Rep. 180.

The case of Houston v. Williams, 13 Cal. 24, is greatly relied upon by the appellant, but in my judgment that case, when properly understood, has no bearing on the question presented here. There the statute directly affected the constitutional power and jurisdiction of the court by providing the manner in which its decisions should be rendered. But, as I have shown, the act attempted to be regulated by the statute under consideration does not affect any right given or duty imposed upon the court by the constitution, or any act necessary to the performance of its constitutional duties or functions. The act to which the statute relates, not being a constitutional one, might not only be regulated by the legislature, but might be entirely taken away. The constitution of this state gives all legislative power not denied to the legislature, while that of the United States gives only such as is named. Const. Cal. art. 4, § 1; Baker v. City of Cincinnati, 11 Ohio St. 534, 542. Therefore, as a general rule, to hold a law unconstitutional it must appear to be a plain violation of some provision contained in the constitution of this state or in the constitution of the United States. Hagar v. Board, 47 Cal. 222; Baker v. City of Cincinnati, supra; Braddee v. Brownfield, 2 Watts & S. 271; Beauchamp v. State, 6 Blackf. 299; Doe v. Douglass, 8 Blackf. 10; People v. Gallagher, 4 Mich. 244. There may be exceptions to this rule, but, in my opinion, this case does not present one of them. Where a court is exercising a jurisdiction conferred upon it by statutory enactment, and not by the constitution, its powers are limited by the statute by virtue of which it acts, and its powers, thus conferred, are subject to be limited or entirely taken away by the legislature. U. S. v. Knight, 1 Black, 488. So it is uniformly held that the legislature of the states have full power and control over the jurisdictions of the court, so long as the statutes enacted for that purpose do not conflict with the constitution. Ex parte Bank, 1 Ohio St. 433. The only authority given this court to grant a rehearing of a case decided in bank is conferred by the section of the Code under consideration, and in my judgment the court should be bound by its limitations and restrictions.

The distribution of the powers of the government into three departments—legislative, executive, and judicial—does not place either department above the law, nor make either independent of the other. McCauley v. Brooks, 16 Cal. 10, 39. In the case cited Mr. Justice Field, speaking for the court, said: "The third article of the constitution reads as follows: 'The powers of the government of the state of California shall be divided into three separate departments,—the legislative, the executive, and judicial,—and no person charged with the exercise of powers properly belonging to one of these departments shall exercise any functions appertaining to either of the others, except in the cases hereinafter expressly directed or permitted.' There is nothing in this distribution of powers which places either department above the law, or makes either independent of the other. It simply provides that there shall be separate departments, and it is only in a restricted sense that they are independent of each other. There is no such thing as absolute independence. Where discretion is vested in terms, or necessarily implied from the nature of the duties to be performed, they are independent of each other, but in no other case. Where discretion exists, the power of each is absolute, but there is no discretion where rights have vested under the constitution or by existing laws. The legislature can pass such laws as it may judge expedient, subject only to the prohibition of the constitution. If it overstep those limits, and attempt to impair the obligation of contracts, or to pass *ex post facto* laws, or grant special acts of incorporation for other than municipal purposes, the judiciary will set aside its legislation, and protect the rights it has assailed. Within certain limits it is independent; when it passes over those limits, its power for good or ill is gone. The duty of the judiciary is to pronounce upon the validity of the laws passed by the legislature, to construe their language, and enforce the rights acquired thereunder. Its judgment in those matters can only be controlled by its intelligence and conscience. From the nature of its duties, its action must be free from coercion. But it is not independent of the legislature in numerous matters materially affecting its action and usefulness. The legislature fixes the places where courts shall be held, determines the number of their terms, and in the regulation of proceedings in civil and criminal cases provides the manner in which suits shall be brought, prosecutions conducted, appeals taken, and all the vast machinery by which rights are asserted and wrongs redressed. In all these matters, with certain limited exceptions, the judiciary is a dependent department." Id. 39, 40. It is as much the duty of this court to respect and protect the powers of the other departments of government as it is to uphold its own, and care should be taken that under the guise of protecting the powers of the judiciary we do not trample those of the legislative department under foot. It is right and proper that the courts should maintain and uphold their independence and freedom as a co-ordinate branch of the state government, but this can best be done, and the independence and usefulness of the judiciary more securely established and preserved, by a fair and liberal construction of laws enacted for its guidance, and by upholding and protecting the constitutional powers of the other departments of state while maintaining its own. Here is a statute plain, unambiguous, and reasonable in its terms, that takes away none of the constitutional or inherent powers of the court, that tends to the stability of its decisions, that is calculated to prevent prolonged litigation, and places no improper restraints upon the court. I know of no reason why the statute should not be upheld and enforced. The most material part of it, and that which the court might with the greatest reason have looked upon with disfavor as a limitation of its powers, viz., that five members of the court should concur in order to grant a rehearing, and that action should be taken within 30 days, has been acted upon as valid. Why should not the other requirements? The whole of the reasoning in the prevailing opinion is outside of the real question presented. It goes to prove that the provision of the statute that five justices must concur in order to grant a rehearing is unconstitutional. There is no such question in the case. Five justices did vote in favor of the rehearing. If they had not, the rehearing would have been denied. The uniform practice of the court has upheld the validity of this provision of the statute, and rehearings have been denied, although a majority of the court voted for them. If the prevailing opinion is right on this point, the court has been wrong from the time the new constitution took effect until the present day. It was hardly necessary to go outside of the case to put the court in antagonism with itself by an attempt to show that it had been violating its constitutional duty, and upholding a statute that is unconstitutional for the past 10 years, especially in an opinion the main force of which is based upon the practice of the court against the validity of another provision of the same statute. The real question in the case, viz., whether the order granting a rehearing shall be in writing and signed, seems to have been overlooked in the zeal of an attempt to prove the court to have been wrong on a point not now before us. I think the motion should be granted.

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82 Cal. 114

BANK OF MENDOCINO v. BAKER *et al.* (No. 12,228.)

(*Supreme Court of California.* Dec. 19, 1889.)

BONA FIDE PURCHASER—NOTICE—POSSESSION.

Open and notorious possession of land puts a purchaser on inquiry as to the extent of possessor's title, though by the records it appears that he is holding under a deed from a stranger to the title.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGARVEY, Judge.

Bond & Fishback, J. M. Mannon, and *C. C. Hamilton*, for appellant. *J. A. Cooper*, for respondents.

FOOTE, C. This is an action in ejectment. A day or two before the trial of the cause the defendants offered, in writing, to allow the plaintiff to take judgment for all the land sued for, except that described in paragraph 6 of the answer. This seems to have been declined, and the result of the trial was that the plaintiff obtained judgment for all the land, except that set out in said paragraph, and for costs. From that judgment and an order denying a new trial the plaintiff has appealed.

Under the facts, as found by the court, the plaintiff was defeated in its effort to recover the land mentioned in the paragraph referred to because it appeared upon the trial that the title and right of possession to that portion of the land in dispute was in the Garcia & Point Arena Railroad Company, a corporation, not a party to the suit, and that the defendants only have possession of it as the agents of that company. The evidence on which the findings were based that the title and right of possession so existed was, in brief, that the railroad company had been for many years in the open and notorious possession of the land, and that a deed in fee-simple had been executed to it about the time that it assumed such possession, in the year 1870, from one Campbell, from whom the plaintiff also claims to derive its title by mesne conveyance. It further appears that the deed to the railroad company had never been recorded, and was lost. The plaintiff claimed title by virtue of a sheriff's deed on a foreclosure sale, under a mortgage executed by one Abbott, to whom Campbell had made a deed of the land long after the deed to the railroad company was executed. In the brief of its counsel, appellant claims that the evidence shows that the plaintiff was a *bona fide* purchaser, without notice of the unrecorded deed from Campbell to the railroad company, and that the findings to the contrary are wrong; and seems to rely mainly upon this point for a reversal of the judgment and order appealed from. It is said the evidence shows that the possession of the railroad company was initiated under a deed of a mere right of way from two persons, Whitmore and Stevens, to whom there was no deed of record from Campbell; that, having taken possession in such manner, and placed such a deed upon record, the railroad company had an apparent possession under that deed; and that such possession, long continued, open, and notorious as it might be, did not and should not have put the plaintiff, when it came to take a deed to the land, upon inquiry as to the true nature of the possession of the railroad company. In other words, the plaintiff contends that the possession of the railroad company was consistent with the deed from Whitmore and Stevens, although, by the record, they were strangers to the title of Campbell, the common source of title, and that the company cannot be heard to say the plaintiff should have inquired diligently as to whether the company held a deed from Campbell of prior date, although unrecorded, to that made to Abbott, from whom the plaintiff claims.

The real question in the controversy, then, is whether an open and notorious possession under the deed of one who apparently never had any connection with or conveyance from the real holder of the title is such as that an individual desiring to purchase the land from one who, by the record, seems to be the true owner, may safely do so without any further inquiry as to the true nature of the occupant's possession, and may conclude that he has possession of the true owner's land by no other conveyance than that of one who has no shadow of title to the premises. The position of the appellant is to the effect that no inquiry would be necessary; that the purchaser would have a right to assume that the possession was under one who had no title whatever, was that of a mere trespasser as to the true owner of the land, and that a purchaser might with safety take a deed from the owner. The case of Fair v. Stevenot, 29 Cal. 490, cited by the appellant, does not sustain his contention. The rule as to the matter is very aptly stated in Pell v. McElroy, 36 Cal. 277, where the appellate court quotes affirmingly from the opinion in the case of Williamson v. Brown, 15 N. Y. 354, to this effect: "The true doctrine on this subject is that, when a purchaser has knowledge of any fact sufficient to put him on inquiry as to the existence of some right or title in conflict with that he is about to purchase, he is presumed to have made the inquiry and ascertained the extent of such prior right, or to have been guilty of a degree of negligence equally fatal to his claim to be considered as a *bona fide* purchaser." The fact of open and notorious possession for so many years, as in this case, would certainly be sufficient to put a purchaser upon inquiry as to the existence of a deed. 3 Washb. Real Prop. (5th Ed.) 337. The disclosure by the record of a deed which was made by a stranger to the title would not clear up the doubt to a prudent man, desiring to purchase. It would hardly be presumed that a person would have had open and notorious possession of another man's land for years without any disturbance under a deed which amounted to nothing. That kind of possession, under such a deed, is equivalent to an open and notorious possession, without any deed upon record, and inquiry should be made as to whether a deed from the owner existed. Where there is such possession, held under no record title, it is clear from the authorities that the intending purchaser is at least put upon inquiry as to whether the party in possession has a deed from the rightful owner or not. Hellman v. Levy, 55 Cal. 118, and cases cited; Patten v. Moore, 32 N. H. 384. It was an easy matter to inquire of those in possession, without any record title from Campbell, under what claim they were in open and notorious possession of his land; and the mere fact that the parties in possession had a deed upon record which did not appear to be from any one connected with the title did not absolve the plaintiff from this inquiry. The possession of the railroad company, by its agents, as it seems to us, was consistent with its unrecorded deed from Campbell; and the plaintiff should have inquired of them about the actual claim of title by the railroad from the true owner. The plaintiff had no right to believe that the railroad company was maintaining open, notorious, and long-continued possession of land under a claim of title exclusively derived from one who, by the record, had no title or claim to the land held by the corporation. Fairly considered, with reference to the different defenses set up in the answer, we do not think that the defendants' admissions that they were the successors "in interest" of the railroad company should be held to preclude the court from finding from the evidence, as presented, that the title was still in the railroad company. Neither do we perceive that the court committed prejudicial error in its rulings as to the exclusion of evidence, of which the plaintiff complains. The other matters adverted to do not require special attention; and we advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

82 Cal. 238

PEOPLE v. BINGHAM. (No. 13,415.)

(*Supreme Court of California.* Dec. 30, 1889.)

QUO WARRANTO—JURISDICTION—TITLE OF RELATOR.

1. Under Const. Cal. art. 6, § 5, providing that "the superior court shall have original jurisdiction in * * * and in all other cases in which the demand * * * amounts to three hundred dollars," and providing that it shall have power to issue writs of *quo warranto*, it has jurisdiction, in an action in the nature of *quo warranto*, brought under the provisions of Code Civil Proc. §§ 803, 809, to oust a person from office, and recover a penalty of $5,000 for unlawfully holding such office.

2. The fact that the person against whom the action is brought is a member of the board of supervisors of the city and county of San Francisco, which board, the consolidation act, § 67, p. 16, declares, "shall be the judge of elections, returns, and qualifications of its own members," does not take away the court's jurisdiction. SHARPSTEIN and THORNTON, JJ., dissenting.

3. As Code Civil Proc. Cal. § 803, authorizes the attorney general to bring the action, in the name of the people, on his own information, or on the complaint of a private party, it is not necessary for the complaint to show that the relator is entitled to the office, or that any one else claims to be entitled to it.

In bank. Appeal from superior court, city and county of San Francisco; F. W. LAWLER, Judge.

Horace W. Philbrook, for appellant. *J. D. Sullivan*, for respondent.

WORKS, J. This action is brought, in the name of the people of the state of California, by George A. Johnson, attorney general, upon the complaint of Charles J. Swift, against the respondent, to oust him from the office of supervisor of the city and county of San Francisco, on the ground that he was not, at the time of his election, a resident of the ward of which he was elected, and to recover the penalty of $5,000 provided for by the statute in such cases. There was a demurrer to the complaint on all of the statutory grounds, which was sustained; but we are informed by the briefs of counsel that the demurrer was sustained on the sole ground that the court had no jurisdiction to hear and determine the cause. This was based upon the ground, which is attempted to be maintained in this court, that by the consolidation act of the city and county of San Francisco the board of supervisors "shall be the judge of elections, returns, and qualifications of its own members." Consolidation Act, § 67, p. 16.

It was held, in an early case, that similar language to this, applied to the common council of the city of Los Angeles, gave to the council the exclusive right to pass upon and determine the election and qualification of its own members, and that the superior court had no jurisdiction of an action, in the nature of a *quo warranto*, to determine the same question. People v. Metzker, 47 Cal. 525. It was said in that case: "The tenth section of the act of March 11, 1850, to provide for the incorporation of cities, (St. 1850, p. 88,) that act being applicable to that city at the time of the alleged election of the relator, provides that the common council 'shall judge of the qualifications, elections, and returns of their own members.' The eighth section of article 4 of the constitution, relating to the legislative department of the state government, is as follows: 'Each house shall choose its own officers, and judge of the qualifications, elections, and returns of its own members.' The words of the constitution and of the statute, being identical, should receive the same construction. It is settled beyond controversy that those words of the constitution confer upon each house the exclusive power to judge of and determine the qualifications, elections, returns of its own members; and it follows that the common council of a city to which that section of the act is applicable possesses the like exclusive authority to judge of and determine the qualifications, elections, and returns of its own members. The court, therefore, had no jurisdiction of the action." As to the effect of such language, the opposite conclusion was reached by the court of appeals of New York in a well-considered case. People v. Hall, 80 N. Y. 117. There it was said: "But it is further urged that the clause of the charter, taken without regard to that likeness, gives exclusive power in the first instance to the board. It does not, unless it takes away jurisdiction from the courts, or, in this case, from the supreme court of the state. That court, from its origin, has had general jurisdiction in law and equity. Const. art. 6, § 6. Within that jurisdiction formerly fell the proceedings by *quo warranto*, and by information in the nature thereof; and now falls the action by which the remedies once got by them are yet reached. The jurisdiction is not taken away by a statute, unless there be express words in it to take it away. 'It is a maxim in the common law that a statute made in the affirmative, without any negative expressed or implied, does not take away the common law.' 1 Coke (2d Inst.) 199, cap. 20–24; Rex v. Moreley, 2 Burrows, 1040. And see, per COWEN, J., Ex parte Heath, 3 Hill, 52; People v. Turnpike Road, 23 Wend. 222. That rule applies here. There is no word in the clause in the charter that, either in terms or by necessary implication, expresses a legislative purpose to take from the supreme court its jurisdiction, and to make the power of the board exclusive, and its judgment final and conclusive. It creates a cumulative jurisdiction. It enables the board to pass speedily, and by simple proceeding, upon the right to membership in it, so that it may not be hampered in the performance of its functions; and, when it has done so, the board, as composed thereby, is for the time a legal body, and its doings authoritative. The courts of competent jurisdiction are not shut out, however, from inquiring, in behalf of the people, the origin of all authority, into the right of any person who, by the action of the board, in fact holds a place in it, and claims thereby to exercise a public office. The officer is such as to be liable to such an inquiry in behalf of the public; and it needs express and unequivocal words, or an irresistible implication, to take away from the judiciary a jurisdiction always possessed. The supreme court has, by its constitution, control over all inferior jurisdictions, of which the board of aldermen is one. To take away its general superintending power, the lan guage, to that end, should be clear and unequivocal, and not to be collected from doubtful inferences or incomplete analogies."

We are inclined to the opinion that the rule laid down by the case last cited is the correct one, but it is unnecessary to so hold in this case. In the case of People v. Metzker the question as to the constitutionality of the statute, which is the controlling question in this case, was not presented or considered. The constitution then in force did not in terms confer jurisdiction on the superior court in this class of cases. The present constitution expressly confers such jurisdiction. Section 5, art. 6, provides: "The superior court shall have original jurisdiction in all cases in equity, and in all cases at law which involve the title or possession of real property, or the legality of any tax, impost, assessment, toll, or municipal fine, and in all other cases in which the demand, exclusive of interest, or the value of the property in controversy, amounts to three hundred dollars." This is an action at law, and is for the recovery of $5,000. Therefore, the section of the constitution referred to gave the superior court jurisdiction. People v. Perry, 79 Cal. 106, 21 Pac. Rep. 423. The same section provides, further: "Said courts, and their judges, shall have power to issue writs of *mandamus*, *certiorari*, prohibition, *quo warranto*, and *habeas corpus*," and confers jurisdiction on said court in cases of this kind. People v. Perry, supra; State v. Railway Co., 34 Wis. 197; State v. Leatherman, 38 Ark. 81; People v. Boughton, 5 Colo. 487; State v. Gleason, 12 Fla. 190; People v. Keeling, 4 Colo. 129; State v. Vail, 53 Mo. 97. In People v. Perry we said: "*Quo warranto* was a case at law. It afforded the legal remedy for the usurpation of an office; and we think this court retains jurisdiction of the case, notwithstanding the legislature may have changed the procedure, enlarged the remedy, and given it a new name. To hold otherwise would be to admit a power in the legislature to abridge our jurisdiction, and take from parties the right of appeal by the easy device of a change of procedure, in many cases, where the right and jurisdiction are unquestioned." Jurisdiction in this class of cases having been conferred on the superior court by the constitution, such jurisdiction could not be taken away or abridged by the legislature; and a statute existing at the time the constitution was adopted, conferring jurisdiction on some other tribunal, was superseded by such constitutional provision, so far, at least, as it could be held to have conferred exclusive jurisdiction upon such tribunal. Haight v. Gay, 8 Cal. 300; People v Turnpike Road, supra; Montross v. State, 61 Miss. 429; High, Extr. Rem. § 615.

It is contended by the respondent that the demurrer to the complaint was properly sustained, because the action was brought on the relation of Charles J. Swift, and it was not shown that he was he entitled to the office, or that any one else claimed to be entitled to the office, and for that reason no right to recover the penalty of $5,000 was shown. The statute authorizes the attorney general to bring the action in the name of the people of the state, upon his own information, or upon the complaint of a private party. Code Civil Proc. § 803. This is a conclusive answer to the contention that a party not entitled to the office cannot be the relator. Section 809 of the Code of Civil Procedure is equally conclusive as to the right to recover the penalty where the relator is not shown to be entitled to the office. It provides: "When a defendant, against whom such action has been brought, is adjudged guilty of usurping or intruding into, or unlawfully holding, any office, franchise, or privilege, judgment must be rendered that such defendant be excluded from the office, franchise, or privilege, and that he pay the costs of the action. The court may also, in its discretion, impose upon the defendant a fine not exceeding $5,000, which fine, when collected, must be paid into the treasury of the state." The recovery of the fine is for the benefit of the state, and must be paid into the state treasury, no matter who is the relator. Judgment reversed, with instructions to the court below to overrule the demurrer to the complaint.

We concur: BEATTY, C. J.; FOX, J.; McFARLAND, J.

PATERSON, J. I concur. Each house of the legislature derives its power to "choose its own officers and to judge of the qualifications, elections, and returns of its own members," directly from the constitution. The fact that the words of the statute are identical with the words of the constitution is a matter of no importance. The power of the court to inquire, on behalf of the people, into the right of any person to hold and exercise a public office, is derived from the same source as that of the legislature to "choose its own officers," etc., i. e., from the people themselves.

SHARPSTEIN, J. I dissent. In People v. Metzker, 47 Cal. 524, the precise question involved in this case was decided. The act of March 11, 1850, which was held to be applicable to the city of Los Angeles, provided that the common council should judge of the qualifications, elections, and returns of their own members. Mr. Justice RHODES, speaking for the court, said: "The eighth section of article 4 of the constitution, relating to the legislative department of the state government, is as follows: 'Each house shall choose its own officers, and judge of the qualifications, elections, and returns of its own members.' The words of the constitution and of the statute, being identical, should receive the same construction. It is settled beyond controversy that those words of the constitution confer upon each house the exclusive power to judge of and determine the qualifications, elections, and returns of its own members; and it follows that the common council of a city to which that section of the act is applicable possesses the like exclusive authority to judge of and determine the qualifications, elections, and returns of its own members. The court, therefore, had no jurisdiction of the action." The language of the consolidation act, which confers all the powers which the board of supervisors of the city and county of San Francisco may rightfully exercise, provides that "the board of supervisors shall be the judge of elections, returns, and qualifications of its own members." The language of the court in People v. Metzker, supra, is as applicable to this case as it was to that; and I am not satisfied that that case should be overruled.

THORNTON, J. I dissent.

82 Cal. 278

GRIGSBY v. SCHWARZ *et al.* (No. 12,412.)

(*Supreme Court of California.* Dec. 31, 1889.)

DEEDS—CONSIDERATION—JUDGMENT LIEN—DEPOSITION—NEW TRIAL.

1. The signing of a note as surety is a consideration for the transfer of property

2. Where the maker of a note transfers land as security to a surety on the note, and then sells it to a third person, who, in consideration therefor, pays the note, a deed of the land executed thereafter to such third person by the surety, on an order given by the maker of the note at the time of such payment, relates back to the time of the payment, and takes precedence over a judgment rendered in the mean time against the maker of the note.

3. Where plaintiff has testified fully in his own behalf, and is still present in court, it is in the discretion of the court to refuse to allow his counsel to read his deposition, taken by defendants before the trial.

4. The granting of a new trial for insufficiency of evidence to justify the decision will never be disturbed except for an abuse of discretion

Department 2. Appeal from superior court, Napa county; R. CROUCH, Judge.

Bill for an injunction by R. F. Grigsby against H. Schwarz, a judgment creditor of T. L. Grigsby, and George W. Allen, a constable, to restrain the latter from giving a constable's deed to said Schwarz of certain premises sold on execution sale under the judgment of said Schwarz against said T. L. Grigsby. Prior to said judgment, said T. L. Grigsby had transferred the premises to A. F. Grigsby and W. A. Trubody, as security, and had then sold it to plaintiff, and directed said A. F. Grigsby and W. A. Trubody to deed it to plaintiff. This deed, however, was not executed until after the judgment was obtained.

Spencer & Henning, for appellants. *Wallace & Johnson*, for respondent.

THORNTON, J. The appeal in this case is by defendants, from an order granting plaintiff's motion for a new trial. The complaint states facts sufficient to constitute a cause of action. Shattuck v. Carson, 2 Cal. 588, and cases cited in note to second edition of 2 Cal. 588, Pixley v. Huggins, 15 Cal. 127; Englund v. Lewis, 25 Cal 337.

Plaintiff's motion for a new trial was made on the ground, *inter alia*, of insufficiency of the evidence to justify the decision. Nothing appearing to the contrary, we must presume that the court granted the motion on this ground. Every intendment is to be made consistent with the record to sustain the correctness of the judgment of the court below Where a new trial is granted on the ground above stated, this court never interferes with it, unless there has been an abuse of discretion. Such a motion is submitted to the sound legal discretion of the court below, and a manifest abuse of such discretion only induces this court to reverse it. This is settled by more than a dozen cases decided here. In Breckenridge v. Crocker, 68 Cal. 403, 9 Pac. Rep. 426, nearly all the cases on this point, decided before the decision in that case, are cited. There have been several cases since decided the same way. We find no abuse of discretion by the court below in this case.

The trial court did not err in refusing to allow plaintiff's counsel to read the deposition of plaintiff, taken previous to the trial by defendants The plaintiff had been offered as a witness on his own behalf, and fully examined by his counsel. He was then present in court. It is not made to appear that there was anything in the deposition concerning which the plaintiff might not have been fully questioned by his counsel when he was on the stand as a witness. Under these circumstances, we regard it as entirely a matter of discretion in the court below to permit the reading of the deposition or not, and its refusal to permit it is a matter which this court would not revise on appeal. In ruling as above we do not intend to hold or not to hold that, if the deposition of a party has been taken by his adversary, it may not be read on behalf of the party whose testimony has been so taken, though the latter is present in court. The question just stated we do not wish to be regarded as deciding. The ruling here is confined to the facts stated above, arising on the record before this court.

The finding that A. F. Grigsby and W. A. Trubody paid no consideration for the transfer of the premises to them, is not sustained by the evidence. They paid for it by becoming sureties for T. L. Grigsby on a note for more than $1,000 in favor of J. H Goodman & Co. This was a very valuable consideration, and this consideration they paid by executing the note. It is a paltering with words to say that they did not pay anything, because they did not pay money. They paid money's worth,—worth much to T. L. Grigsby, their principal. It is immaterial whether they paid the money or not, as they paid a money value. The legal title passed to A. F. Grigsby and Trubody by the conveyance from T. L. Grigsby, and we see no reason why the latter could not sell his interest, and the full title pass to A. F. Grigsby by the deed executed at T. L. Grigsby's request, by his grantees, Grigsby and Trubody, to the plaintiff. See Carter v Hopkins, 79 Cal. 84, 21 Pac. Rep. 549. The evidence tends to show that T. L. Grigsby sold the land in suit to the plaintiff as early as the 18th of March, 1885; that plaintiff about the same time paid the purchase money by paying off the note of T. L. Grigsby to Goodman & Co., on which A. F. Grigsby and Trubody were sureties, after which T. L. Grigsby directed the conveyance to be made to the plaintiff by the parties above named, which was done. When the note was paid, Grigsby and Trubody held the bare title for T. L. Grigsby, their grantor, and T. L. Grigsby could deal with the title, sell it or not, as he saw fit. The deed made by his order to the plaintiff invested him with the full title, and a further conveyance by T. L. Grigsby was unnecessary. It must be borne in mind that the evidence tended to show an absolute purchase by the plaintiff of T. L. Grigsby. If such was plaintiff's purchase, the deed, though executed in November, 1885, related back to the purchase in the preceding March, (Landes v. Brant, 10 How 370; Waterman v. Smith, 13 Cal. 419, 420; Hibberd v. Smith, 67 Cal. 561, 4 Pac. Rep. 473, 8 Pac. Rep. 46,) which was prior to the day (the 16th of May, 1885) on which the lien of Schwarz's judgment attached. When the plaintiff paid the purchase money on the contract for an absolute purchase, his equity to have a deed from T. L. Grigsby was perfect, and this should be regarded as a legal title. Morrison v. Wilson, 13 Cal. 495. When the lien of the Schwarz judgment attached in May, 1885, nothing remained in T. L. Grigsby, the judgment debtor; not even the equity to have a deed from A. F. Grigsby and Trubody. The right to a deed from them had passed to the plaintiff, whose equity was perfect. A sale under Schwarz's judgment could pass nothing to a purchaser, for nothing vendible remained in the judgment debtor. The court below properly finds that there was no fraud in the transaction between T. L. Grigsby and the plaintiff. The title passed to the plaintiff, though he knew that the conveyance to his grantors from T. L. Grigsby was made to them to secure them from loss on the note to which they had become sureties.

What is said herein is not to embarrass the court on a new trial below in dealing with the evidence and finding the facts. The rules of law herein laid down only apply to the facts, if found to exist as above indicated. The order is affirmed.

We concur: McFARLAND, J.; SHARPSTEIN, J.

APPLICATION FOR REHEARING.

(January 29, 1890.)

In bank.

PER CURIAM. What is said in the opinion in this case filed December 31, 1889, in regard to the legal title passing to the plaintiff by the conveyance from Trubody and Grigsby, made by order of their grantor, is withdrawn, and the rehearing is denied.

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82 Cal. 483

KENNEDY v. BOARD OF EDUCATION. (Nos. 12,584 and 13,029.)

(*Supreme Court of California.* Jan. 9, 1890.)

SCHOOL-TEACHERS—REMOVAL—MANDAMUS.

1. Pol. Code Cal. § 1617, confers on boards of education unlimited power to employ teachers, contains no limitations as to the time for which they may be employed, and no restrictions on their right to dismiss or remove for or without cause. Section 1793 provides that "the holders of city certificates are eligible to teach in the cities in which such certificates were granted, in schools of grades corresponding to the grades in such certificates, and, when elected, shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct." *Held*, that the power of the board to remove a teacher "when elected," at least where there has been no formal contract fixing the time of such employment, is limited to the cases enumerated in the last section.

2. Under Code Civil Proc. Cal. § 1085, providing that the writ of *mandamus* may issue "to compel the admission of a party to the use and enjoyment of a right of office to which he was entitled, and from which he is fully precluded," such writ will lie against a board of education, to restore a teacher who has been "elected" to a position from which she has been removed without cause, her right to retain the position being given by express provision of law.

3. The fact that the clause of section 1793, which forbids the removal of a teacher except for cause, was enacted after the election of a teacher, does not affect her right to be protected thereby.

4. The removal of a teacher to a lower grade is as much a violation of the statute as if she had been dismissed and not given another position.

5. A general statute, made applicable to all cities, controls special statutes, made applicable to particular cities.

6. The position of teacher not being an office, the right to have a writ of *mandamus* to restore her to her position is not affected by the fact that another person has been placed in her position.

Fox and McFARLAND, JJ., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; WILLIAM T. WALLACE, Judge.

Barber & Bishop and *Jos. Rothschild*, for appellant. *Horace W. Philbrook* and *Hall & Rodgers*, for respondent. *Alfred Clarke, amicus curiæ.*

WORKS, J. This was a proceeding or action for a writ of mandate, to compel the defendants to admit the plaintiff to the place and position of principal teacher of the North Cosmopolitan Grammar School of the city and county of San Francisco, to which she claims the right, and from which, she alleges, she has been wrongfully excluded by the defendants. The facts relevant to the points herein considered, as found by the trial court, are substantially as follows: In January, 1887, and more than 10 years next prior thereto, "plaintiff was, and ever since has been, and now is, elected and employed by said board as the principal teacher of said school, which is a public grammar school of said city and county; and during all which time she was and now is, the holder of a teachers' first-grade city certificate of said city and county; and during all that time the salary and compensation for the duties and services of principal teacher of said North Cosmopolitan Grammar School has been, and still is, $175 per month;" and during all that time "she was, and still is, eligible as said principal teacher of said school." That on January 26, 1887, upon application of the plaintiff, the board of education granted her leave of absence until May 1, 1887. At the time this leave of absence was granted, and during the entire term of plaintiff's absence, there was in force the following rule of the board of education: "Sec. 158. Whenever a leave of absence is granted to an assistant teacher in the primary or grammar schools for a longer period than three months, or renewed so that the total absence shall amount to more than three months, a regular teacher shall be assigned to the class; but the absentee shall be entitled to the first vacancy of like grade, or lower grade, at his or her option, officially declared after he or she reports for duty. But, when a principal or an assistant has been employed in the public schools of San Francisco for a period of not less than ten years, the board may grant such principal or assistant a leave of absence for not exceeding one year; and the party to whom such leave is ganted shall, at the expiration of the leave of absence, be entitled to a position of the same grade, in the same school, as he or she held when the leave was granted." That on March 16, 1887, during plaintiff's absence, and without notice to her,—without her consent, and without any charges against her,—the board of education made an order that she be transferred to the position of principal teacher of the Ocean View School,—a public school of said city and county, but of lower grade than the North Cosmopolitan School,—at a salary of only $100 per month. At the close of the term of her leave of absence the plaintiff returned, and demanded of the superintendent of schools, and of the board of education, that she be placed in what she claims to be her position of principal teacher of the North Cosmopolitan Grammar School, which demand was refused; and on Monday, May 2, upon the first opening of the school after the term of her leave of absence, she was at said school, "and then attempted to resume the performance of the services and duties of principal teacher thereof, but was resisted in such attempt, and prevented in the performance of all and singular said services and duties, by the defendants." On the 4th day of May, 1887, she delivered to the board of education a letter, in which, among other things, she said: "At the opening of schools on the 2d day of May, 1887, I was at the North Cosmopolitan Grammar School, and was then ready, able, and willing to resume the duties of principal of that school; but I was prevented from doing so by Miss H. M. Fairchild, who claimed to prevent me by your authority, and to be herself principal of that school. I thereupon informed James W. Anderson, the superintendent, of this, and demanded of him to be reinstated in the position of principal of the North Cosmopolitan School, and to be allowed to resume the duties of that position; but he again refused, and, in doing so, told me that I was prevented by you from resuming those duties." The defendants thereupon refused, and ever since have refused, and still refuse, the demands in said letter contained. That on the 26th day of January, 1887, the following were, and ever since have been, and still are, the rules or regulations of the board of education: "Sec. 45. All complaints against teachers or other employes of the school department must be made in writing, and verified, and shall be addressed to the secretary of the board of education." "Sec. 80. Upon a report from the committee on rules and regulations charging a teacher with unprofessional conduct, or upon a report of inefficiency by the committee on classification, a substitute teacher, a probationer, a regular teacher, or an inspecting teacher, may be dropped from the rolls at any time; but no such action shall be taken against a teacher, unless such teacher has had an opportunity of a due hearing before the proper committee." The plaintiff refused to accept or take the position in the Ocean View School to which the board had ordered her to be transferred, but otherwise never had violated any rule or regulation of the board of education, nor failed to perform any duty of her position as principal teacher of the North Cosmopolitan Grammar School; and no charge was ever made against her of which she had notice, or against which she had any opportunity to defend herself. Teachers elected or employed by the board of education have been liable to be dismissed, during the times herein mentioned, for failure or refusal to perform the duties and services required in the positions to which they were or are respectively elected, and for the violation of the rules legally adopted by the board, as well as for other reasons. Ever since the 2d day of May, 1887, plaintiff has been able, ready, and willing to perform all the services and duties of principal teacher of the North Cosmopolitan Grammar School. The trial court adjudged "that plaintiff was on the 2d day of May, 1887, and ever since has been, and now is, eligible and elected as principal teacher of the North Cosmopolitan Grammar School, and entitled to perform the duties and services of principal teacher of said North Cosmopolitan Grammar School, and to receive out of the school fund of said city and county her salary and compensation of $175 per month, and that defendants admit plaintiff to the use and enjoyment of said right, and to allow plaintiff to perform said services and duties." The defendants' motion for a new trial having been denied, they appeal from the judgment, and from the order denying their motion.

The two appeals have been submitted together. The statement on motion for new trial contains no sufficient specification of insufficiency of the evidence to justify any of the findings of fact; and, as the specified errors of law therein seem to be groundless, and are not urged by counsel for appellants, the order denying a new trial should be affirmed.

The questions presented by this appeal are whether the board of education had the power to remove the respondent from her position, and, if not, is *mandamus* the proper remedy, or must she resort to an action for damages, as for a breach of contract? The solution of these questions depends upon the construction to be given to certain sections of the Political Code. Section 1616 provides: "Boards of education are elected in cities under the provisions of the laws governing such cities, and their powers and duties are as prescribed in such laws, except as otherwise in this chapter provided." Section 1617 further provides: "The powers and duties of trustees of school-districts and of boards of education in cities are as follows: * * * (7) To employ the teachers, janitors, and employes of schools; to fix and order paid their compensation, unless the same be otherwise prescribed by law: provided, that no board of trustees shall enter into any contract with such employes to extend beyond the 30th day of June next ensuing." Pol. Code, §§ 1616, 1617. Section 1617 confers upon boards of education unlimited power to employ teachers, and contains no restric-

tions upon their right to dismiss or remove for or without cause. Therefore, if this section stood alone, we might consistently hold that the teacher became, by such employment, an employe, in the ordinary sense of the term; that her right to the position must depend upon her contract, and that alone; and that the only restraint upon the right of the board to dismiss her or remove her would rest in the contract, and a violation of such contract would only entitle her to an action for damages, and not to *mandamus*, to be restored to her place. This section contains no limitation as to the time for which a board of education in a city may employ a teacher. There is such a limitation, but it is confined in terms to boards of trustees. Therefore, such board of education may, under this section, employ a teacher for 1 year or 10, or for an indefinite time, as, for example, during the competency or good behavior of the teacher employed. But we have another section, forming a part of the same statute, bearing directly upon the question; and the two must be construed together. Section 1793 provides: "The holders of city certificates are eligible to teach in the cities in which such certificates were granted, in schools of grades corresponding to the grades of such certificates, and, when elected, shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct. The holders of special city certificates are eligible to teach the special studies mentioned in their certificates, in all the schools in the city in which such certificates were granted." It seems to us that this section of the Code fixes the time for which the right to hold the place shall continue, at least, where the board of education has not limited the time in selecting the teacher. The section does not provide for any contract to be made by the board, but does provide, in plain and unequivocal terms, that "when elected" the teacher "shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct." It is clear to our minds that it was the intention of this section to provide for just what is mentioned in it,—an election of a teacher, and not an employment by a formal contract, fixing the term of such employment. But it is unnecessary to hold in this case that the board had not the power to limit the term of service by an express contract. It is enough to say that this was not done in this instance. She was elected precisely as provided in this section, without limitation as to time. The action of the board and the rules adopted by it, as set out above, all indicate that this has been the understanding of the board as to the manner in which teachers should be selected and retained. The respondent having been elected in this way, the power of the board of education to remove her is expressly and plainly limited by the section last referred to. A teacher so elected "shall be dismissed only" for the causes named in the section. It seems to us that nothing could be plainer than this. It is only the apparent or possible effect of such a provision that seems to call for any hesitation in giving the section its proper construction. It is said, with an apparent fear of disastrous consequences to our free institutions, that such a construction confers upon the teachers of our public schools life positions. But it does not confer a life position. It gives the teacher a right to hold the position so long as he is competent and faithful. When he ceases to be either, his removal is easy. The means by which it may be accomplished is amply provided for, and the board of education has the matter fully within its control. Are any serious consequences likely to result from such a *status?* Why should the length of service of a competent and faithful teacher in our public schools be left to the arbitrary will of the board of education, and subject to the varying personal, and, it may be, political, interests of its change in members? In our judgment there is no reason. We think the clause in this section of the statute was intended to prevent just such results, and their consequences, and that it should not be construed out of existence because of a fear that the positions held by teachers may be made perpetual. The same construction of these statutory provisions, it seems to us, determines the question of remedy against the appellant.

The writ of *mandamus* may issue in this state "to compel the admission of a party to the use and enjoyment of a right or office to which he is entitled, and from which he is unlawfully precluded." Code Civil Proc. § 1085. It may be conceded that a right to hold the position of teacher in the public schools would not be a "right," within the meaning of this section, if such right depended solely upon a contract with the board of education, and the term for which such position should be held were not fixed by the statute. But such is not the case. As we have seen, the term for which the respondent was entitled to hold her position was not fixed by any contract with the appellant. The duration of her term of service is fixed by the statute; and her removal from it was not merely a violation of a contract, but of an express provision of law forbidding such removal. Although her right to take the position depended upon the act of the appellant, the right to continue in it was preserved to her by the statute; and to take it from her was to deprive her of a right given her by law, and to which she has a right to be restored by *mandamus*. People v. Van Siclen, 43 Hun, 537. The object being to restore her to a right given her by law, *mandamus* is the proper remedy; and, as her term of service is uncertain, and depends upon the action of the board of education, based upon the causes named in the statute, her damages could not be ascertained with certainty, and an action for such damages would not be an adequate remedy.

The clause of section 1793 which forbids the removal of teachers except for cause was added thereto as an amendment in 1881, (St. 1881, p. 38,) and after the respondent wa selected a teacher; but this fact does not affect the question before us. The statute applies to all teachers elected by boards of education, and protects them in the right to continue in their positions, whether they were elected before or after its enactment.

It will be observed from the statement of the case that the respondent was not dismissed entirely from service as a teacher. She was removed from the grade in which her certificate and the statute entitled her to teach, which was as much a violation of the statute as if she had been dismissed, and not given another position. We do not wish to be understood as holding that the board of education has not the power to transfer a teacher from one school to another of the same grade. The statute does not guaranty to a teacher the right to continue in any particular school, but to continue, as such teacher, in a certain grade; and the transfer of teachers from one school to another may be necessary for the good of the schools, and should not be prohibited.

We cannot concur in the view so earnestly contended for by the learned counsel for appellant, that, because the respondent is an employe, and not an officer, she may be removed at the will of the board of education. It may be conceded that this would be so ordinarily; but in this case there is a direct statutory prohibition against a removal, except for cause. This, it seems to us, renders the authorities cited by counsel wholly inapplicable.

It is contended that the provisions of the Code above cited are not applicable to the city and county of San Francisco, and that the consolidation act alone is applicable. But this court has held to the contrary in a number of cases. The general statute, which applies to all cities, must control special statutes, made applicable to particular cities. People v. Henshaw, 76 Cal. 436, 18 Pac. Rep. 413; In re Ah You, ante, 929, (opinion filed January 1, 1890.)

The fact that some one else has been placed in the position to which the respondent is entitled cannot affect her right to maintain this action. It is conceded by both parties that the place is not an office; and therefore the case is not within the doctrine that *mandamus* cannot be used to regain an office claimed by, and in possession of, another. It may be well to say that cases may arise in which a teacher cannot compel the board of education to continue his employment, and enforce payment of his salary,—for example, where the school in which he is teaching is abolished, or for any other reason the position has ceased to exist; but no such question is presented here.

We have not referred specifically to the rules of the board of education, for the reason that, in our opinion, they have no bearing on the question presented. They seem to us to be in entire harmony with the construction we have placed upon the statute; but, if they were not, they could not control its provisions. Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; THORNTON, J.

FOX, J. I dissent.

1. The position claimed by plaintiff was an office, in everything but name; but she disclaimed it being such, because to call it an office defeated the life-estate, under the constitution. But, whether it be an office, or a mere right to place, it is a franchise; and in it she shows by her own complaint that there is another incumbent, one holding the place *de facto*. Mandate is not, therefore, the proper remedy. People v. Olds, 3 Cal. 167; Meredith v. Board, 50 Cal. 433; People v. Harvey, 62 Cal. 508; Kelly v. Edwards, 69 Cal. 460, 11 Pac. Rep. 1.

2. I cannot subscribe to the doctrine of a life-estate in the position of teacher in the public schools, which is the effect of the leading opinion. It is contrary to the entire spirit and intent of the constitution, and of all the legislation of the state, and, in my judgment, would be most disastrous to the public service. The people of this state require that all their public servants shall be subject to frequent visitation, and, at stated intervals, to opportunity in the appointing or electing power to determine whether the public service can be improved by change. Full force and effect can be given to section 1793, Pol. Code, without doing violence to section 1617 of the same Code; and, when this can be done, it is the duty of the court to do it.

3. The position of a teacher is distinctly defined by the Code (Pol. Code, § 1617) to be that of an employe. If the statutes and rules of the board determine his duties, powers, and rights, all that remains to complete the contract is his selection for the place; and it makes no difference whether that selection is made by a vote of the board, commonly called an "election," by appointment, or by specially negotiated contract. It does not change the fact that he is still an employe, and that his rights are based upon his contract of employment. Any violation of those rights was a breach of contract, for which the plaintiff has an adequate remedy at law; and, in that view of the case, mandate is not the proper remedy.

4. Whatever may have been the rights of the plaintiff at the time of commencing the action, May, 1887, in my view of the case, those rights had ceased before the entry of the judgment, February 11, 1888; and it was error to enter judgment declaring that she is now entitled to be restored to the place demanded, and to the emoluments thereof down to that date. As I view it, her contract expired by operation of law, at the end of the school year in which the action was brought, June 30, 1887; and there is no pretense that she was re-elected, reappointed, or that any new contract had been made with her.

MCFARLAND, J. I dissent. In my opinion, respondent shows no right, either by *mandamus*, *quo warranto*, or other proceeding, to compel the board of education to oust the present principal of the North Cosmopolitan Grammar School, who has occupied the place now for a year and a half, and put the respondent in her position. Certainly, a doctrine so destructive of the discipline, unity, and efficiency of the public school system should not be entertained, unless the statutory language upon the subject is so absolute as to leave no room for the play of ordinary and well-settled rules of construction. If respondent's relation to appellants was merely one of employment, then, of course, *mandamus* would not lie; and subdivision 7 of section 1617, Pol. Code, speaking of the relations between school officers and teachers, uses the words "employ" and "contract." No one ever heard of an employer being compelled by a judicial writ to retain an employe in his service. The remedy, in such case, is an action for damages for breach of contract. On the other hand, if the position was an office, then, in the first place, as it appears that another person is in the possession of the office, claiming a right to it, *mandamus* would not lie to oust her. The remedy would be the statutory action to determine the right to the office between the two contestants. But, in any event, respondent would have to show that she is entitled to the office for some definite term, which has not yet expired; and this she utterly fails to do. The only pretense which she makes in this regard, is to present the theory that the term of her office is "for life," to be forfeited only by such gross misconduct, or by such utter failure of qualification, as would warrant an extreme proceeding, in the nature of impeachment. If there be any statutory provision that must necessarily bear that construction, such provision, considering the position an office, is in contravention of section 16, art. 20, of the state constitution, which provides that the term shall not exceed four years. But, in my opinion, there is no statutory provision bearing such a construction. It is admitted that "section 1617, Pol. Code, confers upon boards of education unlimited power to employ teachers, and contains no strictures upon their right to dismiss or remove for or without cause," and that, if this section stood alone, respondent could not maintain the proceeding. And respondent's case is based on section 1793, which provides that teachers, "when elected, shall be dismissed only for violation of the rules of the board of education, or for incompetency, unprofessional or immoral conduct." And the whole stress of the argument rests on the construction to be given the words, "when elected;" and the construction given by respondent is "elected for life." But is there any other nook or corner in the whole body of our statutory and constitutional law in which "elected" means "elected for life?" Why should a meaning be given the word here which it bears nowhere else, and which is in the teeth of the constitution itself? Considering the position of a teacher as an office, then, in my judgment, the word "elected" should be given its ordinary and constitutional meaning, namely, chosen for some definite term; and, as respondent has not shown that she is entitled to any unexpired term of the alleged office or employment, she, in my opinion, shows no right which can be enforced by *mandamus* or otherwise.

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82 Cal. 286

SPRING VALLEY WATER-WORKS v. CITY AND COUNTY OF SAN FRANCISCO. (No. 13,411.)

(*Supreme Court of California.* Jan. 11, 1890.)

For majority opinion, see ante, 910.

THORNTON, J. I dissent. I am of the opinion that the superior court had jurisdiction of this case. It has jurisdiction of all cases in equity. Const. art. 6, § 5. I have no doubt it has jurisdiction of the case attempted to be made by the complaint herein, as presented in that pleading. It is a case brought for preventive relief. Its general purport is to prevent the property of the plaintiff from being taken by the action of the board of supervisors of the city and county of San Francisco, claimed to be unauthorized by law, without due process of law, and without compensation. All other relief sought is incidental to that just mentioned. Surely there can be no doubt at this day that such a case is within the equity jurisdiction of the superior courts of the state. The questions here to be considered relate to the exercise of jurisdiction, and the limits the law prescribes to the exercise of that jurisdiction. If the court has not exceeded such limits, its judgment must stand. The only real questions presented in this case relate to error in the employment of its jurisdiction. The judgment is correct, unless there can be found error in the record.

The question of the sufficiency of the complaint first attracts attention, and I am of opinion that the complaint does not state facts sufficient to constitute a cause of action. The complaint is defective in this: that it does not show on its face, by proper averment, that the rates fixed by the defendant board of supervisors are unjust or unreasonable or oppressive, and will not yield to the plaintiff all the revenue to which, under the law, it is entitled. The averments in regard to the fixing of rates are general and indefinite. The one most particular and definite, and on which, in my opinion, the decision of the case must turn, is contained in the following paragraph of the complaint: "That the said ordinance or order is, and the rates purporting to be prescribed and fixed thereby are, grossly unjust, unreasonable, and oppressive; that said rates do not permit of, nor provide for, a just or fair or reasonable compensation for the water to be supplied during said year by this plaintiff to said city and county, and to the inhabitants thereof; and that if said ordinance or order is enforced, and if the plaintiff is prevented from charging and collecting any other or greater rates than those prescribed, its gross income from the said rates for the year commencing July 1, 1889, and ending June 30, 1890, will not and cannot possibly exceed the sum of $750,000; and it will be wholly insufficient to pay the interest on the plaintiff's indebtedness, its operating expenses, and taxes, and not only will not and cannot yield any dividend to its stockholders, but will render it necessary to levy heavy assessments upon said stockholders to pay said interest, expenses, and taxes." It is here averred that the rates allowed by the ordinance will not and cannot produce an income, and will not allow the plaintiff to collect a sum which exceeds in amount $750,000. The plaintiff must show to the court by the averments that this is so; general averments of the character above set forth are insufficient. The facts must be pleaded from which the court can perceive and itself make an estimate, and the estimate so made by the court must show a result from which it can perceive that the rates fixed are unjust and unreasonable, and will produce an income less than that to which the plaintiff is by law entitled. Such a result must be shown by the facts stated in the pleading. The *data* on which the computation is to be made must appear by distinct allegation on the face of the complaint. The mere statement of the plaintiff as to the amount of money which the rates will bring to its coffers cannot be accepted by the court. Branham v. Mayor, etc., 24 Cal. 602. The facts in this regard are not sufficiently pleaded, and for this reason they are not admitted by the demurrer. A party demurring admits only such facts as are well pleaded. Branham v. Mayor, etc., supra; Johnson v. Kirby, 65 Cal. 487, 4 Pac. Rep. 458; Steph. Pl. 143; Gould, Pl. c. 9, §§ 5, 6, 24, 29. In Branham v. Mayor, etc., the court said: "Had the Ayuntamiento power to mortgage the pueblo lands to Aram, Belden, and Reed, under the circumstances, for the purposes narrated in the complaint? This question is not discussed by counsel for appellant, under the pretense that it cannot be made upon demurrer holding that, inasmuch as he has averred that the Ayuntamiento had full power and authority to make the mortgage, such power and authority is admitted by the demurrer. The Ayuntamiento, being a municipal body, could take and exercise only such powers as were conferred by the will of the sovereign, as expressed in the laws creating it. Every question as to what power has been conferred by such laws is a question of law and not of fact; and the averment in the complaint that the Ayuntamiento had full power and lawful authority to do the act in question, is but an averment of a conclusion of law, and does not tender an issue of fact. A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusion which counsel may choose to draw therefrom, although they may be stated in the complaint." In Johnson, v. Kirby supra, the following observations were made by the court on this point: "It is also averred that this assessment was not levied in accordance with law, and is void; but the defendants insist that it is valid, and treat it as valid. The pleader does not state any fact showing, or tending to show, that the assessment was not made in accordance with law, or that it is not valid. It is stated in the complaint, as matter of law, as a legal conclusion. A demurrer only admits such facts to be true as are well pleaded. It does not admit matter of law or legal conclusions. Such averment, then, goes for nothing. We cannot take it into consideration in deciding the questions in this cause; nor can we take into consideration the averment that the company sold the 13,000 shares of stock to the Lanes, and thereby Kirby became possessed of the benefits of this stock. It is not alleged in what mode he became possessed of these benefits. It is not averred that the Lanes were Kirby under another name; that they were in fact Kirby himself. It is not stated that Kirby became in any way the owner of the shares, but became possessed of benefits. What these benefits are does not appear. That he became possessed of benefits is a legal conclusion. No facts are alleged, and therefore none are admitted by the demurrants."

The facts above stated, taken from the complaint, are conclusions of fact, or conclusions made up of law and fact, and, whether conclusions of fact or conclusions of law and fact, they are alike insufficient. As said in Branham v. Mayor, etc.: "A demurrer admits the truth of such facts as are issuable and well pleaded; but it does not admit the conclusions which counsel may choose to draw therefrom, although they may be stated in the complaint." 24 Cal. 602. I cannot perceive how a court can accept the conclusions drawn by the pleader in the paragraph above quoted as well pleaded and admitted by the demurrer. That the allegation "the said ordinance or order is, and the rates purporting to be prescribed and fixed hereby are, grossly unjust, unreasonable, and oppressive," is a conclusion either of fact, or of law and fact, is too plain to admit of doubt. The same is true of the succeeding allegation, "that said rates do not provide for a just or fair or reasonable compensation for the water to be supplied during said year by the plaintiff to said city and county, and to the inhabitants thereof." The above allegation states no issuable fact; it is full of conclusions, and nothing beside. The next allegation is of the same character. The defendant should not be called on to answer such allegations. Under our system of pleading, facts only must be stated. This means the facts as contradistinguished from the law, from argument, from hypothesis, and from the evidence of the facts. Green v. Palmer, 15 Cal. 412, and cases cited in note of second edition of 15 Cal. Such allegations of fact the defendant is only required to answer. See case last cited.

The rule that should control in this is that which is applied to pleadings in which fraud is charged. Though fraud is not expressly charged, still the charges are of a gross dereliction of duty; and the facts showing such dereliction should be set forth in the complaint. The counsel for plaintiff strenuously asserts and contends that it is a case of fraud, and bases an earnest argument on it to sustain the jurisdiction of the court below. It is not sufficient to aver fraud in general terms; the facts constituting the fraud must be alleged. This is held in many cases decided by this court. This course of decision commenced at an early date in this state, as in Gushee v. Leavitt, 5 Cal. 160, decided in 1885; Kinder v. Macy, 7 Cal. 207, decided in 1857, and continued in Kohner v. Ashenauer, 17 Cal. 580; Meeker v. Harris, 19 Cal. 289; Castle v. Bader, 23 Cal. 76-79; Semple v. Hagar, 27 Cal. 163; Hager v. Chindler, 29 Cal. 60; Kent v. Snyder, 30 Cal. 674; Perkins v. Center, 35 Cal. 713; and many other cases which can be found by reference to the digest. Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028, is a strong authority to support the contention herein put forth. The question in that case was as to the reasonableness of rates of transportation prescribed by the statute of the state of Arkansas on a railroad within that state. Justice GRAY delivered the opinion of the court, in which he quoted with approval the rule laid down in Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191, as to the limitation of the power to prescribe rates in such cases, viz.: That the rates must not be so fixed as to amount to a taking of private property for public use without compensation, or without due process of law. The opinion subsequently proceeds as follows: "The plaintiffs in error do not contend that it is always or generally unreasonable to restrict the rate for carrying each passenger to 3 cents a mile. They argue that it is so in this case, by reason of the admitted fact that, with the same traffic that their road has now, and charging for transportation at the rate of 3 cents per mile, the net yearly income will pay less than 1½ per cent. on the original cost of the road, and only a little more than 2 per cent. on the amount of its bonded debt. But there is no evidence whatever as to how much money the bonds cost, or as to the amount of the capital stock of the corporation as reorganized, or as to the sum paid for the road by that corporation or its trustees. It certainly cannot be presumed that the price paid at the sale under the decree of foreclosure equaled the original cost of the road, or the amount of outstanding bonded debt. Without any proof of the sum invested by the reorganized corporation or its trustees, the court has no means, if it would, under any circumstances, have the power, of determining that the rate of 3 cents a mile fixed by the legislature is unreasonable. Still less does it appear that there has been any such confiscation as amounts to a taking of property without due process of law." The action in Dow v. Beidelman was brought against certain trustees, who were alleged to be the owners, and in possession, of the railroad. The defendants did not prove the facts referred to in the above extract from the opinion to show that the rates prescribed by the statute were unreasonable, and therefore they failed in the suit. Such facts could not be proved without being alleged. It is so held in Green v. Palmer, supra, and it is common law and common learning. A party must allege every material fact which he is required to prove, and will be precluded from proving any fact not alleged. 15 Cal. 412, 415. In view of this rule, which is of frequent application in courts, Dow v. Beidelman is a strong authority to show that the view of the complaint above taken is correct, and that it does not state facts sufficient to constitute a cause of action. The complaint here does not furnish *data* or state facts from which a court can see that the rates allowed by the ordinance are not just and reasonable, or that the income which will be received by the plaintiff from the adoption of such rates in making collections will not furnish all the revenue which the law allows, or that it can claim. One cannot perceive or calculate from any facts set forth in the complaint the amount which the rate-payers will have to pay under the rates prescribed by the ordinance each month or for the year. Until such facts are set forth, so as to make manifest to judicial cognition what such amount must and will be, it cannot be held that the complaint is sufficient.

A court should not consider a cause when such grave charges of an intentional dereliction of duty (for it is clear that intentional wrong is intended here to be charged) against a public officer are stated in the complaint. Nor should such officer be held to answer them. They should be make specific in statement, so that the defendant may see in advance what he has to admit or deny, and what evidence he will have to produce to disprove the charges made against him. The board of supervisors have important and responsible duties to perform, and, when they are charged with a dishonest and intentional failure to discharge their duties, the complaint should aver in what particulars they have so failed. Fraud lurks in generalities, and the law imposes on every plaintiff the obligation, in making such charges, to make them in distinct and specific language. The complaint should not be argumentative, nor an attempt to show, by inference to be drawn from general statements, that public officers have been guilty of intentionally dishonest conduct in the discharge of their official duties. Courts are bound to assume that the supervisors are men of ordinarily respectable standing, and they have a right to ask and demand of courts that they should be protected as far as the law allows from charges of dishonest official conduct, couched in general statements. They should be stated specifically, so that each of them may know what the charge is, and what they have to defend against. This is common justice, every day administered by courts, and never otherwise administered.

I do not think, for the reasons above stated, that the statements of the complaint generally made, as pointed out, are sufficient to justify the court in coming to the conclusion that the board of supervisors of the city and county of San Francisco, in fixing rates for water to be paid by the rate-payers in February, 1889, have failed in discharging their duty honestly and uprightly, and I am of opinion that the court below erred in overruling the demurrer to the complaint, for which error the judgment should be reversed.

I am of opinion that it is incumbent upon the board of supervisors of the city and county of San Francisco to so fix the rates for which water is to be sold by the plaintiff as to furnish it a fair income on its investment, employed in furnishing water to the rate-payers, but not on any investment made by it not so employed. What is such a rate is submitted by the constitution and laws to the discretion of the board. This discretion, when fairly exercised, cannot be controlled by this court or any other court. It is so held in all the cases cited by counsel for the plaintiff. When the fairness of the rates so established is attacked in a court of justice, and the court can see that such a discretion has been exercised as to allow a compensation to the company furnishing water, beyond the cost of furnishing it, it cannot interfere in the rates so fixed. Its power is then at an end. It is so limited by the law, and courts cannot pass this limit without usurpation. Such must be the rule, or the courts must assume the duty vested by the constitution in the board of supervisors. Take the rule as stated in the cases cited and relied on by the able and learned counsel for plaintiff. In Water-Works v. Schottler, 110 U. S. 347, 4 Sup. Ct. Rep. 48, this was said with reference to the power of the defendant, board of supervisors, to fix rates: "Like every other tribunal established by the legislature for such a purpose, their duties are judicial in their nature, and they are bound in morals and in law to exercise an honest judgment as to all matters submitted for their official determination." In Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. Rep. 334, 338, 1191, the court, in speaking of the power of the legislature through the agency of a commission to fix rates of fare and freight on railroads within the state, said: "This power to regulate is not a power to destroy, and limitation is not the equivalent of confiscation. Under pretense of regulating fares and freights, the state cannot require a railroad corporation to carry persons or property without reward; neither can it do that which in law amounts to a taking of private property for public use without just compensation, or without due process of law. What would have this effect we need not now say," etc. In Dow v. Beidelman, 125 U. S. 680, 8 Sup. Ct. Rep. 1028, reference is made to the cases above referred to, and the same rule is stated. In this case, the defendants, who were the railroad trustees, failed in their defense for lack of proof that the rates fixed by the legislature of Arkansas were unreasonable. In Banking Co. v. Smith, 128 U. S. 174-179, 9 Sup. Ct. Rep. 47, the court, speaking by **Field**, J., said: "It has been adjudged by this court in numerous instances that the legislature of a state has the power to prescribe the charges of a railroad company for the carriage of persons and merchandise within its limits, in the absence of any provision in the charter of the company constituting a contract vesting in it authority over those matters, subject to the limitation that the carriage is not required without reward, or upon conditions amounting to the taking of property for public use without just compensation." The cases of Railroad Co. v. Dey, 35 Fed. Rep. 866; Railway Co. v. Becker, Id. 883, are decided on the same rule. The above rule, as is seen in the case of Railway Co. v. Becker, above mentioned, only amounts to this: that in fixing rates something must be allowed beyond the expense of cost or service. In that case the rates fixed by a state railroad commissioner for switching cars was $1 per car, while it cost the plaintiff railroad company $1.14 for such service. The court below held that this rate could not be enforced; quoting this remark from the Railroad Commission Cases, 116 U. S. 331, 6 Sup. Ct. Rep. 334, 348, 349, 388, 391, 1191: "The state cannot require a railroad corporation to carry persons or property without reward." See, further, Railroad Co. v. State, 5 South. Rep. 833; State v. Gas-Light Co., 18 Ohio St. 298, 301, 302. The rule established by the cases cited may be formulated thus: The rates fixed must allow something beyond the cost of service. This something is compensation. If such compensation is allowed there is no taking of property without compensation. See cases cited above. What the compensation shall be is left entirely to the discretion of the state or the railroad commission, and here to the board of supervisors. This is plainly set forth in Railroad Co. v. Dey, supra. **Brewer**, J., after quoting the rule from the cases decided by the supreme court of the United States, and particularly from Stone v. Trust Co., 116 U. S. 307, 6 Sup. Ct. Rep. 334, 388, 1191, said: "It is obvious from these last quotations that the mere fact that the legislature has pursued the forms of law in prescribing a schedule of rates does not prevent inquiry by the courts; and the question is open, and must be decided in each case, whether the rates prescribed are within the limits of legislative power, or mere proceedings which, in the end, if not restrained, will work a confiscation of the property of complainant. Of course, some rule must exist, fixed and definite, to control the action of the courts; for it cannot be that a chancellor is at liberty to substitute his discretion as to the reasonableness of rates for that of the legislature. The legislature has the discretion, and the geneal rule is that, where any officer or board has discretion, its acts within the limits of that discretion are not subject to review by the courts. Counsel for complainant urge that the lowest rates the legislature may establish must be such as will secure to the owners of the railroad property a profit on their investment at least equal to the lowest current rate of interest,—say 3 per cent. Decisions of the supreme court seem to forbid such a limit to the power of the legislature in respect to that which they apparently recognize as the right of the owners of the railroad property to some reward; and the right of judicial interference exists only when the schedule of rates established will fail to secure to the owners of the property some compensation or income from their investment. As to the amount of such compensation, if some compensation or reward is in fact secured, the legislature is the sole judge. The question is then one alone of policy. Whether, by reducing the compensation to a minimum, railroad enterprises shall be discouraged, or, enlarging, encouraged, is a matter for legislative and not judicial determination. Take a kindred matter. It is within the power of the legislature to prescribe the rate of interest, and to punish by severe penalties the exaction of larger than the legal rate. What that legal rate shall be is not for the courts, but the legislature, to determine. Suppose the legislature of Iowa should reduce the legal rate of interest to 1 per cent. Although such legislation would prevent capital from coming into the state, would the courts have power to declare the law unconstitutional? In like manner the rulings of the supreme court imply that the legislature may reduce railroad rates until only a minimum of compensation is secured to the owner. The rule, therefore, to be laid down is this: That where the proposed rates will give some compensation, however small, to the owners of the railroad property, the courts have no power to interfere. Appeal must then be made to the legislature and the people. But where the rates prescribed will not pay some compensation to the owners, then it is the duty of the courts to interfere and protect the companies from such rates."

In regard to the contention that as to the rates fixed the courts must decide what is reasonable, and not the legislature, it was said: "Where property has been clothed with the public interest, the legislature may fix a limit to that which shall in law be reasonable for its use. This limit binds the courts, as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." Peik v. Railway Co., 94 U. S. 178. In Dow v. Beidelman, supra, the above language of Chief Justice WAITE was quoted with approval, and the rule laid down in it acted on. That it was acted on in that case will appear so plainly from a perusal of the opinion, that it is not necessary to spend time in pointing it out. The rule thus declared by the chief justice is supported by Peik v. Railway Co., 94 U. S. 178; Railroad Co. v. Ackley, Id. 179; Railroad Co. v. Blake, Id. 180; Stone v. Wisconsin, Id. 181; Dow v. Beidelman, 125 U. S. 687, 688, 8 Sup. Ct. Rep. 1028.

In my judgment, those cases establish the rule that, in fixing rates, the compensation to be allowed must exceed running expenses or cost of service. What the amount of that compensation shall be is confided entirely to the discretion of the tribunal fixing the rates. When such compensation is allowed, it "limits the courts as well as the people. If it has been improperly fixed, the legislature, not the courts, must be appealed to for the change." As said by BREWER, J.: "It cannot be that a chancellor is at liberty to substitute his own discretion as to the reasonableness of rates for that of the legislature." 35 Fed. Rep. 878. That an enlarged discretion is committed by the constitution and statute to the board of supervisors in the matter of fixing rates for water cannot be disputed. They cannot so exercise this discretion as to compel the plaintiff to render the service of supplying water without reward. They must so fix the rates that a sufficient amount of money may be derived on their collection by the plaintiff to pay the cost of services, and beyond that some reward or compensation. What such reward or compensation shall be is a matter left entirely to the discretion of the board, and with the exercise of such discretion the courts cannot at all interfere. The above is the result of all the decisions which have been cited and relied on by the plaintiff's counsel. After a diligent examination, I can find no other principles or rules established. According to this rule, the rates must be so fixed as to allow money to be raised to pay the fairly necessary operating expenses of the plaintiff in rendering the service required. In this I include taxes on the property of the plaintiff, invested and used in rendering such service as part of such operating expenses.

In fixing the compensation, regard must be had by the board to the value of the investment of the plaintiff in rendering the service required of it. The board must get at the value of the property of which the investment of the plaintiff consists, and upon such value they will allow such compensation as in their discretion they shall think fair and right. The obligation does not rest on the board to fix the rates so as to furnish money to the plaintiff to pay the interest on the bonds negotiated by it. If the plaintiff has invested the money borrowed on the bonds in purchasing property used by it in rendering the service due from it, the value of the property, as said above, must be taken into consideration in fixing the reward or income it is to receive. When the value of such property has been taken into consideration, and the compensation fixed in regard to it, to allow rates so as to raise a sum sufficient to pay the interest on the bonds would be to allow compensation for the property bought with the money raised on the bonds, and for interest on such money in addition. This would be to allow for it twice. If any portion of the money borrowed on the bonds was not invested in the property, needful and used in rendering the service required of plaintiff, it would be manifestly unjust to compel the rate-payers to pay interest on money so borrowed. If the bonds bear too high a rate of interest, the rate-payers should not be required to furnish any money, if bound at all to furnish it for such purpose, to pay more than a reasonable rate of interest.

The above considerations show that the rates should be fixed so as to furnish compensation to the plaintiff based on the amount invested, and not on their bonds or any other debts. Nor is the board bound to fix rates to furnish the money to be used in the further extension or construction of the water-works of plaintiff. The rate-payers cannot be called on to pay for the construction of water-works which the plaintiff is to own, and on the value of which compensation is to be allowed it. This would be to compel the rate-payers to furnish money to buy property for plaintiff, and also to pay plaintiff an income on such property when so paid for by them. The rate-payers in such case would buy the property for the plaintiff, and pay it interest on it. This cannot be just or right. In dealing with this subject of rates, the rate-payers have rights which are to be regarded. The board must remember that, while they owe a duty to the plaintiff, they also owe a duty to the rate-payers. Their rights are to be regarded as well as the rights of the plaintiff; and while a fair compensation, considering the value of its investment, should be allowed to the plaintiff, this compensation should be adjusted with regard to the rights of those who have to pay such rates to the plaintiff. The notice to the plaintiff was sufficient. The constitution and statutes, of which plaintiff must be held to have been cognizant, informed plaintiff that the rates had to be fixed by the board in the month of February of this year and of each year. Const. Cal. art. 14, § 1, and section 1 of Act of March 7th, (St. 1881, p. 54.) A tax-payer has no more notice of the assessment of his taxables, and of the meeting of the board of equalization. If a tax-payer desires the valuation of his property fixed by the assessor reduced by the board of equalization, he must take notice of its meetings which are fixed by law, and must apply to the board to be heard for that purpose. The law as to the notice requisite is clearly set forth in the State Railroad Tax Cases, 92 U. S. 575, and the rule there declared is clearly applicable to the notice required in this case. The point as to notice claimed by the railroad corporation in these tax cases was there disposed of by the court, (all concurring,) speaking by MILLER, J.: "There is, however, an objection urged to the conduct of the board of equalization, resting on the action of the board in these particular cases, in which they are charged with a gross violation of the law, to the prejudice of the corporations, which we will consider. The statute requires the proper officers of the railroad companies to furnish to the state auditor a schedule of the various elements already mentioned as necessary in applying the statutory rule of valuation. It is charged that the board of equalization increased the estimates of value so reported to the auditor, without notice to the companies, and without sufficient evidence that it ought to be done; and it is strenuously urged upon us that for want of this notice the whole assessment of the property and levy of taxes is void. It is hard to believe that such a proposition can be seriously made. If the increased valuation of property by the board without notice is void as to the railroad companies, it must be equally void as to every other owner of property in the state, when the value assessed upon it by the local assessor has been increased by the board of equalization. How much tax would thus be rendered void it is impossible to say. The main function of this board is to equalize these assessments over the whole state. If they find that a county has had its property assessed too high in reference to the general standard, they may reduce its valuation; if it has been fixed too low, they raise it to that standard. When they raise it in any county, they necessarily raise it on the property of every individual who owns any in that county. Must each one of these have notice, and a separate hearing? If a railroad company is by law entitled to such notice, surely every individual is equally entitled to it. Yet if this be so, the expense of giving notice, the delay of hearing each individual, would render the exercise of the main function of this board impossible. The very moment you come to apply to the individual the right claimed by the corporation in this case, its absurdity is apparent. Nor is there any hardship in the matter. This board has its time of sitting fixed by law. Its sessions are not secret. No obstruction exists to the appearance of any one before it to assert a right or redress a wrong; and in the business of assessing taxes this is all that can be reasonably asked." 92 U. S. 609, 610. The subject of notice was also considered and passed on in Davidson v. New Orleans, 96 U. S. 97, and the Kentucky Railroad Tax Cases, 115 U. S. 331, 6 Sup. Ct. Rep. 57; and by this court in Lent v. Tillson, 72 Cal. 413, 14 Pac. Rep. 71. In the last-cited case, where the point was fully argued by counsel, and considered and discussed by the court, this court said: "It is claimed that the act does not provide for due process of law, because the notices prescribed are insufficient. The notices provided for in the act which are criticised under this head are the notice of the organization of the board, and the notice that the report of the board is open for inspection. The sufficiency of the notice will depend, to a very considerable extent, on the nature of the proceeding, and the statute on which it is based. The statute is always presumed to be known, and whether the notice really affords the necessary information, and gives the party whose interests are affected an opportunity to be heard, must depend largely upon those provisions. It has been repeatedly held that proceedings for the levy and collection of taxes are not necessarily judicial, and that due process of law, as applied to such matters, does not require such notice as is considered essential to the validity of a judgment. In the Kentucky Railroad Tax Cases, 115 U. S. 331, 6 Sup. Ct. Rep. 57, it is said: 'Notice by statute is generally the only notice given, and that has been held sufficient. "In judging what is due process of law," said Justice BRADLEY, in Davidson v. New Orleans, 96 U. S. 97, "respect must be had to the cause and object of the taking, whether under the taxing power, the power of eminent domain, or the power of assessment for local improvements, or none of these; and, if found to be suitable or admissible in the special case, it will be adjudged to be due process of law; but if found to be arbitrary, oppressive, and unjust, it may be declared to be not due process of law."' In other words, the sufficiency of the notice must be determined in each case from the particular circumstances of the case in hand. And, further, in matters of assessment and taxation the same character of notice is not required as in ordinary actions in a court of justice, for the reason, I presume, that in such summary proceedings it is not practicable or usual." The court then proceeds to argue the question fully, and holds that the provisions of the statute gave notice, and no more particular notice was required; that the notice so given was all that "due process of law" required.

I am of opinion that the cases above cited should be regarded as settling the law on this question, and settling it adversely to the contention put forth in behalf of plaintiff. It cannot be said that any more specific notice is required in a case like this, where a plaintiff is seeking to acquire a right to levy and collect rates or taxes on the rate-payers, than there is required for the assessment of taxes, or for an assessment for local improvements on the property benefited thereby. In accordance with the criterion stated and adopted in Davidson v. New Orleans, supra, if the notice is found to be suitable or admissible in the peculiar case, it will be adjudged to be due process of law, but, if found to be arbitrary, oppressive, or unjust, it may be declared to be not due process of law.

I cannot find the notice to the plaintiff here to be either arbitrary, oppressive, or unjust. On the contrary, it is clearly suitable and admissible. The contention preferred here on the point is manifestly destitute of merit. It does not appear that the plaintiff made any application to the board for a hearing until the last day of the month (February) in which the rates were to be fixed. It could have made such application at any time during the month of February, or of January or December preceding. Nothing prevented it from informing the board of its desire to be heard, and requesting the fixing of a day for such hearing. The board of supervisors on the 3d of December, 1888, in accordance with the provisions of section 2 of the Act of March 7, 1881, adopted an ordinance requiring plaintiff to furnish the statement required by section 2 of the act above mentioned, with which it (plaintiff) complied on the 31st of January, 1889. Certainly there was no impediment to its asking the board for a hearing, and to fix a day for such hearing at any time after the 3d of December above mentioned. No court has a right to assume that the board would not have complied with such a request if seasonably made. In my opinion it was not bound to comply with the request when made on the last day of February, and on the last day of the month within which the board was required by the constitution and by the statute, under a penalty of removal from office, (section 8) to act. The request then made was unseasonable and unreasonable, and the board denied no right of plaintiff in refusing such a request.

As to the right of the plaintiff to introduce evidence before the board, this must be left to the discretion of the board. I cannot see that the law clothes the plaintiff with any such right. It seems to me that the legislature has regulated the matter of evidence by the act of March 7, 1881. This is done by section 2 and 3 of the act of 1881. See St. 1881, pp. 54, 55. By section 2, the plaintiff corporation is required, upon the requisition of the board of supervisors, to furnish to the board, in the month of January of each year, a detailed statement, verified by the oath of the president and secretary of the corporation, showing the name of each water rate-payer, his or her place of residence, and the amount paid for water by each of such water rate-payers during the year preceding the date of such statement, and also showing all revenues derived from all sources, and an itemized statement of expenditures made for supplying during said time. By section 3 it is provided that, accompanying the statement above mentioned, the plaintiff corporation shall furnish to the board a detailed statement, verified in like manner as the other statement, showing the amount of money actually expended annually, since commencing business, on the purchase, construction, and maintenance, respectively, of the property necessary to the carrying on of its business, and also the gross cash receipts annually, for the same period, from all sources.

I remark here that, though the first statement is required by law to be furnished in the month of January of each year, it was not furnished by the plaintiff in the year 1889, until the 31st day of January. It does not appear that the other statement required by section 3 has ever been furnished. The averment that the plaintiff, ever since the passage of the act of 1881, has complied in every respect with all the requirements thereof, is insufficient to show that it furnished in January, 1889, or at any other time, the statement required by section 3. The general averment of performance is allowed in pleading the performance of conditions precedent in a contract, (Code Civil Proc. § 457,) but here there is no contract, and the section is not applicable. The general allegation of compliance is manifestly insufficient. I know of no rule of pleading which permits or justifies it.

The legislature, under the first clause of article 14 of the constitution, has clearly fixed the evidence on which the board is to act. The evidence required to be furnished to the board is all that is necessary to be supplied by the plaintiff, as will be seen on examination of the contents of the statements provided for in the act of the legislature. It is entirely in the discretion of the board to permit the plaintiff to offer any further evidence. It may do so or not, as prompted by its discretion. The refusal by the board to permit the plaintiff to introduce further evidence in regard to the adjustment of rates was matter wholly within their discretion, and was not a denial of any legal right of the plaintiff. Neither was the board bound to hear argument on behalf of plaintiff. This also is submitted to its discretion. It was no more under obligation to hear argument on behalf of plaintiff than is a legislature to hear argument on behalf of parties interested in a bill before them for their action. All the allegations of the complaint just above referred to relate to immaterial or superfluous matters, which the defendants did not admit by their demurrer.

It is averred in the complaint that the ordinance of the board fixing the rates was not duly or lawfully passed, or that it was not published as required by the statute for five successive days. It appears by averment that it was published on six days, viz.: On the 21st, 22d, 23d, 25th, 26th, and 27th of February, 1889. It was not published on the 24th of February, 1889. In the year 1889 the 24th of February fell on Sunday. I am of opinion that the publication was sufficient. If it were not duly or lawfully passed, it was void. The board then had not acted at all, and was therefore guilty of an act subjecting them to the penalty fixed by law, of removal from office for non-action. If it is void, I cannot see why this action should be brought, unless to procure a judgment that such ordinance is void; certainly there is no need for an injunction to restrain the enforcement of a void ordinance, nor do courts, nor should they, exercise such power, or waste their time in considering such an application. That which is void injures no one, and no preventive relief is required or granted in such case, for the plain reason that there is no wrong to be redressed or prevented. As it does not appear that the plaintiff ever furnished to the board of supervisors the statement (second statement) required by section 3 of the Act of 1881, I am of opinion it has failed to place itself in a position entitling it to be heard in a court of equity. The plaintiff must have complied with all the requirements which the statute has imposed on it to enable the board to act understandingly in fixing rates before it is entitled to complain or to be heard in court; when it has failed to comply with the lawful requirements made upon it, it has not done equity. Equity does not act in favor of those who have failed to do equity.

In conclusion, in my opinion, this complaint does not show that the plaintiff has been deprived of due process of law, or that any of its property has been or will be taken for public use without just compensation. Conceding that the rates fixed by the ordinance will, n its enforcement, yield but $750,000, and that its operating expenses, including taxes, will amount to $442,278.05, (this is the amount stated in paragraph 13 of the complaint,) there still remains as compensation the sum of $307,721.95, the excess of $750,000 over $442,278.05. It thus appears that the compensation will exceed the cost of service by $307,721.95. The amount of the compensation, it may be said, is small, but with the rate or amount of compensation, when it is allowed, courts have nothing to do. This is left by the constitution and statute to the discretion of the board of supervisors, which courts can no more control than the board can control the discretion or judgment of courts. See cases above cited from the federal courts.

For the reasons heretofore given, I am of opinion that the court erred in overruling the demurrer to the complaint, and therefore that the judgment should be reversed.

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82 Cal. 19

MUIR v. MEREDITH *et al.* (No. 12,576.)

(*Supreme Court of California.* Dec. 11, 1889.)

EJECTMENT—PLEADING—VERDICT—APPEAL—TAXATION OF COSTS.

1. A complaint and judgment in ejectment sufficiently describe the land in controversy by calling for a well-ascertained beginning point, from whence the line is to be run to a designated monument, a "station fence post," and then giving the course of every other call in the description.

2. A verdict, in ejectment, finding that plaintiff is entitled to recover the land in controversy, is sufficient, and the words "in accordance with the United States survey," appended at the end, will be presumed to be consistent with the former part, in the absence of a showing to the contrary, and may be rejected as surplusage.

3. An objection to the taxation of costs will not be considered, on appeal, where no motion was made to retax, and no exception reserved below.

Department 2. Appeal from superior court, Contra Costa county; JOSEPH P. JONES, Judge.

Ejectment by Susan Muir against William Meredith and others. From a judgment for plaintiff, defendants appeal.

A. H. Griffith and *James G. Maguire*, for appellants. *Chase, Chase & Miller*, for respondent.

THORNTON, J. The record is free from error. The descriptions in the complaint and judgment are sufficient. The land is described in the complaint as that certain lot of land situate in the county of Contra Costa, and described as follows: "Beginning at a point in fence line at the center of section 7, T. 1 N., R. 1 E., Mount Diablo base and meridian; thence along fence line 1.20 chains to station fence post; thence N., 89½° W., along fence line, 8.37 chains, to station in fence line; thence S., 88½° W., 6.80 chains, to station in fence; thence S., 74½° W., 8.80 chains, to station on the ¼ section line between the N. E. and N. W. ¼ sections of section 7, T. 1 N., R. 1 E., Mount Diablo base and meridian; thence W., along the ¼ section line, 22 links, to station; thence N., 13° W., 1.06 chains, to station in fence; thence N., 73¾° W., 1.00 chain, to station in fence; thence S., 83½° W., 1.06 chains, to station in fence; thence S., 66° W., 3.00 chains, to station in fence on the ¼ section line between the N. E. and the N. W. ¼ of section 7, T. 1 N., R. 1 E., Mount Diablo base and meridian; thence easterly, along said ¼ section line, to the point of beginning,—containing 2.49 acres of land." The same description is in the judgment. The beginning point of description is certain. It is easy enough to find that point. The description then proceeds: "Thence along fence line 1.20 chains to station fence post." The course is given by designating a fixed monument, the station fence post. The line is to be run from the beginning point to the "station fence post," in whatever direction that is. If it was said, "thence to a tree marked in a blaze with the letter 'A,'" the line would run to this tree, and the location of the tree would determine the direction or course. Rarely can it be said that there is no sufficient description of a lot of land where the beginning point is, or can be, fixed. A surveyor who understands his business can, with the description before him, when the starting point can be fixed, identify and survey the tract. The course of every other call in the description is given. It cannot be presumed or assumed, as a matter of law, that the station fence post called for cannot be found. On what principle of law it can be held that the judgment is a nullity for want of description, we cannot divine. The evidence is not before us. The case comes up on the judgment roll. It nowhere appears in the transcript that the location and identity of the land sued for was not established by the evidence. The fact that the jury found a verdict for it, and the court rendered judgment on the verdict, is sufficient to show to this court that the location of the land sued for was proved by the testimony. At any rate, this court would so presume, to sustain the judgment of the trial court. Error cannot be presumed. It must be made to appear. The transcript fails to show that any objection that the land was not identified by the evidence was made when the case was on trial. There was no demurrer to the complaint. But, waiving all this, the land was sufficiently described in the complaint and judgment.

The verdict is sufficient. It finds that the plaintiff is entitled to recover the land in controversy. The words, "in accordance with the United States survey," appended at the end of the verdict, may be rejected as surplusage. The verdict is sufficient without them. But we will say, further, that we have no doubt that this latter part of the verdict is consistent with the former part of it, and that the reference to the survey is to the survey of the land by the United States referred to in the complaint and judgment, and will aid in fixing the location and identity of the land sued for. At any rate, we cannot say as a matter of law, on construing the language of the verdict, that there is any want of consistency in the first and last clauses of the verdict. In the absence of a showing to the contrary in the verdict, we must presume it to be so. The sheriff can, no doubt, with the proper writ of execution in his hands, find the land recovered, and put the plaintiff in possession. If he cannot, we have no doubt the court below can.

The objection to the costs in the judgment is not well taken. If the costs were not regularly taxed, the defendants should have moved to retax. On such motion the court below could have corrected any error or mistake in the judgment of the costs. The defendants might have reserved an exception to the ruling of the court below as to the costs, and could have had such ruling reviewed by this court on a bill of exceptions. By failing to do so, any such question is waived, and there is nothing before this court to be considered. The judgment and order are affirmed.

We concur: SHARPSTEIN, J.; McFARLAND, J.

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82 Cal. 68

CHEVER *et al.* v. CHING HONG POY *et al.*
(No. 12,468.)

(*Supreme Court of California.* Dec. 14, 1889.)

RIGHT OF HEIRS—DECREE OF DISTRIBUTION.

Defendant conveyed his interest in his father's estate to his mother, and afterwards a decree was entered in the probate court distributing the land belonging to the estate among the heirs at law, including defendant. *Held*, that the decree of distribution did not invalidate defendant's deed, under Code Civil Proc. Cal. § 1666, which provides that a decree of distribution is conclusive as to the rights of the heirs, legatees, or devisees.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by Edward E. Chever and others against Ching Hong Poy and others to recover rents for certain lands. From an order granting a new trial defendant William J. Chever appeals.

James M. Seawell, for appellant. *F. W. Van Reynegom, Jarboe, Harrison & Goodfellow, H. R. Cotton*, and *T. D. Riordan*, for respondents.

McFarland, J. This action was brought against certain Chinese tenants to recover rent for certain land, and against William J. Chever, who claims a certain interest in the land and rent, and who was made a defendant because he refused to join as plaintiff. The Chinese defendants paid the rent due into court; and the only matter in controversy is the right to a certain one-fifth of the rent, which is claimed by both plaintiff and defendant William J. Chever. The court first decided the issue in favor of said defendant, but afterwards granted a new trial; and from the order granting the new trial the said defendant William J. Chever appeals. The plaintiff Edward E. Chever sues in his own right, and also as administrator of his deceased mother, Lydia D. Chever; and it is in his capacity as such administrator that he claims the said one-fifth of the rent.

The facts are that James W. Chever, who was the father of plaintiff and defendant, died seised of the land in question in the year 1857. He left surviving him his widow, Lydia D. Chever, and five sons, viz., Edward E., (the plaintiff,) David A., George F., Charles G., and the defendant William J. Chever. He left a will in which he devised all his property to his widow, Lydia D., during her widowhood, with a proviso that if she should marry again it should immediately go to his said children in equal proportions. As she did not marry, the effect of the will was simply to give her a life-estate in the property, without further dispostion of it; leaving it to go after her life according to the law of descents. Afterwards, on May 10, 1860, but before the settlement of the estate of the deceased father, the defendant herein, William J. Chever, duly executed to his mother, the said Lydia D., a deed in which he did "give, grant, sell, devise, release, and forever quitclaim" to said Lydia D. "all his right, title, and interest in and to all the real property * * * which might be coming to the said William J. Chever as heir at law of said James W. Chever, deceased;" and further covenanted to warrant and defend the same to said Lydia D., her heirs and assigns, forever, etc. His interest at that time was one-fifth. Afterwards, and prior to April, 1878, the said brother, George F. Chever, died unmarried, without issue, and intestate. On April 8, 1878, on the petition of the administrator of the said father, James W. Chever, a decree was entered in the probate court distributing the land described in the complaint to the said widow, Lydia D. Chever, during her widowhood, and afterwards in equal proportions to the surviving sons, Edward E., (plaintiff herein,) David A., Charles G., and the defendant William J. Chever. Afterwards, on January 15, 1883, Lydia D. died; and plaintiff is her administrator.

Upon this state of facts, the contention of appellant is that, notwithstanding his said deed to his mother of May 10, 1860, by which he conveyed to her all his right and title to the property, the subsequent decree of distribution entirely destroyed the effect of that deed, and conclusively established the title in appellant as of the date of the decree. The contention of respondent is that the title vested in appellant on the death of his father by operation of law, and passed by the deed to his mother. And we think that the view of the question taken by respondent, and adopted by the court below, is the correct one. Section 1666, Code Civil Proc., provides that a decree of distribution "is conclusive as to the rights of heirs, legatees, or devisees;" but it is conclusive against them only as heirs, legatees, or devisees,—only so far as they claim in such capacities. The probate court has jurisdiction to determine who are the legal heirs of a deceased person who died intestate, and who are the devisees or legatees of one who died testate; but its determination of such matters does not create any new title. It merely declares the title which accrued under the law of descents, or under the provisions of the will. The decree of distribution has nothing to do with contracts or conveyances which may have been made by heirs, devisees, or legatees, of or about their shares of the estate, either among themselves or with others. Such matters are not before the probate court, and over them it has no jurisdiction. An heir may contract about or convey the title which the law had cast upon him on the death of his ancestor; and the validity or force of such contract is not affected by the fact that a probate court afterwards, by its decree of distribution, declares his asserted heirship and title to be valid. Section 1678, invoked by appellant, applies particularly to cases of partition between heirs or devisees, where commissioners are appointed to make division, etc., and merely gives the right to a grantee of an heir or devisee to have the share of his grantor set off to him. Whether, even in such a case, the probate court would have jurisdiction to hear and determine a contested issue between an heir and alleged grantee, when the former denied the right of the latter, or whether it was intended to apply merely to admitted claims, is a question which need not be answered here. It is clear that on rendering ordinary decrees of distribution probate courts deal only with issues and parties legitimately before them. In opposition to these views, appellant cites Freeman v. Rahm, 58 Cal. 114. It is not very clear what principles were intended to be determined in the leading opinion in that case, or if they would be applicable to the case at bar. At all events, we cannot hold that that case rules this one differently from the conclusion herein reached. Views opposite to those claimed to be stated in Freeman v. Rahm are expressed in Theller v. Such, 57 Cal. 447; Bath v Valdez, 70 Cal. 350, 11 Pac. Rep. 724; and Barnard v. Wilson, 74 Cal. 512, 16 Pac. Rep. 307. Order appealed from affirmed.

We concur: Thornton, J.; Sharpstein, J.

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82 Cal. 170

Traverso v. Tate *et al.* (No. 12,560.)

(*Supreme Court of California.* Dec. 23, 1889.)

Fraudulent Conveyances — Findings — Bona Fide Holder.

1. In an action to quiet title, where the pleadings admit that the fee is held by plaintiff, a finding that an undivided half interest is owned by another, without finding the facts from which such

legal conclusion is drawn, is insufficient to support a judgment against plaintiff for half the land.

2. The answer alleged that the deed made by plaintiff's vendor was without consideration, and to hinder, delay, and defraud one F., a creditor of vendor, which allegation was denied. *Held*, that no issue was raised as to whether the deed was made to delay or defraud the creditors of the vendor, generally.

3. The payment of taxes on land by one in possession, who was also the owner of an undivided half interest therein, is not evidence of the *bona fides* of the deed from his co-tenant for the other half, under which he holds.

Department 1. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Davis Louderback, for appellant. *W. B. Tyler*, for respondents.

FOX, J. This is an action to enjoin the sheriff of the city and county of San Francisco from selling the interest of one Francisco Traverso, otherwise called Frank Traverso or Frank Travers, in a certain piece of land in said city and county, upon an execution issued out of the superior court, on a judgment in favor of the defendant Tate, and against said Frank Traverso or Frank Travers. The plaintiff, Giuseppe Traverso, claims to be the owner in fee of the entire interest in said lot of land, and that a sale on the execution against said Frank Traverso, of all his interest in said land, will operate as a cloud upon plaintiff's title. In his complaint plaintiff has set out a deraignment of his title, from 1879 down to the time of the levy under the execution against Frank, who is his brother, and by it shows that, as to an undivided half interest therein, he claims under a deed from Frank dated October 4, 1882. The answer admits the plaintiff's deraignment of title, but as to the deed from Frank to plaintiff of October 4, 1882, under which plaintiff claims to have acquired the undivided half interest which at that date stood in his brother Frank, it claims that the same was not made for a full or for a valuable consideration, was not *bona fide*, and avers that the same was made without consideration, and to hinder, delay, and defraud the said Tate, and that said Frank Traverso is still the owner of an undivided half interest in the said tract of land. Prior to the making of said deed, Tate, by Tyler, his guardian *ad litem*, had commenced an action for damages, in tort, against the said Frank Travers, but judgment thereon was not recovered until May 8, 1885, two and a half years after the making of said deed. May 11, 1885, execution was issued on said judgment, under which the sheriff is threatening to sell the interest of Frank Traverso in the property, and this is the threatened sale which it is now sought to have enjoined. The findings of the court below are as follows: (1) That the plaintiff is not the owner in fee of the entire lot of land described in the complaint, but that Frank Traverso, otherwise known as Frank Travers, owns an interest in said real estate at least equal to an undivided one-half thereof. (2) That the deed of Frank Traverso to the plaintiff of date 4th day of October, 1882, was not *bona fide*, but was made with intent to hinder, delay, or defraud the creditors of said Frank Traverso; and judgment was entered for defendants. The points made by appellant are that the evidence is insufficient to support the findings; that the findings are insufficient to support the judgment; that the court has not found on all the issues in the cause necessary to support the judgment, that the finding that the conveyance was made to hinder, delay, and defraud the creditors of Frank Traverso is not within the issues framed by the pleadings; that the judgment is against law; and that the court erred in the exclusion of certain testimony offered by the plaintiff.

The findings are not only unsupported by, but they are in direct conflict with, the undisputed evidence and the admissions of the pleadings. The pleadings admit, and the evidence without conflict shows, that the whole fee-simple title to the property stood in the plaintiff. An attempt was made to frame the pleadings, and they were treated as having been framed, so as to present an issue upon the question of whether or not the deed from Frank to plaintiff was simulated, without consideration, and made to hinder and defraud the defendant; in effect, whether or not the plaintiff held the title as to an undivided half thereof for the benefit of Frank. The findings are wholly insufficient to meet these issues. It being conceded by the pleadings that the legal fee-simple title stood in plaintiff, it was necessary for the court to find, in order to support this judgment, the facts from which the legal conclusion could be drawn, that as to the undivided half thereof it was held by plaintiff for the use and benefit of Frank Traverso, which has not been done. There was no issue as to whether or not the deed was made to hinder, delay, or defraud the creditors of Frank Traverso, generally.

The judgment is against law, because it is against the admissions of the pleadings. The court did not err in excluding the evidence offered by plaintiff as to the assessment and payment of taxes on the property. Plaintiff was not entitled to offer the assessment for the purpose of proving value; it was inadmissible for such a purpose. Before the making of the deed from Frank, and ever since 1879, the plaintiff was the owner, as a tenant in common, of the undivided one-half of the property, in the actual possession of the whole, and living on it with his family. It was therefore not improperly assessed to him, and it was his duty to pay the taxes on it. The fact that it was so assessed, and that he paid the taxes thereon, did not, therefore, tend to prove the *bona fides* of the deed from Frank to him. Judgment and order reversed, and cause remanded.

I concur: PATERSON, J.

I concur in the judgment: WORKS, J.

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82 Cal. 263

CASE v. MANUFACTURERS' FIRE & MARINE INS. CO. (No. 11,652.)

(*Supreme Court of California*. Dec. 30, 1889.)

INSURANCE—AMOUNT OF LOSS.

1. A clause in a policy that, "in case of differences touching any loss or damage after proof

thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial appraisers, whose award in writing shall be binding on the parties," not providing for the number of appraisers or the mode of their selection, is too vague to give the company a right to demand arbitration, and the insured's refusal of such demand does not deprive him of the right to sue on the policy, or to prove the full amount of his loss, even though it is more than stated by him in the proofs.

2. In an action on an insurance policy, it appeared by plaintiff's calculation that his loss amounted to more than $4,000. One of his witnesses placed the loss at $3,000. Plaintiff's clerk testified that he usually had a stock worth $5,000; and another witness testified that three weeks before the fire it was worth $5,000, but that during that time large amounts of goods had been sold, and little purchased. Witnesses for defendant put the value of the stock at much less than $4,000. *Held*, that a finding of $4,000 loss was supported by the evidence.

In bank. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

Action on insurance policy by George A. Case against the Manufacturers' Fire & Marine Insurance Company. From a judgment for plaintiff, defendant appeals. For former report, see 21 Pac. Rep. 843.

Wright & McCormac and *T. Z. Blakeman*, for appellant. *Haggin, Van Ness & Dibble*, for respondent.

BEATTY, C. J. The order denying defendant's motion for a new trial in this case was reversed by a decision of department 1, (21 Pac. Rep. 843,) on the sole ground that the finding as to the amount of respondent's loss was contrary to the evidence. A rehearing having been granted we are satisfied, after reargument and reexamination of the record, that we misconstrued the testimony of the witness Pam, and were led to an erroneous conclusion as to the effect of it by failing to add to the invoice price of the goods purchased the whole amount of the freight, $893. This was necessary in order to obtain a proper basis for the computation as to the value of the goods destroyed. Making this correction, the computation shows that the goods destroyed were worth a little in excess of $4,000, and so there is evidence sufficient to support the verdict. As to other points involved in the appeal we adopt the opinion of the department. Judgment and order are affirmed.

We concur: MCFARLAND, J.; PATERSON, J.; SHARPSTEIN, J.; THORNTON, J.; WORKS, J.; FOX, J.

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3 Cal. Unrep. 208

GREGORY v. KEATING *et al.* (No. 12,472.)

(*Supreme Court of California.* Dec. 31, 1889.)

MORTGAGES—FORECLOSURE—MODIFICATION OF JUDGMENT.

Where a defendant in a mortgage foreclosure claims an interest in the property adverse and superior to that of the mortgagee, and the findings by the trial court do not determine such claim, the judgment, which bars only the right, title, and equity of redemption of such defendant, will be modified so as to preserve, unaffected and unprejudiced, the adverse right so claimed.

Department 2. Appeal from superior court, city and county of San Francisco; E. B. MAHON, Judge.

Action by James B. Gregory against Denis Keating and Mary Jane Keating to foreclose three mortgages executed by said Denis Keating to plaintiff. Defendant Mary Jane Keating claimed an adverse and paramount title to the buildings on the mortgaged premises. Plaintiff obtained a judgment, and defendants appealed.

Mich. Mullany, for appellants. *A. H. Laughborough*, (*Carter P. Pomeroy*, of counsel,) for respondent.

THORNTON, J. In this case the judgment forecloses the mortgages executed to plaintiff, and subjects to sale the right, title, and interest of the mortgagor, Denis Keating, in the mortgaged premises. It forecloses and bars only the right, title, and equity of redemption of defendant Mary Keating as to such possession. It does not purport to affect in any way her prior adverse right to the buildings on the premises, if she has any. Nor do we see in the findings of facts anything determinative of the claimed adverse right of Mary Keating. The facts found as to her only bear on her right to remove the buildings from the land involved in the suit under the terms of the lease. On the return to the court below, that court is directed to modify the judgment so as to preserve the adverse right to the buildings set up by her, unaffected and unprejudiced by the judgment. On the making of such modification of the judgment, the judgment and order will stand affirmed.

We concur: MCFARLAND, J.; SHARPSTEIN, J.

GREGORY v. KEATING *et al.* (No. 12,472.)

(*Supreme Court of California.* Jan. 29, 1890.)

In bank. On rehearing. For hearing in department 2, see supra.

PER CURIAM. Appellants, in their petition for rehearing, complain that the court has not noticed their contention that the findings of the superior court are unsupported by the evidence. The point was not overlooked, although not expressly adverted to. We think that the evidence was sufficient to sustain all the findings of the superior court. Rehearing denied.

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82 Cal. 529

MCLAIN v. BAKER. (No. 13,231.)

(*Supreme Court of California.* Jan. 11, 1890.)

WEIGHT AND SUFFICIENCY OF EVIDENCE.

In an action to recover for money had and received, and for services rendered, plaintiff testified that he had deposited $220 with defendant, who had returned $165, and had rendered services to defendant reasonably worth $480; in which he was corroborated by other witnesses. Defendant controverted plaintiff's evidence by testimony that he had received but $124.50, had expended for and returned to plaintiff $385, and that plaintiff's services were agreed upon at a much less sum than plaintiff claimed; and there was only the conflicting testimony of the parties as to an alleged prior settlement between them. *Held*, that the evidence was sufficient to sustain a finding in favor of plaintiff for $535.

Commissioners' decision. Department 2. Appeal from superior court, San Bernardino county; HENRY M. WILLIS, Judge.

Paris, Goodcell & Fox, for appellant. *Rowell & Rowell*, for respondent.

GIBSON, C. This action was to recover of the defendant the sum of $220 received from and to the use of plaintiff, and for services rendered by plaintiff to defendant at his request from about May, 1886, to on or about September 20, 1887, for which defendant agreed to pay the reasonable worth of such services, which were alleged to be reasonably worth the sum of $30 per month. Defendant, by his answer, denied that he received from plaintiff any greater sum than $124.50, and that the plaintiff rendered him any services other than from April 20, 1887, to October 20, 1887, which he avers were at the agreed price of $15 per month. And as an affirmative defense, that he (defendant) expended for the use of plaintiff, at his request, from December, 1885, to October, 1887, the sum of $437; that at plaintiff's request he boarded and pastured three horses for plaintiff, for different periods, which board and pasture were reasonably worth $170; that through the negligence of plaintiff he (plaintiff) lost a horse worth $50, loaned to him by defendant, for which he agreed to pay the latter sum; that he (defendant) furnished a hayrack to plaintiff, and rendered certain services to him, at his request, reasonably worth $45. The action was tried without a jury, and the court found that defendant received $220 which belonged to plaintiff, and returned only the sum of $165 thereof; that during the years 1886 and 1887 the plaintiff, at request of defendant, performed labor for defendant, for a period of 16 months, reasonably worth $30 per month, amounting in all to the sum of $480; and that all other accounts and demands existing between the parties and set forth in defendant's answer were fully settled by them prior to the commencement of this action. Judgment was accordingly entered in favor of plaintiff for the sum of $535 and $130.10 costs. From the judgment and an order denying a new trial comes this appeal.

The only question raised by the appellant is that the findings are not sustained by the evidence; or, in other words, that they are against the weight of evidence. As was said in Spring Val. Water-Works v. San Mateo Water-Works, 64 Cal. 123, "In this court it is incumbent upon the appellant, on such a contention, to show that in the evidence upon which the findings are based there was no substantial conflict, and that the facts and the inferences deducible from them, as found by the court, were contrary to the evidence." In the present case the appellant has not attempted to show that no substantial conflict existed in the evidence upon which the findings complained of are based; nor that the facts and inferences deducible therefrom, as found by the court, are contrary to the evidence. But the record shows that such a conflict exists, and does not show that any of the facts found are contrary to the evidence. Regarding the sum of $220 claimed by the plaintiff, he testified that in May, 1886, early one morning, while suffering from a sudden illness, which he thought might prove fatal, and when no one else but himself and defendant were present, he gave the defendant two packages of money, containing $100 each, $25 in gold, and a handful of silver. He heard the defendant, in counting all but the silver, make $190 of it. And further on he said defendant counted $220 in all. Defendant testifies that he received but $124.50. Poole, who was called for defendant, testified that he did not see Baker take the money from plaintiff, and that all he knew about the amount was from what Baker showed him, viz., one package of $120, and $5 in silver. Thus it appears that upon this point there is a decided conflict in the testimony of the parties. The testimony of Poole was of little value, as he was not present when the transaction occurred, and only knew what the defendant exhibited to him afterwards; and it was for the trial court to say whether it added sufficient weight to that of defendant to overcome the testimony of plaintiff. A similar conflict of testimony exists as to the amount returned by the defendant to plaintiff. The latter said he received $50, with which to go to San Diego, and on his return he gave $10 back to defendant; that he received $50 for a pair of colts he sold, which presumably belonged to the defendant, and at another time received about $75, making $165 in all, as found by the court, while the defendant says he gave him $220 additional. So it is with regard to the services, and the value thereof. The plaintiff says he was employed by defendant, and worked for him for 16 months; that nothing was said as to the rate of compensation, but he expected $30 per month; and there is abundant testimony to show that such services as he rendered were reasonably worth $30 per month. Defendant's evidence tends to show that plaintiff worked for less than that period for the agreed price of $15 per month, and that his services were not reasonably worth more. As to the affirmative matter set up in defendant's answer, found by the court to have been settled before the commencement of the suit, there is but the conflicting testimony of the parties. The defendant denies that the items thus claimed by him were included in the settlement, while the plaintiff says: "I heard some of the testimony of defendant Baker, about a settlement we had at the time I quit work,—a portion of it; not all. I sold Baker some horses at that time,—three head of horses,—a cow and a yearling, a buckboard, a wagon and a harness, that he sold before he went out there. I put the whole thing together, and told him I would take two hundred dollars for the whole thing, and call it a trade. I told him that did not include everything,—not my services and the two hundred and twenty dollars. I started to take my things off, and he said: 'Hold on. We will call it a trade, if you say so.' 'All right, I will give it.' The trade was for two hundred dollars for that stuff, and to pay my expenses there, and did not include my services there or the money. That don't look reasonable." It therefore clearly appears that there was evidence enough to sustain the findings, and that there was such a conflict in the evidence upon which the findings are based that, under numerous decisions of this court, among which Mallett v. Swain, 56 Cal. 171; Stockman v. Irrigating Co., 64 Cal. 57,—may be cited, they cannot be disturbed;

and the judgment and order appealed from, therefore, ought to be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order appealed from are affirmed.

82 Cal. 167

CARTER v. MULREIN *et al.* (No. 12,203.)

(*Supreme Court of California.* Dec. 23, 1889.)

INJUNCTION—BOND—SURETIES.

Where an order is made that an injunction issue on the filing of a bond, and the bond recites that it is given in consideration that the said writ of injunction may issue, but the injunction is issued and served before bond is given, the sureties on the bond are not liable.

Department 2. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

Action by Charles H. Carter against David Mulrein and others to recover damages for a breach of an injunction bond. From a judgment for plaintiff, and from an order denying a new trial, defendants Alpers and Westphal appeal.

Langhorne & Miller, for appellants. *Wm. T. Baggett* and *J. M. Lesser*, for respondent.

MCFARLAND, J. This is an action on an injunction bond alleged to have been executed by the defendant Mulrein as principal and the other defendants as sureties, in a certain action in the superior court on which the said Mulrien was plaintiff, and I. S. Kalloch and Carter, the plaintiff herein, and others, were defendants. Judgment in the case at bar went for plaintiff, and the defendants Alpers and Westphal, two of the sureties on the bond, appeal from the judgment, and from an order denying a new trial.

The first point made by appellants is that the complaint does not state a cause of action; that point having been made, also, in the court below, on an objection by defendants to the admission of any evidence on the part of plaintiff. And we see no escape from holding that the point is well taken. It fully appears from the complaint, and is admitted on the argument, that in the said case of Mulrein v. Kalloch et al., an order was signed by the judge of the court on March 3, 1881, and filed March 4, 1881, that an injunction issue "on the filing by plaintiff of a joint and several undertaking to the defendants in the sum of $7,500, with two sufficient sureties;" that on said March 4th a writ of injunction was issued and served; that said writ was the only writ of injunction ever issued in said action; that all the alleged damage to plaintiff was caused by his obedience to that writ; and that the bond sued on in the case at bar was not executed until March 12, 1881, eight days after the issuance and service of said writ. The bond recites that, "whereas the above-entitled court has made an order that upon the filing by the above-named plaintiff of an undertaking in the sum of $7,500, with two sufficient sureties, a writ of injunction issue: * * * now, therefore, in consideration of the premises, and that said writ of injunction may issue, we" undertake, etc. No writ issued after the filing of the undertaking. It is well settled that sureties on statutory bonds, having no personal interest in the litigation, can stand upon the express terms of their undertaking, and cannot have their liability forced beyond those terms. "A surety has a right to stand on the precise terms of his contract. * * * He can be held to no other or different contract." People v. Buster, 11 Cal. 220. "His liability arises under his contract merely, and is limited by its terms and conditions." McDonald v. Fett, 49 Cal. 355. "If there is any principle of law well settled, it is that the liability of sureties is not to be extended beyond the terms of their contract. To the extent, and in the manner, and under the circumstances pointed out in their obligation, they are bound, and no further. They are entitled to stand on its precise terms." Pierce v. Whiting, 63 Cal. 543. In the bond sued on in this case there is no undertaking by the sureties to protect against the injunction which had been issued on March 4th. It referred entirely to a writ of injunction which might issue, by virtue of the undertaking, upon or after its filing; and no such writ ever issued. No doubt the defendant in that case (plaintiff in this) relied upon that undertaking; but we cannot wrest settled principles of law from their foundations in order to condone the carelessness of parties who fail to look after their rights at the proper time. If the defendants in the injunction suit had paid the slightest attention to their interest when the bond sued on was filed, they would have discovered that it afforded no protection against the writ which had for several days been issued and served, and that said writ was invalid, unless, indeed, we must presume that some other bond had been filed before the writ issued. Whether the real facts are different from those averred, and whether plaintiff could better his case by amending his complaint, these are matters of which we have no knowledge. Judgment and order reversed.

We concur: THORNTON, J.; SHARPSTEIN, J.

82 Cal. 109

Ex parte ROSS. (No. 20,630.)

(*Supreme Court of California.* Dec. 18, 1889.)

CRIMINAL LAW—POSTPONEMENT OF TRIAL.

1. Where a trial is commenced within 60 days after information is filed, but after the evidence is in, a juror becomes disabled from attending court and the jury is discharged, defendant has been brought to trial within Pen. Code Cal. § 1382, providing that the court must order the prosecution to be dismissed unless defendant is brought to trial within 60 days after the filing of the information.

2. Where a case has been continued for more than 60 days in violation of Pen. Code Cal. § 1382, the objection is not available, on a motion to dismiss, until the 60 days have expired, as a trial may be had within the 60 days.

In bank. Application for *habeas corpus*. *C. V. Scanlan*, for petitioner.

BEATTY, C. J. The petition shows that the petitioner has been accused of robbery by information filed October 12, 1889. October 27th he was put upon trial. After the evidence was all in, a juror was by accident disabled from attending court, and the jury was necessarily discharged. Petitioner thereupon demanded an immediate trial, but the superior court continued the further hearing of the case to February 4, 1890. December 14, 1889, petitioner moved the superior court to dismiss the information, and discharge him from custody, on the ground that he had not been brought to trial within 60 days after information filed. His motion was denied, and hence this petition.

Section 1382 of the Penal Code is relied upon. It is as follows: "The court, unless good cause to the contrary is shown, must order the prosecution to be dismissed in the following cases: (1) When a person has been held to answer for a public offense, if an indictment is not found or an information filed against him within thirty days thereafter; (2) If a defendant, whose trial has not been postponed upon his application, is not brought to trial within sixty days after the finding of the indictment or filing of the information." The case made by the petition is not within the section. Petitioner was brought to trial within 60 days. There was a mistrial, and the case was necessarily continued.

Conceding that the court had no power to continue it for more than 60 days without petitioner's consent, that period has not expired. *Non constat* that another trial may not be had before the expiration of 60 days, notwithstanding the order for continuance. This is a sufficient reason for denying the writ, irrespective of other questions, as to which we refrain from expressing any opinion in the present stage of the case. Writ denied.

We concur: McFarland, J.; Fox, J.; Sharpstein, J.; Thornton, J.; Paterson, J.

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82 Cal. 420

King v. Ponton. (No. 13,257.)

(*Supreme Court of California.* Dec. 28, 1889.)

Will Contests—Findings.

In a proceeding to probate a will it was stipulated by the parties that, according to the finding of the issues by the jury, the form of their verdict should be: "We, the jury, find for the contestant, K.," or "for the petitioner, P." The stipulation was not in writing, nor was it entered on the minutes, nor were special findings waived in any other manner. The verdict was for contestant, and an entry thereof was made in the minutes, in the presence of the petitioner and his counsel, without any objection thereto. *Held*, that the absence of any findings of fact was an irregularity which, as it did not affect the substantial rights of the parties, could be disregarded, within Code Civil Proc. Cal. § 475.

Department 2. Appeal from superior court, Fresno county; M. K. Harris, Judge.

The petition of Thomas Ponton for the probate of the will of James McCalman, deceased, was opposed by E. J. King, as public administrator. From a judgment denying admission of the will to probate, and from an order denying a motion for a new trial, petitioner appeals.

T. P. Ryan, Wharton & Shorb, and *Goucher & Geis,* for appellant. *Sayle & Coldwell* and *W. D. Tupper,* for respondent.

Sharpstein, J. Appellant presented to the superior court of the county of Fresno, sitting in probate, an instrument which he alleged to be an holographic will—the last will and testament—of John McCalman, who died in said county on or about the 16th day of July, 1888. Appellant was named in said alleged will as sole executor; and he prayed that said alleged will be admitted to probate, and that letters testamentary therein be issued to him. At the time appointed for hearing said application, respondent appeared to contest said will, and filed written grounds of opposition to the probate thereof; to which appellant filed an answer traversing the objections. Thereupon the contest came regularly on trial before the court and a jury of 12 men, who were duly sworn to try said cause. An instrument which appellant offered to prove as the last will and testament of John McCalman was read in evidence. It is written on one side of one sheet of writing paper, of foolscap size, and is not signed at the foot or end in any manner, but said sheet of paper is torn at the lower end thereof, and that part usually occupied by the signature is torn away, and not produced. That part which is torn away, and not produced, is described as follows. "Commencing at the right-hand edge of said sheet of paper, about two and one-half inches from the lower edge thereof, and less than one inch below the last line of said instrument, and extending thence, towards the left-hand corner, and reaching the lower edge of said sheet, about one and one-half inches to the right of the lower left-hand corner. The torn edge is slightly circular towards the left and bottom of the sheet, from a point about the middle thereof. There appears just above the torn edge, and about three inches to the right-hand side, a pen-mark in ink, almost circular, with the open side down, and resting in the torn edge." It was admitted by the contestant before the court, and in the presence of the jury, that the paper instrument in evidence as the last will and testament of John McCalman was executed and signed by him, and that he had sufficient reason for devising his property to the parties named in the will, and that the reason was strong enough to induce him to do that. By that admission all the issues were eliminated from the contest except one, viz., whether "the said John McCalman did before his death tear, cancel, and destroy his signature from said instrument, with the intent and for the purpose of revoking the same as a will." Respondent insists that the evidence shows that he did, and appellant that he did not. The evidence shows that decedent, after writing and subscribing his name to the instrument alleged to be his last will and testament, put it into a valise, and said to appellant, who is named as executor in said instrument: "Ponton, if ever you require this paper, you will know where to find it." The valise was one in which he left his papers; and after his death said will was found therein, minus the signature. After his death the valise was found in decedent's bedroom, in his own house. "Anybody could have had access to the house or valise at nearly all times." It is therefore quite possible that some person other than decedent tore his signature from the will. The evidence that decedent did it with intent to revoke the will consists of statements made by him during his last illness. In a conversation between him and appellant, decedent said: "Ponton, I don't know what's going to come of this thing. I believe I ought to do something about a will." To which appellant replied: "Why, Mac, you made a will long ago." He said: "That is destroyed." The next day decedent said to appellant and Mrs. Thomas: "Now, I have got my will all planned." To a witness (Curtis) he said: "I destroyed that will, Curtis, and I think I had better fix up my affairs. I don't know what is coming of this." At the time of saying this "he was very sick, and very weak. He was laboring under such weakness and pain that he was really not himself." As to the mental condition of deceased at the times when these circumstances occurred, the evidence is somewhat conflicting, and we could not disturb a finding that he was sound of mind.

Although a jury was impaneled to try the issues, no special issues were framed and submitted to them, and no special verdict was returned by them. But the record shows: That "it was stipulated and agreed by and between the parties in the presence of the court, and during the trial, and after the jury had been instructed upon the law and upon such stipulation and agreement, it was by the court ordered that, if the jury should find the issue in said contest for the said contestant, then they might and should return their verdict in the following words: 'We, the jury, find for the contestant, E. J. King;' and that, if said jury should find said issue for the petitioner, then their verdict might and should be returned by them in the following words: 'We, the jury, find for the petitioner, Thomas Ponton.'" But said stipulation and agreement was not made in writing, nor was the same entered on the minutes, nor were special findings by the jury waived in any other manner than as appears in this statement or motion for a new trial. That thereupon the jury retired, and after deliberation returned into court on said 2d day of October, 1888, and gave the following verdict: "'We, the jury, find for the contestant, E. J. King. October the 2nd, 1888. D. D. Hudson, Foreman.' Said verdict was then and there received by the court, and an entry thereof made by the clerk in the minutes of the court, as the law requires, all in the presence of said petitioner, and in the presence of his attorneys, without any objection being made by said petitioner or his attorneys to said verdict, or to the form thereof, or to the reception and entry of the same, unless said objection be implied from the silence of said petitioner and his attorneys. That there were and are no findings of fact upon the issues joined herein, made and filed by the court, nor were said findings waived by the proponent herein. That thereafter, and in the absence of such findings, the following judgment was made, entered, and filed by the court." This was an irregularity which we hope may never be repeated; but it did not in this case, we think, affect the substantial rights of the parties, and therefore must be disregarded. Code Civil Proc. 475. Judgment affirmed.

We concur: Thornton, J.; McFarland, J.

85 Cal. 549; 2 Cal. Unrep. 191

MOONEY v. DETRICK. (No. 12,551.)

(*Supreme Court of California.* Dec. 12, 1889.)

INSOLVENCY—DISCHARGE.

A discharge in insolvency is not a bar to an action on a contract for hiring for a certain length of time, for money which became due thereon after defendants were declared insolvent, as under Insolvency Act Cal. 1880, c. 87, § 42, only such sums as were due at the time they were declared insolvent could be proved, and would be affected by the discharge.

Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Action by John H. Mooney against E. Detrick and J. H. Nicholson. Judgment for plaintiff, and defendant Detrick appeals.

Kellogg & King, for appellant. *Dorn & Dorn*, for respondent.

SHARPSTEIN, J. This action is for the recovery of money alleged to be due plaintiff from defendants under a contract between them, to the following effect: Plaintiff having sold and assigned a patent-right to defendants, in consideration thereof promised to serve said defendants in and about their business for the term of five years from the 1st day of January, 1881; and the defendants agreed to employ the plaintiff during said entire period of five years, and to pay him for every day of his employment, during said entire period, (Sundays and holidays excepted,) the sum of four and one-half dollars. Pursuant to the terms of said agreement, defendants employed plaintiff in and about their business constantly, and paid him in full therefor, until the 1st day of March, 1884. Since March 1, 1884, defendants have failed and refused to give plaintiff employment, except for the space of 166 days, and refused to pay plaintiff anything more than $664 under said contract. Judgment was entered in favor of plaintiff, and against the defendants, for the sum of $1,333.40, interest and costs. Defendant's motion for a new trial was overruled, and from that order and the judgment this appeal is taken by defendant, Detrick. The defendants in their answer allege that as a firm and individually they and each of them were on the 14th of July, 1884, discharged of and from all debts, liabilities, and claims whatever, except such as were by the insolvent laws excepted from its operation, and that the claim sued on in this action is not one of the claims so excepted. The petition of the defendants as a firm and as individuals was filed on the 28th day of February, 1884, and the plaintiff's cause of action, if any, has accrued since that date. The discharge, and proceedings leading up to it, are well pleaded, and the allegations of the defendants in relation thereto are admitted by the plaintiff to be true. The plaintiff presented his claim against the defendants to the assignee in insolvency, and he refused to allow it; whereupon plaintiff applied to the court in which the insolvency proceedings were pending for leave to sue the assignee, but such application was denied. The demand sued on in this action was not set forth in the schedule of claims, debts, liabilities, and demands filed by the defendants or either of them in the insolvency proceedings, and was not, and, we think, could not have been, proved therein. When the defendants were adjudged to be insolvent there was nothing due from them, or either of them, to the plaintiff under their contract with him. Had anything then been due from defendants to plaintiff, he might have proved his claim for the amount, and no more. Insolvent Act 1880, c. 87, § 42. The certificate of discharge is only a bar to debts and demands which were or might have been proved, but not as against personal covenants which were not provable. If a demand is not provable, it is not barred by the certificate. This is the just and settled rule. Murray v. De

Rottenham, 6 John. Ch. 52. Judgment and order affirmed.

We concur: McFARLAND, J.; THORNTON, J.

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82 Cal. 199

BENDEL v. CRYSTAL ICE CO. *et al.* (No. 12,339.)

(*Supreme Court of California.* Dec. 28, 1889.

CHATTEL MORTGAGES—SALE OF PROPERTY.

Civil Code Cal. § 3005 provides that a sale by the pledgee of property must be made by public auction, "upon the notice to the public usual at the place of sale, in respect to auction sales of similar property, and must be for the highest obtainable price." *Held* that, though a chattel mortgage waives demand for payment, and notice to mortgagor of time and place of sale, and stipulates that the mortgagee may become the purchaser, a sale under it is invalid as against a junior mortgage, where the mortgagee purchases the property for $1,000, when it is worth $5,000, and on a notice of the sale for only two days, when the usual notice was not less than five days.

Department 1. Appeal from superior court, city and county of San Francisco; JAMES G. McGUIRE, Judge.

Byrne & Cross and *Russell J. Wilson*, for appellant. *J. P. Langhorne*, for respondent.

WORKS, J. The Crystal Ice Company executed a chattel mortgage to one Wainwright to secure the payment of a promissory note, and a subsequent mortgage, on the same property, for a like purpose, to the respondent. The mortgage to Wainwright contained the following clause: "And in case default shall be made in the payment of said note or of the interest thereon when due, or any part thereof, according to its terms, or in case default be made in the performance of any of the covenants thereof, then the said mortgagee is hereby empowered to proceed to sell the above mortgaged property, either by proceedings of foreclosure, as provided by the Code of Civil Procedure, or by a sale of the mortgaged property, and proceedings had and taken as in case of pledges without any previous demand for the performance or notice of time and place of sale; the said mortgagor having waived demand and notice, and at any such sale the mortgagee may become the purchaser, if he so desire, either directly or indirectly." Default was made in the payment of the note, and Wainwright, acting under the authority above quoted, sold the property; and after several transfers the same was purchased by the appellant Pauson. The respondent brought this action against the ice company and Pauson to foreclose his junior mortgage. The ice company made default. There was a trial as to the defendant Pauson, and judgment rendered foreclosing the mortgage as against him. He moved for a new trial, which was denied; and he appeals.

The only question worthy of consideration presented on this appeal is as to the validity of the sale by Wainwright under his mortgage. The Code provides: "The sale by a pledgee of property pledged must be made by public auction, in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property; and must be for the highest obtainable price." Civil Code, § 3005. There are other sections, requiring that the pledgee demand performance from the debtor, if he can be found, and that he give such pledgeor actual notice of the time and place at which the property pledged will be sold, at such reasonable time before the sale as will enable the pledgeor to attend. Id. §§ 3001, 3002. But these last requirements may be waived by the pledgeor. Id. §§ 3003, 3004. It will be observed that by the clause in the mortgage above set out the property might be sold as provided by the sections above quoted, except that a demand of performance and notice to the pledgor were waived, and it was provided that the pledgee might become the purchaser at the sale. Therefore, the question is whether the statutory requirements not waived were so far complied with as to render the sale valid as against a junior mortgagee. The court below found against the appellant on this point. The finding is as follows: "That said sale was made at San Francisco on October 24, 1884, but the same was not made or conducted in the manner prescribed by law for the sale of pledged property at public auction, nor in the manner, nor upon the notice to the public, usual at said city and county of San Francisco, the place of sale of similar property, nor for the highest obtainable price." It is claimed by the appellant that this finding was not sustained by the evidence. The requirements of the statute, that the sale must be made "in the manner and upon the notice to the public usual at the place of sale, in respect to auction sales of similar property, and must be for the highest obtainable price," were not waived. It appears from the evidence that the property was of such a kind that but few persons would be likely to want to purchase it, and that it was of the value of from $5,000 to $6,000. The notice given was for two days, and did not show that the property was to be sold for the satisfaction of the Wainwright mortgage, or any other mortgage. There was nothing in the notice to call to the attention of the respondent, who was an interested party, or to any one else, that the property to be sold was the property covered by these mortgages, except the description of the property. The property was bought in by the mortgagee at $1,000, which was not more, and was probably less, than one-fifth of its actual value. The evidence showed, beyond controversy, that the notice, as to time, was not such as was "usual at the place of sale in respect to auction sales of similar property." The undisputed evidence was that notices of such sales were never for less than 5 days, and the great weight of the evidence was that the usual notices of like sales were from 10 to 20 days. We think that the finding that this sale was not made in conformity to the statute was sustained by the evidence, and that the judgment was right. Judgment and order affirmed.

We concur: BEATTY, C. J.; FOX, J.

82 Cal. 425

BIENENFELD v. FRESNO MILLING CO.

(No. 13,378.)

(*Supreme Court of California.* Dec. 28, 1889.)

APPEAL—JURISDICTIONAL AMOUNT.

Under Const. Cal. art. 6, § 4, which confers on the supreme court appellate jurisdiction in cases at law in which the demand, exclusive of interest, or the value of the property in controversy, amounts to $300, the supreme court will dismiss an appeal from a judgment of the superior court dismissing a writ of *certiorari*, and affirming a judgment of a justice's court in defendant's favor for $106.65, costs, though counsel fail to raise the point of jurisdiction on the argument of the case.

Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Trover brought in justice's court by Bernard Bienenfeld against the Fresno Milling Company. There was a verdict for defendant, and the justice rendered a judgment for $106.65, costs, in its favor. Plaintiff obtained a writ of *certiorari* from the superior court. From a judgment dismissing the writ, and affirming the justice's judgment, he appeals.

Meux & Edwards, for appellant. *Oliver Wolcott*, (*T. P. Ryan*, of counsel,) for respondent.

SHARPSTEIN, J. This is an appeal from a judgment and order of the superior court of Fresno county, dismissing a writ of *certiorari* and affirming a judgment of a justice's court in the above-entitled action. The judgment of the justices' court is in favor of the defendant and against the plaintiff for the sum of $106.65, costs incurred by defendant in said action, in which there was a verdict and judgment in his favor. We think the appellate jurisdiction of this court does not extend to such a case. This court has "appellate jurisdiction in all cases in equity, except such as arise in justice's courts; also in all cases at law which involve the title or possession of real estate, or the legality of any tax, impost, assessment, toll, or municipal fine, or in which the demand, exclusive of interest, or the value of the property in controversy, amounts to $300; also in cases of forcible entry and detainer, and in proceedings in insolvency, and in actions to prevent or abate a nuisance, and in all such probate matters as may be provided by law; also in all criminal cases prosecuted by indictment or information in a court of record on questions of law alone." Const. art. 6, § 4. This case does not appear to be within the appellate jurisdiction of this court, as defined by the constitution. Therefore we cannot entertain jurisdiction of it. If there had been an appeal from the justice's to the superior court, we are confident that no appeal from the judgment of the latter to this court would have been attempted. Our appellate jurisdiction is the same in both cases. Not having jurisdiction of the appeal we must dismiss it. The only embarrassment we experience in arriving at this determination is caused by the omission of respondent to raise the point. But we cannot proceed further in a case after discovering that we have no jurisdiction, whether the point is raised by counsel or not. Appeal dismissed.

We concur: THORNTON, J; McFARLAND, J.

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82 Cal. 454

In re MILLER. (No. 20,606.)

(*Supreme Court of California.* Jan. 2, 1890.)

HABEAS CORPUS—MISDEMEANORS—JURY TRIAL—PUNISHMENT.

1. The denial of a jury on a trial for a misdemeanor does not affect the jurisdiction of the court, and is an error which cannot be reached by *habeas corpus*.

2. Under Pen. Code Cal. §§ 1446, 1456, a justice of the peace may, on conviction for a misdemeanor, impose in the alternative a sentence of imprisonment in the county jail, in case the fine assessed is not paid, though the ordinance under which the prosecution was instituted does not provide for such imprisonment.

In bank. On petition for *habeas corpus*.

The petitioner, J. H. Miller, was tried and convicted on the 2d day of September, 1889, in the justice's court of Yuba township, Sutter county, Cal., for the violation of a certain ordinance declaring it to be a misdemeanor to sell, or engage in selling, any malt, spirituous, or vinous liquors without first obtaining a license therefor, and providing as a punishment for the violation of said ordinance, that any person who should carry on, or attempt to carry on, any kind of business specified in said ordinance without first having taken out the necessary license therefor, should be guilty of a misdemeanor, and, upon conviction by any court having jurisdiction thereof, should be punished by a fine not exceeding $500, and not less than $25, or by imprisonment in the county jail not exceeding six months, or by both such fine and imprisonment. Under this ordinance the prisoner was arrested and taken before a justice of the peace, and tried and convicted. At the trial of the cause the prisoner demanded that he should be tried by a jury. This demand being refused, the prisoner was tried by the justice of the peace, without the intervention of a jury, was found guilty, and was sentenced to pay a fine of $100, or, in default thereof, to serve 100 days in the county jail of said county. Pen. Code Cal. § 1446, provides: "A judgment that the defendant pay a fine may also direct that he be imprisoned until the fine be satisfied, in the proportion of one day's imprisonment for every dollar of the fine." Section 1456 provides: "When a judgment is entered imposing a fine, or ordering the defendant to be imprisoned until the fine is paid, he must be held in custody during the time specified in the judgment, unless the fine is sooner paid."

M. C. Barney and *A. L. Hart*, for petitioner. *Geo. A. Johnson*, Atty. Gen., and *W. T. Phipps*, for respondent.

WORKS, J. This is an application for a writ of *habeas corpus*. The principal ground of the application is that the petitioner, upon a trial for a violation of an ordinance of the board of supervisors of Sutter county, was by the justice's court denied a jury, and, upon a trial by the justice, convicted and fined $100. The offense charged was not a felony, and a jury might have been waived. The return of the officer to the alternative writ shows a valid commitment by a court having jurisdiction of the subject-matter and of the party. If a jury trial was denied, it was a mere error, which could not be reached by a writ of *habeas corpus.* Ex parte McCullough, 35 Cal. 97; 4 Crim. Law Mag. 798 et seq; Ex parte Brandon, 49 Ark. 143, 4 S. W. Rep. 452; Turney v. Barr, 75 Iowa, 758, 38 N. W. Rep. 550; Zelle v. McHenry, 51 Iowa, 572, 2 N. W. Rep. 264; Kelly v. People, 115 Ill. 583, 4 N. E. Rep. 644.

It is further contended that the judgment of the justice's court was void, because it provided for the alternative of imprisonment in the county jail in case the fine assessed was not paid. This is placed on the ground that the ordinance under which the petitioner was prosecuted did no provide for such imprisonment. But the offense for which the petitioner was convicted was a misdemeanor, and the Code provides for such imprisonment as a means of enforcing the fine. Pen. Code, §§ 1446, 1456; Ex parte Ellis, 54 Cal. 204; Ex parte Chin Yan, 60 Cal. 78; Ex parte Baldwin, Id. 432. The judgment was in proper form and valid. Writ denied and prisoner remanded to the custody of the sheriff of Sutter county.

We concur: BEATTY, C. J.; THORNTON, J.; SHARPSTEIN, J.; PATERSON, J.; FOX, J.; MCFARLAND, J.

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82 Cal. 51

MILLS *v.* DEARBORN. (No. 12,534.)

(*Supreme Court of California.* Dec. 13, 1889.)

MOTION FOR NEW TRIAL—STATEMENT.

1. Code Civil Proc. Cal. §§ 659, 660, provide that the application for a new trial shall be heard at the earliest practicable period after the bill of exceptions or statement is filed, and that the statement must be filed with the clerk. *Held,* that the clerk's certificate, showing that the statement was not filed before the motion for a new trial was submitted, is conclusive in the appellate court, appellant's affidavit to the contrary notwithstanding.

2. Respondent is not estopped from denying that the statement was filed by a stipulation made by him before the time for filing that it had been served in time, and was correct, and might be presented to the court for settlement without further notice.

Department 1. Appeal from superior court, San Mateo county; E. F. HEAD, Judge.

George H. Buck and *George H. Filkins,* for appellant. *George C. Ross,* for respondent.

WORKS, J. The questions attempted to be presented in this case depend upon a statement of the case, which appears in the record. It is contended by the respondent that the statement should be stricken out, and must be disregarded by this court, because it was not filed in the court below at the time the motion for a new trial was submitted and denied. The motion for a new trial was submitted December 10, 1887. There is no indorsement of filing on the statement as it is copied into the record, nor is there any evidence of any kind that it was then on file, or that it was before the court, or made the basis of the motion. The certificate of the clerk, at the close of the transcript, after certifying to copies of papers constituting the judgment roll, recites: "And I further certify that the foregoing printed transcript, beginning at folio one (1) and ending at folio three hundred and seventy-three, (373,) excepting, however, and excluding, the map attached to page 35 of said transcript, is a correct copy of a document filed in said court on the 10th day of February, 1888. And I further certify that the map attached to page 35 of said transcript is a true copy of said map received by me and attached on the 13th day of February, 1888." The "document" referred to is the entire transcript, commencing with the complaint and ending with the notice of appeal. If this can be construed to be a certificate of the filing of the statement, it shows that it was not filed until two months after the motion for a new trial was passed upon. In addition to this, another certificate of the clerk is filed in support of the motion to strike out the statement which appears in the transcript, which certificate recites: "I have carefully examined all entries made in the Register of Actions of said superior court in the case of D. O. Mills, plaintiff, vs. Lydia Dearborn et al., defendants, No. 720, and all of the original papers in said action, and that there is no entry in said Register of Actions of any 'statement on motion for a new trial' having been filed in said action between April 4, 1887, and February 10, 1888, and that no paper whatever indorsed or entitled, or purporting to be, a statement on motion for a new trial in said action, is contained among said original papers, other than a document which is not entitled or named on the back thereof, but which consists of numerous papers attached together, and on the back of the whole thereof marked, 'Filed February 10, 1888,' and among which said papers so filed is one entitled on the face thereof, 'Statement on Motion for a New Trial.'" The attorney for appellant makes affidavit that he left the statement with the clerk for filing; and this is corroborated by another witness, but it is most positively denied in the affidavit made by the clerk, in which he says: "That deponent never saw such a statement on the 10th day of December, 1887, or at any other time; that he never had any information or notice whatever that said Buck desired any such statement filed in said court or matter; that no statement on motion for a new trial in said action was ever filed, or presented to deponent to be filed, in the superior court of said county of San Mateo; that on the 10th day of February, 1888, said Buck did come to the office of deponent, and then and there had a conversation with deponent, and applied to, and requested of, deponent, as such county clerk, to certify to the correctness of the printed transcript now on file herein; that deponent examined said transcript, and then stated to said Buck that he could not truthfully certify to its correctness, as no statement on motion for a new trial had ever been filed in said cause, and declined to so certify; that said Buck thereupon produced and exhibited to deponent a document of which the entire printed transcript herein, excepting the map at page 35, is a copy, and then and there requested deponent to file the same, and to date the filing thereon 'December 10, 1887,' but that said deponent refused to so file and date said filing, as the same would not be a true indorsement thereon; that the character or description or name of said document was not indorsed upon the same when so presented to deponent, nor is it now indorsed; that in such conversation said Buck stated that he had had all the papers comprising said document at San Francisco, and had there given the same to a printer, for the purpose of having the transcript in said cause printed, and that the map was still in San Francisco, but that he (Buck) would get it, and have it attached to said document; that upon the refusal of deponent to certify to the said transcript being correct, and deponent declining to file said document, and date the filing thereof December 10, 1887, said Buck stated that he would apply to the judge of said superior court for an order directing said document to be filed *nunc pro tunc* as of December 10, 1887; and that said Buck did thereafter, in the presence of deponent, apply to and request the judge of said court to make such an order, but that said judge refused to do so; and that said Buck then requested deponent to file said document as of and on said 10th day of February, 1888; and that deponent did thereupon so file it, and thereafter, and on the 13th day of February, 1888, said Buck brought said map, as he stated, from San Francisco, to deponent, and requested deponent to attach said map to said document; and that deponent did thereupon pin said map to one of the sheets of said document; and that said document, in the condition it was presented to deponent on the 10th day of February, 1888, with the indorsement thereon, is now on file in the office of the clerk of said superior court, with said map still attached with a pin thereto; that said Buck at no time, during the conversation with deponent hereinbefore mentioned, said, asserted, or contended that he had ever prior to said day, or on said 10th day of December, 1887, presented to or left with deponent, or in his office, any statement on motion for a new trial in said cause; and that deponent was first informed of such claim on the part of said Buck on yesterday, viz., September 16, 1889. Deponent further avers that said document shows that the sheets of paper have been taken apart, and subsequently pasted together, and that its whole appearance indicates that it has been through the hands of a printer." This court must be bound by the certificate of the clerk, as against the affidavit of the appellant, and it shows that no statement was filed. If the certificate was false, the appellant should have taken steps to have it corrected. Not having done so, it is binding on this court. The Code requires the statement to be filed with the clerk. Code Civil Proc. § 659. And the "application for a new trial shall be heard at the earliest practicable period after * * * bill of exceptions or statement * * * are filed." Id. § 660. Until the statement is filed, it is no part of the record, and cannot properly be considered by the court; and, from what we can learn from the record before us, the court below may have denied the motion for the reason that no statement had been filed, and therefore no error was shown.

The appellant contends that the respondent is estopped to claim that the statement was not filed by a stipulation made by him that the statement had been served in time, and that the same was correct, and might be presented to the court for settlement without further notice. But this was before the time for filing, and before the settlement of the statement, and could not affect the question now presented. A statement was settled, as shown by the judge's certificate; but this does not show that it was filed. As indicated by the affidavit of the clerk, the attorney for the appellant may have kept it in his possession until it was printed, and then have presented it for filing. It is true, as counsel for appellant contends, that it is not necessary that the paper should have been indorsed and filed by the clerk. If it was actually left with him to be filed, this would have been enough. Boyd v. Desmond, 79 Cal. 250, 21 Pac. Rep. 755. But here the fact is, as shown by the certificate and the clerk's affidavit, that it was not left with the clerk for filing. The statement not having been before the court below when the motion for a new trial was submitted, the motion was properly denied. No reason is shown why the judgment should be reversed.

While, as stated, we could not properly look into the alleged statement for the purpose of reversing the judgment or order, we have examined it, and other parts of the record, sufficiently to satisfy us that the judgment was right on the merits. Judgment and order affirmed.

We concur: FOX, J.; PATERSON, J.

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82 Cal. 550

BATES *v.* GERBER, City Treasurer. (No. 13,329.)

(*Supreme Court of California.* Jan. 15, 1890.)

MUNICIPAL BONDS—OVERDUE COUPONS—INTEREST.

1. As St. Cal. 1858, pp. 279, 280, providing for the payment by the city of Sacramento of certain bonds, makes no provision for the payment by the city treasurer of other than annual interest, *mandamus* will not lie against him for the payment of interest on unpaid interest. Davis v. Porter, 6 Pac. Rep. 746, followed.

2. As the bonds were issued under a special statute which provided for the payment of the principal and annual interest, and nothing more, and which created a specific fund for the payment of the bonds, the city, on the insufficiency of the fund for any one year to meet the annual interest, does not become liable to pay interest on overdue coupons, under the general statute providing for interest on all contracts after maturity. THORNTON, J., dissenting.

In bank. Appeal from superior court, Sacramento county.

W. C. Belcher and *A. C. Freeman*, for appellant. *Taylor & Holl*, (*A. P. Catlin*, of counsel,) for respondent.

WORKS, J. *Mandamus* to compel the respondent, as treasurer of the city of Sacramento, to pay interest on overdue coupons of certain bonds of said city. The court below sustained the demurrer to the complaint, and rendered judgment for the defendant thereon. The plaintiff appeals.

The precise question presented here was decided adversely to the appellant in Davis v. Porter, 66 Cal. 658, 6 Pac. Rep. 746. On the authority of that case, the judgment of the court below must be affirmed, not alone because it has been so decided by this court, but because it was correctly decided for the reasons stated in the opinion. In this case a demand was made on the treasurer for the payment of the annual interest provided for by the coupons, and interest on the amount due on such coupons from the time the same matured. The treasurer offered to pay the amount called for by the coupons, on delivery of such coupons to him, but declined to pay interest on the interest or to pay any part of the indebtedness unless the coupons were surrendered as fully paid and satisfied.

It is earnestly contended by the appellant that, conceding that *mandamus* would not lie to compel the treasurer to pay interest on the annual interest, such coupons drew interest from their maturity under the general statute providing for such interest, after maturity, on all contracts; and that as the debt existed the treasurer had no right to impose, as a condition upon which he would pay the annual interest, that the coupons should be surrendered. We cannot accede to this view of the law. These bonds are provided for by special statute, which provided a specific fund out of which they should be paid. The act provided for the payment of the principal and annual interest, and nothing more. St. 1858, p. 279, § 35. There was no other fund out of which the interest demanded could have been paid, and to have paid out a part of the fund on a liability not provided for or allowed by law would have been to divert a part of the fund from the purpose intended, and thereby to deprive other bondholders of their annual interest, and perhaps of their principal. The statute having provided specifically what should be paid out of this fund, and of what the fund should consist, it cannot be presumed that it was the intention of the legislature that there should be a general liability over against the city for interest on the annual interest, in case the fund for any year should be insufficient to meet such interest. The statute under and by virtue of which these bonds were issued was the basis of, and became a part of the contract, and the bondholders must be held to have taken the bonds with the understanding and agreement that they were only entitled to the principal and the annual interest, and that if the fund provided for the payment thereof should be insufficient to meet the same that no interest on the coupons were provided for or could be recovered. Judgment affirmed.

We concur: McFarland, J; Paterson, J.

Fox, J., (*concurring*.) I concur in the judgment. Even if these coupons bear interest after maturity, or after non-payment for want of funds at or after maturity, (which is not conceded,) the treasurer did all that he was required or authorized to do when he offered to pay the face of the coupons upon condition of their surrender to him; and the condition was one which he was not only authorized, but which it was his duty, to impose. The bond from which each coupon was severed, as well as the act under which it was issued, was a part of the contract made between the municipality and the person to whom the bond was issued, at the time it was issued, and all the conditions of that contract followed the bond, and every coupon attached to it, into whosesoever hands it might thereafter go. The act was a special one for the incorporation of a municipality, the funding of the indebtedness of its predecessors, for which it would be liable, and providing for the general government of the new municipality. It constituted the whole law of the state on the special subjects with which it dealt, and for which it provided; taking those subjects out of the operation of all general laws, which might otherwise have been applicable thereto. The holders of claims against the former municipality or the former county were not bound to accept its provisions, but, if they did, they and their subsequent assignees were bound by them. *Quoad* these bonds, and the coupons attached to them, that act becomes a part of the contract. The act provided for the issuance of the bonds, for the time of their maturity, for the payment of annual interest thereon at the rate of 6 per cent. per annum, payable at the office of the treasurer on the 1st day of January in each year, and that coupons for the interest should be attached to each bond; and also provided for a fund to meet these several sums as they should fall due. It did not provide for either principal or interest bearing interest after maturity, and provided no fund to meet such an added liability. The holders of the bonds accepted them with full knowledge of these provisions, and that this statute constituted the whole law by which their rights and remedies were to be ascertained and determined; for every man dealing with a municipal corporation is bound to know that its powers are only such as are conferred by the statute under which it is authorized to act, and its obligations can only be such as it is by the statute authorized to assume, or those necessarily incident to the exercise of the powers expressly conferred. Knowing this, they knew that no provision was, or without further legislation could be, made for the payment of interest after maturity upon any of these obligations. They also knew that they could not maintain any action against the municipality upon any obligation arising under this act, and accepted their obligations upon that condition. Nothing in the act prohibited them from maintaining any proper action against the officers of the municipality for neglect to perform any of the duties prescribed by the act, but they were forbidden to maintain any action against the municipality itself, upon any liability incurred under the act, and they voluntarily accepted these obligations upon that condition.

This act provided for the funding of the old indebtedness; for the creation of a fund to meet the obligations specially authorized in that behalf; and also for a fund to meet the current expenses of the government of the municipality; but it not only, *ex industria*, omitted to provide for any of these obligations bearing interest after maturity, or for the payment of any such interest, but it also expressly provided that no officer nor any person should have power to contract a debt against the municipality for any purpose or under any pretext whatever. See section 45, p. 281. If any of the officers had made any provision, express or implied, to the effect that any of the obligations which they were authorized to issue under the act should bear interest at a greater rate or for a longer period than that provided in the act itself, to that extent it would have been in direct violation of this provision, and void. In view, then, of the fact that all the rights and obligations of the parties in relation to these bonds and coupons are limited and controlled by the provisions of this act under which they were issued, the able argument of counsel in support of the proposition that the coupons bear interest after maturity, based upon other statutes and upon decisions rendered under other laws, seems to me to have no application. This act takes the subject-matter upon which it operates out of the general laws in relation to interest, and out of the operation of all other laws. Under this act the rule laid down in Soher v. Supervisors, 39 Cal. 134, seems to me the only rule that can be applied: "When no provision is made in a funding statute for the payment of interest after the bonds issued under it have become due, no interest will accrue thereon after that date." And the rule that will apply to the bonds will also apply to the coupons. As was said in Beals v. Supervisors, 28 Cal. 450, "there is no express contract to pay interest, and no rule of law, independent of statutory provisions, that would require interest to be paid." The statute under consideration in the case of David v. County of Yuba, 75 Cal. 452, 13 Pac. Rep. 874, and 17 Pac. Rep. 533, was so widely different from the one now under consideration as to make the decision in that case of no value as an authority in this case. There it was expressly provided that other funds might be resorted to than the one created under the funding act, and that the board might make other provisions than those specified in the act, if those were found insufficient. The payment of interest in consideration of forbearance might well be allowed in that case, as the provisions of the statute were sufficiently liberal to allow that to be done.

It is claimed that the case of Davis v. Porter, 66 Cal. 658, 6 Pac. Rep. 746, holds that the coupons upon the bonds issued under this act bear interest after maturity, but I do not so read the decision. The effect of that decision is that, even if it be conceded that they so bear interest, the plaintiff was not entitled to the relief demanded, for the reason that the treasurer was not authorized to pay more than the face of the coupons. It was not necessary in that case to decide that they did (or did not) bear interest, and the language used does not import a decision to that effect. I am unable to find any decision that will support that theory, as applicable to bonds or coupons issued under a statute like the one here under consideration. But as said in the case last referred to, and as I have said in the beginning, even if these coupons did bear interest after maturity or presentation the plaintiff is not entitled to this writ, for the reason that the treasurer is not by the act authorized to pay anything more than the face of the obligation, and he offered to pay that upon the only terms and conditions upon which he was authorized to pay it, namely, upon surrender of the coupons. The bond, as well as the act, forms a part of the contract, and every coupon refers to the bond, and declares upon its face that it is for interest upon the bond. The holder is therefore bound to look at the bond, as well as the coupon, for the conditions of his contract; and when he does so he finds it specified in express terms that the interest (for which the coupon is attached) is payable upon surrender of the coupon. Plaintiff was not therefore, entitled to the payment of even the principal sum named in the coupon, except upon surrender of such coupon.

THORNTON, J., (*dissenting*.) I concur in the judgment for the reasons stated in the decision in Davis v. Porter, 66 Cal. 658, 6 Pac Rep. 746. In that case the main question presented in this case was fully argued by counsel, considered and decided. I am of opinion that the decision there made was correct in every particular, viz., that *mandamus* would not lie to command the payment of interest on the interest mentioned in the coupons. The prayer in the petition for the mandate herein is for a writ commanding the payment of both coupons and interest on them. It was properly refused, for the reason that as asked for it would include interest on coupons, which the court could not lawfully grant. The demand on the treasurer also included both coupons and interest on coupons. It was therefore proper to refuse the writ. Price v. Irrigating Co., 56 Cal. 436. While it would have been error to refuse the writ for the payment of the coupons, it was not error to refuse it for the payment of coupons and interest on them.

I am, however, of opinion that the holder of overdue coupons has the right to have, under the statute as it has stood from the date of the first statute on the subject of interest enacted in this state, and as it stands now, from the city of Sacramento interest on such overdue coupons. In that respect the city of Sacramento is like any other debtor. The refusal to pay such interest would be repudiation, nothing more nor less. I am of opinion that the treasurer had no right to demand, as a condition of paying such coupons that they should be surrendered to him. The holder of such coupons has a right under the general statute, (Civil Code, § 3137,) and under the law, if no statute had been enacted, to retain them, for the reason that he has a claim upon them for interest. The payment of the principal of the coupon does not pay it in full; a partial payment is only thus made. The debtor (the city of Sacramento) can only require that a receipt for the amount paid be written on each coupon. Id. § 3137, supra. The treasurer can require no more, and the holder has a right to retain in his possession the coupons, with the receipts written on them, as evidence of his claim for interest not paid.

82 Cal. 562

DAVIS v. CITY OF SACRAMENTO. (No. 13,249.)

(*Supreme Court of California*. Jan. 23, 1890.)

In bank. Appeal from superior court, Sacramento county; JOHN HUNT, Judge.

W. C. Belcher and *Freeman & Bates*, for appellant. *A. P. Catlin*, for respondent.

WORKS, J. The object of this action is the same as Bates v. Gerber, ante, 1115, (opinion filed January 16, 1890;) the case referred to being *mandamus* against the treasurer to compel the payment of interest on overdue coupons, and this an action directly against the city to recover such interest. We held in Bates v. Gerber that the coupons did not draw interest after maturity, and the decision in that case is decisive of this. It was held in Davis v. Yuba Co., 75 Cal. 452, 13 Pac. Rep. 874, and 17 Pac. Rep. 533, that the coupons of certain bonds issued by said county bore interest after maturity, but that case differed materially from this. Here a specific fund is provided for the payment of the bonds and annual interest, and nothing more, and no other means of paying anything more is provided. In the case cited it appears that the county was made generally liable to pay the bonds and interest, and, if the fund specifically provided for their payment was insufficient, the treasurer was authorized to draw on the general fund, and if that proved insufficient the board of supervisors was authorized to raise the necessary funds by contracts or loans. As the county was made generally liable for the annual interest, and means provided for meeting it, we see no reason why the county should not have been held liable for interest on the coupons, if the same were not paid at maturity. But for the reasons stated in the opinion first above referred to, we are of the opinion that no such liability attached under the circumstances of this case, and that for that reason the demurrer to the complaint was properly sustained. Judgment affirmed.

We concur: MCFARLAND, J.; FOX, J.; PATERSON, J.

I dissent: THORNTON, J.

82 Cal. 202

WOODARD v. WRIGHT. (No. 12,405.)

(*Supreme Court of California*. Dec. 23 1889.)

TRUSTS—EXPENDITURES BY TRUSTEE—PAYMENTS TO BENEFICIARY.

1. Where a trustee has expended money in necessary repairs and improvements of the trust-estate, and the outlay has been approved by the *cestui que trust*, he may hold the land on which the money was expended till the sum is repaid.

2. In the absence of an express agreement to the contrary, money paid to the *cestui que trust* by the trustee will be presumed to be payments on account of the rents, issues, and profits of the trust-estate.

Department 2. Appeal from superior court, Marin county; E. B. MAHON, Judge.

Estee, Wilson & McCutchen, for appellant. *Jos. McKenna* and *John McKenna*, for respondent.

PATERSON, J. This is an action brought by the plaintiff for a decree adjudging the defendant to be her trustee of the tract of land described in the complaint, and requiring him to execute a deed of conveyance to her. Plaintiff had judgment in the court below, and from that judgment, and an order denying a motion for a new trial, defendant has appealed.

Plaintiff averred in her complaint that the defendant undertook and assumed as her agent, and at her special instance and request, to purchase the land described in the complaint and take a deed therefor in her name, and for her benefit; but fraudulently, and without her knowledge or consent, on the 19th day of November, 1877, took a conveyance of the land in his own name, and for his own benefit. The defendant admitted that the conveyance was taken in his own name, but denied that it was in fraud of the plaintiff, or against her wish or consent, and averred that the plaintiff knew that the deed was taken in his own name, and that the same was taken at her solicitation and request. He further averred that, of the purchase price paid, $5,000 belonged to the plaintiff, and the balance thereof, namely, $832.50, was the money of the defendant; that, although the deed was taken in his own name, he received the property in trust for the benefit of the plaintiff, subject, however, to advances of money made and to be made by the defendant to the plaintiff; that since the purchase was made he has paid over to the plaintiff all of the net income arising from the property; that in addition to the net income derived from the property which has been paid over to the plaintiff, the defendant has paid, laid out and expended for, and loaned to, the plaintiff since the creation of the trust, and at her special instance and request, various sums of money, amounting to $7,383, in which sum he claims the plaintiff is indebted to him. The court found that, at the request of the plaintiff, defendant purchased the property, and took a deed in his own name to secure the repayment to him of the sum of $832.50 only, the same being the balance of the purchase price loaned by him to plaintiff to make the purchase; that of the purchase price, to-wit, $5,832.50, $5,000 belonged to the plaintiff, and the balance, $832.50, to the defendant; that defendant, immediately after the purchase and pursuant to his agreement with the plaintiff, took possession of the land as security for the money advanced to make the purchase, and has ever since been in possession of the same; that the defendant, since the purchase, has laid out considerable money for taxes and for necessary repairs, and for expenses of farming the same when the premises were not leased. The court further found: "*Tenth*. That the rents, issues, and profits arising from said land and premises, and collected by the defendant since the date of purchase, up to the date hereof, are more than sufficient to pay the $832.50, the amount advanced to purchase, and the interest thereon from the 19th of November, A. D. 1877, at the rate of 7 per cent. per annum up to the date hereof, and all the taxes on said premises paid by defendant, and all the sums of money expended by him for the necessary repairs of said premises, and for the expenses of farming the same, when the said premises were not leased. * * * *Twelfth*. That the defendant has never paid to plaintiff any part of the income of said land and premises, as such, but has made loans to plaintiff, as hereafter set forth. *Thirteenth.* That defendant has made since the purchase valuable improvements on said land and premises, but said improvements were put on said land and premises without the consent or knowledge of plaintiff, and there were no special circumstances to justify the making of any of them. *Fourteenth.* That the defendant, after the purchase, made loans of divers sums of money to plaintiff; but that plaintiff never agreed with defendant before, or at the time, or after said loans, either by express verbal terms, or in writing, or in any other way, that said loans, or any of them, should be a lien against said land and premises, or against the proceeds thereof. *Fifteenth.* That defendant, after the purchase, made for plaintiff expenditures of money for purposes having nothing to do with the preservation of the land and premises, and in no way concerning the property, but that the plaintiff never agreed with the defendant before, or at the time, * * * or in any other way, that said expenditures, or any of them, should be a lien against the said land and premises, or against the proceeds thereof." As conclusions of law the court found that the defendant took the land simply as a mortgagee, to secure only the repayment to him of $832.50, with interest thereon at the rate of 7 per cent. per annum; that he was entitled to be allowed for his expenditures for taxes, necessary repairs, and expenses of farming when the premises were not leased; that plaintiff was entitled to have the income arising from the rents, issues, and profits of the land, less said sums allowed the defendant; that the defendant is not entitled to be allowed for moneys expended by him in making improvements, nor for divers sums of money which he had lent to plaintiff after the purchase of the land; that defendant has now no lien or claim against the land, but that plaintiff is entitled to the possession thereof, together with a good and sufficient deed of conveyance from the defendant, and her costs of the action.

There is no doubt that the defendant took the property to be held in trust by him for the plaintiff. The only question in the case is how much, what items of expenditure, he should be allowed before he is required to convey to the plaintiff. We think the court erred in refusing to allow the defendant his necessary expenses incurred in erecting a fence around the property, for constructing a windmill, in laying water-pipes for carrying water to portions of the property and the house, for digging a new well, and for the construction of a new bridge. The evidence shows that the defendant, with the consent of the plaintiff, had the entire management of the property. His power to manage the same at will seems not to have been disputed. There is nothing in the record, so far as we can see, to indicate any abuse of authority thus given him. Trustees thus invested with the general power to manage and control the property of the *cestui que trust* are justified in laying out money for the repair and ordinary improvement of property, such as draining, fencing, necessary farm buildings, etc., and they are allowed to hold the estate until the moneys thus expended are repaid. The question of reimbursement does not depend upon the knowledge or consent of the *cestui que trust.* Mannix v. Purcell, 19 N. E. Rep. 572; Myers v. Myers, 2 McCord, Eq. 214; Hidden v. Jordan, 28 Cal. 309; Harper's Appeal, 64 Pa. St. 315; 2 Perry, Trusts, §§ 485, 915; Hill, Trustees, 673. Assuming that it is necessary in such cases for the trustee to show special circumstances justifying the making of improvements, we think that the thirteenth finding of the court, that there were no such special circumstances, is not supported by the evidence. Nearly all of the items of expenditure for which the defendant claims reimbursement were presented to the plaintiff in an account, and by her approved. This amounted to ratification of the defendant's acts. Furthermore, the testimony, without substantial conflict, showed that all of the improvements made were absolutely necessary. It is unnecessary for us to recite here the testimony upon which we base this statement. The fence was worthless; the one which defendant put in its stead was substantial, and added a permanent value to the property; the bridge was unsafe and not worth repair; the new one was therefore necessary and proper; the old well had become exhausted, and it was cheaper to dig a new one than to attempt to repair the old; the windmill and pipes were such as any good husbandman, with the means at hand would have provided under the circumstances. Defendant also expended money in payment of insurance; for this he should have been allowed. The rule is that trustees may insure, and it has been held that good management would demand it, but they are not bound to do so. 2 Perry, Trusts, § 527. The authorities cited by respondent bearing upon the question as to what expenditures may be made by a mortgagee in possession are not in point. This is a case of trust, and trustees with general powers are not bound to the strict limitations which are placed upon mortgagees in possession. The twelfth finding, to the effect that the defendant has never paid to plaintiff any part of the income of the land, is not supported by the evidence. In her examination in chief the plaintiff testified as follows: "Question. You stated this morning that you received $2,206 from your brother. On what account was that? Answer. It was on account of the property. Rents that came from Fairfax. Q. That is the way it was given to you from him? A. Yes, sir." The attempt subsequently to qualify and explain this statement was ineffective. The money was actually received by her, and any payments made by the defendant to the plaintiff while he was holding the rents, issues, and profits of the property of his *cestui que trust*, in the absence of an express understanding or agreement to the contrary between the two, will be presumed to have been payments on account of the rents, issues, and profits thus received by him, and not as advances or loans from him to her. The finding of the court, that the plaintiff never agreed with the defendant that any loans or advances made by the defendant should be a lien against the land, is supported by material evidence. The most that can be said in favor of appellant is that there is a conflict in the evidence. The finding, therefore, cannot be disturbed. It is claimed by appellant that the court erred in striking out certain portions of the answer. Those portions are referred to in the transcript as "beginning at the word 'that,' line 16, page 1, and ending at the word 'property,' line 16, page 11," etc. These numbers of the lines and pages refer to the lines and pages of the original answer on file, but furnish us with no information as to what portions of the answer are included therein. Assuming, however, that all of the answer was stricken out except that which is given in the concluding portion of respondent's brief herein, we see no error. All of the matters properly involved in the issues can be determined upon the pleadings as they stand, as well as they could if the portions stricken out had remained in the answer.

Judgment and order reversed, and cause remanded for a new trial.

I concur: Fox, J.

Works, J., (*concurring.*) I concur in the judgment of reversal. I do not concur in the statement of Mr. Justice Paterson, that the evidence showed a trust in the defendant. He was a mortgagee in possession, and was not entitled to all the credits given him in the foregoing opinion. But the plaintiff having claimed that the relation of trustee and *cestui que trust* existed between the parties, and the cause having been tried on that theory in the court below, both parties agreeing that there was a trust, some of the items the court below refused to allow the defendant should have been allowed him. If the action had been brought to redeem, treating the deed held by the defendant as a mortgage, as I think should have been done, the conclusion reached by the court below would have been right.

(82 Cal. 182)

People v. Lawrence. (No. 20,588.)

(*Supreme Court of California.* Dec. 24, 1889.)

Gaming—Police Courts—Jurisdiction.

Const. Cal. art. 6, §§ 1, 5, 13, vest the judicial power in superior courts, "and in such inferior courts as the legislature may establish in any incorporated city or town, or city and county," and give the superior courts jurisdiction of felonies, and of all "misdemeanors not otherwise provided for," and provide that the legislature may fix the jurisdiction of any inferior courts so established. St. 1871-72, p. 84, and other statutes, create the police court of the city and county of San Francisco, and give it jurisdiction of all misdemeanors punishable by fine not exceeding $1,000, and imprisonment for one year, or both. *Held*, that the effect of these acts was to deprive the superior court of jurisdiction over the offense of gaming, that being among the misdemeanors "otherwise provided for" by the acts. Following Green v. Superior Court, 21 Pac. Rep. 307.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. Sullivan, Judge.

The defendant, Lawrence, was convicted in the superior court of San Francisco on an indictment for gaming. From the judgment and the order denying a new trial he appeals. Const. Cal. art. 6, § 5, provides that the superior courts shall have jurisdiction in all criminal cases amounting to felony, and cases of misdemeanor not otherwise provided for. Id. § 13, provides that the legislature shall fix by law the jurisdiction of any inferior courts which may be established in pursuance of section 1, and shall fix by law the powers, duties, and responsiblities of the judges thereof. "Consolidation Act," as amended in 1872, prescribes the jurisdiction of the police court of the city and county of San Francisco, and that said court shall have jurisdiction of misdemeanors punishable by fine not exceeding $1,000, or by imprisonment not exceeding one year, or by both.

J. D. Sullivan and *Alfred Clarke*, for appellant. *Geo. A. Johnson*, Atty. Gen., for the People.

Foote, C. The defendant was tried and convicted in the superior court of the city and county of San Francisco upon an indictment charging him with the commission of a misdemeanor, viz., gaming, under section 330 of the Penal Code. From the judgment and an order denying a new trial he has appealed. The only point made for the reversal of the judgment and order is that the court which tried him was without jurisdiction so to do. Under the authority of the case of Green v. Superior Court, 21 Pac. Rep. 307, 78 Cal. 556, it is apparent that the point is well taken. We therefore advise that the judgment and order be reversed.

We concur: Belcher, C. C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are reversed.

(82 Cal. 456)

Willard v. Superior Court. (No. 20,573.)

(*Supreme Court of California.* Dec. 30, 1889.)

Criminal Law—Attendance of Witnesses.

1. The provision of Const. Cal. § 13, art. 1, that, "in criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial, to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend in person and with counsel," is limited by the concluding sentence, "The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses in criminal cases other than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial," and does not secure to a defendant in a criminal action an absolute right to have the process of the court issue to compel the attendance, as a witness, of a convict imprisoned in the state-prison.

2. Under Pen. Code Cal. § 1567, providing that "when it is necessary to have a person imprisoned in the state-prison brought before any court * * * an order for that purpose may be made by the court, and executed by the sheriff of the county where it is made," it is in the discretion of the court to determine whether the attendance of such person is necessary, and *mandamus* will not lie to compel the making of an order

Works and Thornton, JJ., dissenting.

In bank. On application for writ of mandate to superior court, Santa Barbara county; R. M. DILLARD, Judge.

Beatty & Fowler, for plaintiff. *Geo. A. Johnson*, Atty. Gen., for respondent.

PATERSON, J. The question involved in this application for a writ of mandate is whether a person held for trial on a charge of felony has the right to have the process of the court to compel the attendance in his behalf of witnesses who are confined as prisoners in the state-prison. Title 13 of the Penal Code, which is entitled, "Proceedings for Bringing Persons Imprisoned in the State-Prison, or the Jail of Another County, before a Court," provides that, "when it is necessary to have a person imprisoned in the state-prison brought before any court, * * * an order for that purpose may be made by the court, and executed by the sheriff of the county where it is made." If this were the only provision of law bearing on the subject, it would be the duty of the court, on a proper showing by the defendant as to the advisability and materiality of the proposed testimony, to make an order requiring the sheriff to bring the witness from the prison to testify at the trial: but other provisions of the constitution and the Codes somewhat becloud the question. Section 1333 of the Penal Code provides that "when the testimony of a material witness for the people is required, in a criminal action before a court of record of this state, and such witness is a prisoner in the state-prison, or in a county jail, an order for his temporary removal from such prison or jail, and for his production before such court, may be made by the court in which the action is pending, or by the judge thereof; but, in case the prison or jail is out of the county in which the application is made, such order shall only be made upon the affidavit of the district attorney, or other person, on behalf of the people, showing that the testimony is material and necessary, and even then the granting of the order shall be in the discretion of the court or judge." Section 1346 provides that "when a material witness for a defendant under a criminal charge is a prisoner in the state-prison, or in the county jail of a county other than that in which the defendant is to be tried, his deposition may be taken, on behalf of the defendant, in the manner provided for in the case of a witness who is sick," etc. If the legislature had intended to authorize the defendant in a criminal action to compel the attendance of such witnesses, it would have done so, doubtless, in the same chapter with section 1333, supra, which chapter is devoted to the subject of "Compelling the Attendance of Witnesses." The facts that in that chapter provision is carefully made for the production of witnesses on behalf of the prosecution, that nothing is said about witnesses on behalf of defendant, and that in the next chapter, which relates to the "Examination of Witnesses Conditionally," provision is made for taking depositions on behalf of the defendant, and nothing is said about depositions on behalf of the prosecution, are significant. Reading the three sections together, it would seem that the legislature intended two things: (1) That the court might in any case, on a proper showing that the testimony of the witness was material and necessary, whether for defendant or for the prosecution, make an order for his attendance. That is the purport of section 1567, and there is nothing in the other sections to overcome it. (2) That the court, when satisfied that the examination of a witness on behalf of a defendant is necessary, may order that he be examined conditionally; but no deposition shall be taken on behalf of the prosecution, the defendant having the right to be confronted at the trial by the witnesses against him. In neither of these cases does an order issue as a matter of right. It issues only when it appears to the satisfaction of the trial court that the witness is necessary. The statute has lodged in that court the right to determine whether the witness is necessary or not, and, being thus clothed with discretion, it is not subject to the mandate of this or any other court. For any abuse of that discretion the aggrieved party has his remedy, which is the same as for all other mere errors of judgment. The legislature, however, recognizing the liability of the criminal classes to abuse the process of the court, if given the privilege, as a matter of right, to command the attendance of persons confined in the state-prison, has wisely left it to the court to say whether the witness called for is necessary, and, in order to cut off as many cases of necessity as possible, has provided for the taking of depositions. There may be cases in which the personal attendance of a witness confined in the state-prison is necessary. for the purpose of identity, or for the exhibition of some physical or mental peculiarity, which could not well be described in depositions; but it never was intended to give to a defendant charged with crime the power to summon convicts to testify to his good behavior while among them, or at any other time; yet, if the position taken by petitioner be correct, this might be done, the county in which a defendant is to be tried put to great and unnecessary expense, and the courts and officers of the state greatly harassed by contumacious and vindictive criminals.

But it is claimed by petitioner that, if this be the proper construction of the acts of the legislature, then those acts are in violation of the provisions of article 1, § 13, of the constitution, and are void. That section provides that, "in criminal prosecutions in any court whatever, the party accused shall have the right to a speedy and public trial; to have the process of the court to compel the attendance of witnesses in his behalf; and to appear and defend in person, and with counsel." It is contended that under this provision the petitioner is entitled, as a matter of right, to an order of the court directing the sheriff to bring from the state-prison, to testify in his behalf, any prisoner or prisoners confined therein, whom he may state in an affidavit to be necessary and material witnesses in his behalf. But the concluding sentence of the section reads as follows: "The legislature shall have power to provide for the taking, in the presence of the party accused and his counsel, of depositions of witnesses, in criminal cases oth than cases of homicide, when there is reason to believe that the witness, from inability or other cause, will not attend at the trial." And it is said that this portion of section 13 does not in any way limit the right guarantied in the first clause, quoted above, and that it was decided in People v. Hurtado, 63 Cal. 293, that the last sentence of the section was intended to grant to the accused further and additional rights for his protection, by extending to him the privilege of taking depositions in cases where, from inability or other cause, the witness could not be brought by the process of the court to testify. We do not so understand the case referred to. The court there said: "The section, with the exception of the last clause, relates to the privileges of persons accused of crime. * * * There can be little doubt that the right to due process of law would include the common-law right to be confronted by his witnesses. To prevent misunderstanding, however, the framers of the constitution added: 'The legislature shall have power to provide for the taking,'" etc. It is sufficient to say, however, that the question before us here was not an issue in that case. We think that the legislature, in the provisions adverted to above, has strictly followed the letter and the spirit of the constitution. There has been no infringement upon the constitutional rights of the petitioner, or any other person charged with felony. It may be said in conclusion that the legislature has the right at any time, directly or indirectly, to provide that no person convicted of felony shall testify in any action, civil or criminal. The petition for a writ of mandate is denied.

We concur: SHARPSTEIN, J.; MCFARLAND, J.; FOX, J.

I dissent: WORKS, J.

BEATTY, C. J. I concur in the judgment. The statute certainly does not give the defendant in a criminal action an absolute right to an order for the attendance as witness of a convict imprisoned in the state-prison. It gives a guarded and limited right to the prosecution, subject to the discretion of the court, to have such an order; but it does not in terms give such a right to the defendant, either absolutely or upon conditions. The general provision of section 1567 of the Penal Code, authorizing an order for the production of a prisoner "when it is necessary," is not confined to cases in which the prisoner may be needed as a witness. It applies equally where he is needed for any other purpose, as, for instance, where it is desired to try him upon some charge other than that upon which he has been imprisoned; and the whole object of the section is to prescribe the manner of procuring his presence when needed. We must look to other portions of the statute to discover the cases in which his presence is necessary. No section of the statute has been cited, and I know of none, which makes his presence necessary as a witness, or provides for an order for his production, except section 1333, Pen. Code, by which the privilege of securing his attendance is confined to the prosecution exclusively, subject to the discretion of the court to deny the order. And there is good reason for making this discrimination in behalf of the state. The defendant may in all cases have the benefit of the prisoner's deposition. In cases of homicide, the state cannot have it. Const. art. 1, § 13. And, besides, the district attorney, acting, as he does, in the interest of the public, and under the obligations of his oath of office, will not abuse the privilege; but there is not only no security that defendants in criminal cases would not abuse it, it is highly probable that they would, and the worse the criminal the more probable the abuse.

It being clear, to my mind, that the right contended for by the petitioner is not secured to him by statute, the only remaining question is whether it is secured by the constitution. By section 13, art. 1, it is provided that in criminal prosecutions the party accused shall have the right to compulsory process to compel the attendance of witnesses in his behalf; and I am willing to concede that the provision is self-executing. But what does it mean? Substantially the same provision is found in the sixth amendment to the constitution of the United States, and in the organic law of several of our sister states. We have not been cited by counsel to these provisions, or the construction they have received; and, without the time to investigate the question more thoroughly, I do not care to express an opinion as to the exact limits of the right conferred by this clause of the constitution. I feel very sure, however, that it does not mean, and that it never was intended, that on the mere demand of a defendant in a criminal action any convict, or any number of convicts, must be transported from the state-prison to the place of trial, as an essential prerequisite to proceeding with the trial. It is not possible that the court or judge to whom application is made has no discretion to examine the sufficiency of the grounds upon which it is based, and to deny it, if, in his opinion, it ought to be denied. If this is so, *mandamus* will not lie to compel the making of the order. We may by *mandamus* compel the superior court to act. We cannot prescribe what action it shall take. It has jurisdiction upon the application; and, if it decides erroneously, the only remedy is by appeal from the judgment on bill of exceptions.

THORNTON, J. I dissent. A defendant proceeded against for a felony has a right, under the 13th section, art. 1, of the constitution of this state, "to have the process of the court to compel the attendance of witnesses on his behalf." He has the same right to this process as he has "to appear and defend in person and with counsel." Both are secured by the above section of the constitution. This process cannot be denied to him by any power of the state, whether by legislative, executive, or judicial. The constitution (section above noted) assures this right to a defendant accused of felony. It needs no statute to confer it. The constitution confers it, and it cannot be taken away by statute. Nor has the legislature attempted to deprive such defendant of this right. Section 1333 of the Penal Code, by its very terms, refers only to a witness for the people, not to a witness for the defendant. Section 1346 grants the right to the defendant to have the deposition of his witness taken when the witness is confined in the state-prison, or in the county jail of a county other than that in which the defendant is to be tried, in the manner provided for in the case of a witness who is sick; but he is not bound to have the testimony of the witness so taken. He can waive his constitutional right, and have the deposition taken, should he so elect. But it is entirely at his option to have the witness compelled to attend, or to have his testimony taken by deposition. The defendant may waive his right, and resort to the privilege conferred on him by this section. Further privileges are granted a defendant by sections 1336 and 1337 of the Penal Code. Doubtless the accused would elect to have the deposition taken, if the witness was unable from illness to attend, rather than lose his testimony. The legislature cannot, without a violation of section 13 of article 1 of the constitution, restrict one on trial in a criminal action to having the testimony procured by deposition. The guaranty of the constitution, above pointed out, is for the benefit of the defendant in criminal actions. No such guaranty is given to the people. Therefore section 1333 of the Penal Code was passed, to enable the people to procure the attendance of an imprisoned witness. Without this statute, it may be that the people would have no such right. Section 1346 gives the defendant an additional right, as does the last clause of section 13 of article 1 of the constitution. Both confer the privilege on defendant to take depositions in the categories expressed in them; but neither are limitations on the constitutional guaranty. There is no rule of construction which countenances any such interpretation. They are in perfect harmony. One secures a right, the other grants a privilege. The defendant may waive his right and avail himself of the privilege, or may decline the privilege and cling to his right. When provisions of a constitution or statute are reconcilable, so that both can stand and have their full operation, the one cannot be regarded as a restriction of the other. Limitation is then out of the question. It is illogical to hold it a limitation. It is said that the legislature has the right at any time, directly or indirectly, to provide that no person convicted of a felony shall testify in any action, civil or criminal. Granting that it can, it has not done so; and, until it does so, courts must administer the law as written. Convicted felons are now competent witnesses. Code Civil Proc. §§ 1878–1881. But, as at present advised, we are not prepared to hold that the legislature can, while the section of the constitution above referred to is in force, enact that a witness material for the defense of a person accused and on trial for a felony shall be declared incompetent to testify for the defense. Certain we are that no such legislation will ever be attempted while the above-cited provisions of the constitution remain unchanged. It would be cruel to withhold such testimony from a person tried for an offense which may result in his deprivation of liberty. The guaranty that a defendant shall "have the process of the court to compel the attendance of witnesses in his behalf," as the guaranties of a speedy and public trial, and to appear and defend in person and with counsel, is assured in the same section of the constitution. Other guaranties are also expressed in the same section. The legislature cannot deprive defendant of any of these rights. To their praise, it is said they have nowhere attempted it. The guaranties in section 13 of article 1 of the constitution came down to us, for the most part, from our English ancestors. They are of the great muniments of personal liberty. Some of them are included in the provisions of section 29 of the act of parliament known as "*Magna Charta.*" See Co. Inst. pt. 2, p. 45, and notes following. They are of too much value to be impaired by legislation, or frittered away by construction or interpretation. They should stand and be accorded in their entirety, unabridged and undiminished.

The right of a defendant to have process to compel the attendance of his witnesses in court was substantially decided in People v. Dodge, 28 Cal. 448. It arose on an application for a continuance. The court held that the right of defendant to have the deposition of a witness taken under the statute as it then existed (see Wood, Dig. §§ 562–582, inclusive) was an enlargement of his rights, and was not designed to impair the rule, or abridge his (defendant's) right to have the personal attendance of his witnesses at the trial. The court, per SANDERSON, J., (all concurring,) said on this point: "A defendant in a criminal action is undoubtedly entitled to the personal attendance of his witnesses at the trial, if the same can be obtained without unreasonable delay. Such is the policy of the law, not merely from considerations affecting the defendant only, but also from considerations affecting the ends of public justice, irrespective of individual interests, which is manifest from the fact that the depositions of such witnesses are allowed to be read in evidence only upon further evidence at the trial that their personal attendance cannot be obtained. Section 582. It is to the interest of the people, as well as the defendant, that the witnesses of the latter should be made to give their testimony in the presence of the jury; for we all know, by daily experience, how much weight is added to or taken from testimony by the personal appearance, bearing, and manner of the witness while under examination. If these add to the weight of his testimony, the defendant ought not to be deprived of such effect, except upon the grounds of necessity; and if they detract therefrom, such effect should be secured to the people, in order that the ends of public justice may be subserved. Thus this rule requiring the personal attendance of witnesses, if the same can be had, is founded upon considerations of the wisest policy, and the provisions of the statute whereby the defendant is enabled to examine conditionally, on commission, a witness who is about to leave the state, or is sick or infirm as to afford reasonable grounds for apprehending that he will be unable to attend the trial, were not designed to impair the rule, or abridge the previous rights of the defendant, but, on the contrary, to enlarge those rights, by enabling him to secure testimony of which he would otherwise be deprived, and at the same time preserve the rule in full force, so far as the same could be done, in view of the right conferred by the statute." 28 Cal. 448, 449. See People v. Francis, 38 Cal. 183; People v. Mitchell, 64 Cal. 85. A defendant has the constitutional right to have the witnesses against him examined in open court, and in his presence. By the guaranty of due process of law, he has a right to be confronted with the witnesses for the prosecution. The correlative right is given him to have the witnesses in his behalf testify in open court.

The decision in People v. Dodge is of greater weight here, in favor of the contention of the appellant, for the reason that it was pronounced under the constitution of 1849, in which the guaranty to a defendant that he should have the process of the court to compel the attendance of witnesses in his behalf was not contained, as in the constitution of 1879. The right was then placed in the policy of the law, as shown by the sections of the statute referred to in the opinion. It was not in the constitution of 1849, unless included within "due process of law" which was in that constitution. But was it so included? See definition of "due process of law," in Pennoyer v. Neff, 95 U. S. 733. The opinion in Dodge's Case makes no reference to any constitutional provision, which would seem to indicate that it was not regarded by the members of the court as given in the organic law. Suppose that this guaranty to a defendant, invoked here, has not been formally enacted into a statute. But it is clear that it is given by the constitution. And why is it not self-enacting? If the right is given by the constitution, courts are provided with ample power to execute and enforce it. Section 187, Code Civil Proc.

But the legislature has provided for the case before us in section 1567 of the Penal Code, which is in these words: "When it is necessary to have a person imprisoned in the state-prison brought before any court, or a person imprisoned in a county jail brought before a court sitting in another county, an order for that purpose may be made by the court, and executed by the sheriff of the county where it is made." The expression "may be made" leaves nothing to the discretion of the court. The word "may" must be held to mean "must," when the rights of the public or of third persons are concerned. Such is the settled law. See Abbott's Dic. word "May." Here the right of the public and of a third person, the applicant for the writ, are both concerned. The public is concerned in assuring to the accused a fair trial; and the accused is concerned in having her witness testify *viva voce*, in open court. See People v. Dodge, supra. Under section 1567, the lower court is bound to make the order. It has no discretion or option to refuse it. 28 Cal. supra. "When it is necessary" is shown by the affidavit of defendant. The court cannot disregard it. People v. Hurtado, 63 Cal. 294, is in the same line, where this court said, as is said in that case, that the provision in regard to depositions is for the protection of defendants. It certainly cannot mean that it is intended to take away a right assumed by the first part of section 13 of article 1 of the constitution. To so construe it would take away a protection from defendants. It would deprive them of a substantial right guarantied by the first portion of the section. Far from being a protection, it would be a disprotection, of defendants. It would be taking away the more important means of protection. That the order made under section 1567 is process is clear from section 7 of subdivision 15 of the Penal Code. If the word "writ" infers an order in writing, then such order is a writ or process under the sudivision of the section referred to. The court must make the order, and issue the necessary writ or process to execute and carry out the order, which it has power to do under section 128, subd. 8, and section 187, of the Code of Civil Procedure. The constitution and statutes furnish all the required machinery to assure this right to defendants, and the enforcement of it.

One further proposition should be stated. It was said on the argument that the state alone has the right to bring a witness from the state-prison. This was said with reference to section 1333, supra. The reason why this right was not further assured to a defendant by statutory enactment has been stated above. What a strange construction, that a great state, prosecuting one of its citizens,—one of its children,—should retain a right which it would not grant to the humblest of its citizens, when prosecuted for a public offense. Surely the state can have no feeling of revenge against one of its citizens, even though it is an erring one. Its prosecution of guilty persons should not be marked by any manifestation of vindictiveness. Such conduct on the part of the state, in holding for itself a right which it would not allow to one of its citizens, would savor more of the cruelty of a step-mother than of the justice due from a protecting father. The state owes equal and exact justice to those under its authority, in all proceedings against them. It can have no higher justifiable right as to witnesses that the defendant. Nor should nor does it ask any higher right in this regard. If anything, it should be content with an inferior right. It holds the lists, and appoints the president thereof, in which the contest between the people and the defendant on trial is waged. And the defendant might truly say that equal justice has not been done when the state can compel the attendance of a witness to prove his guilt, and the defendant cannot compel the attendance of a witness, in like circumstances, to establish his innocence. Justice, as Lord Coke says, should be free, full, and speedy. Free, because nothing is more unjust than justice which has to be bought; full, because justice ought not to halt or be maimed; and speedy, because delay is to some extent a denial of justice. See Co. Inst. pt. 2, p. 55.

It should be recollected that this witness, brought from the state-prison, might clearly show the defendant's freedom from guilt. The difference between the living, speaking witness, before a jury, and the inanimate lines of a deposition, is recognized by all familiar with courts of justice. As is well said in an old act of parliament of 9 Edw. II. styled "*Articuli Cleri*," in referring to a trial by jury: "We hold and shall be able to approve it to be a farre better course for matter of fact, upon the testimonie of witnesses, sworne *viva voce*, then upon the conscience of any one particular man, being guided by paper proofes." See Co. Inst. pt. 2, p. 611. Especially would this be the case with a convict in prison brought from a state-prison. He comes with a stain of conviction on his credit. But his appearance and manner, under the ordeal, in open court, of examination and cross-examination, might assuredly show to court and jury that he is a perfectly reliable witness, and establish beyond question the innocence of the person on trial. Should a defendant, then, be deprived of this right? I say, No. Emphatically, No!

It is hardly necessary to reply to the argument that the petitioner here has a remedy at law, by appeal from a judgment of conviction on a bill of exceptions setting forth the application for process, the refusal of it, and an exception. Such remedy is neither speedy nor adequate. We have a right to assume on this application that the testimony of the witness whose attendance is sought to be had will acquit the petitioner. Courts have no authority to require a defendant to submit to a conviction in order to procure her rights. This weight should not be laid on the defendant by a court. It would be the height of injustice to permit it. The court should be eager to relieve defendant of the burden. Long ago, in 1857, it was held in this court that the remedy at law must be speedy and adequate. Mining Co. v. Fremont, 7 Cal. 132, 133, (Jan. 7, 1857.) So, also, in Fremont v. Crippen, 10 Cal. 211; Clark v. Crane, 57 Cal. 629. In Mining Co. v Fremont, supra, it was said: "The remedy by appeal is too slow, and is not adequate." And the writ was allowed. The same may be said here. The case cited (from 7 Cal.) is undoubtedly law, and has been frequently followed by this court, and will be followed always when the case calls for it. I am of opinion that the judge was bound to make the order asked for to procure the attendance of the witness, and that the writ here sought should issue.

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82 Cal. 557

STOHR v. SAN FRANCISCO MUSICAL FUND SOC. (No. 11,737.)

(*Supreme Court of California.* Jan. 22, 1890.)

MUTUAL BENEFIT SOCIETIES—CHANGE OF BY-LAWS.

Where both the general laws of the state and the by-laws of an incorporated society give it the right to repeal, alter, or amend its by-laws, it is not a breach of contract for such society to amend a by-law which provides that, in case of sickness, a member shall be entitled to receive $10 per week, by limiting such allowance to a certain number of weeks thereafter, though a member be sick at the time of such amendment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; J. F. SULLIVAN, Judge.

W. H. L. Barnes, for appellant. *Jos. Rothschild*, for respondent.

HAYNE, C. This was an action to recover certain "sick benefits." The complaint alleges that the defendant was a corporation organized "for the purpose, among other things, of assisting members who, by accident or sickness, are incapacitated from pursuing their professional calling;" that the plaintiff has been a member in good standing ever since the organization; that during all of said time the following has been one of the by-laws: "Every person who has been a member of the society for one year, and is not disqualified by any article of these by-laws, shall, in case of sickness or accident, by which he is incapacitated from following his profession, be entitled (on notifying the president or secretary) to receive the sum of $10 per week, to take effect from the day of such notice. No allowance shall be made for such disability when it exists for a less time than one week." The complainant further alleges that the plaintiff has been a member in good standing from the organization of the corporation; that on January 1, 1883, he became sick and incapacitated from following his profession; that he at once notified the president thereof; that thereupon the defendant paid him the $10 per week from January 1, 1883, to December 1, 1883; that although plaintiff's incapacity has continued the defendant refuses to pay him anything further; wherefore he sues for $440. The answer set up two separate defenses. The first defense avers that on April 24, 1883, the following by-law was duly adopted, viz.: "If any member, after the adoption of this section, shall have received benefits continuously for six months, or shall have received benefits to the amount of $260 within a period of time not exceeding twelve consecutive months, the payment of further benefits to such member shall thereafter cease, unless ordered otherwise by the board of directors." This defense further avers that after the adoption of this by-law, and within 12 consecutive months, "the defendant paid to the plaintiff the full sum of $260 and upwards in payment of said weekly benefits, at the rate of $10 per week," and that no further payment has been ordered by the board of directors. The second defense is like the first, except that, in addition to the foregoing, it contains the averment that, from the time of the admission of the plaintiff as a member, there has been a by-law of the defendant "by which it did and does reserve and retain to itself the right to repeal, alter, or amend its by-laws, rules, and regulations." The plaintiff demurred to the answer, on the ground that neither defense stated facts sufficient to constitute a defense to the action. The court sustained the demurrer, and, no amendment to the answer being made, gave final judgment for the plaintiff for the amount claimed. The defendant appeals.

It is contended for the respondent that the by-law giving a right to benefits constituted a contract which could not be changed, and the question presented is whether the defendant had power to change said by-law in the way it did. Undoubtedly, when the plaintiff complied with what was required of him as a member, the by-laws constituted a contract; and, unless the contract itself otherwise provided, it could not be changed without the consent of all the parties. But here the contract itself does provide otherwise. Under the averments of the second defense, there is an express provision that the by-laws may be changed; and we do not consider the second defense to be different from the first in legal effect, for the law provides that the by-laws may be changed. This provision must be held to enter into and form a part of the contract, and in legal effect it is as potent as the express provision of the second defense. The latter is but the expression of what the law provides. In view of this power to alter the contract, it cannot be said that the defendant could not alter its by-laws in any respect. The respondent argues, however, that it had no power to alter them so as to impair a vested right. This must be conceded, but we do not think that the new by-law purported to impair a vested right. The term "vested right" is often loosely used. In one sense every right is vested. If a man has a right at all, it must be vested in him; otherwise how could it be a right? The moment a contract is made a right is vested in each party to have it remain unaltered, and to have it performed. The term, however, is frequently used to designate a right which has become so fixed that it is not subject to be divested without the consent of the owner, as contradistinguished from rights which are subject to be divested without his consent. Now a right, whether it be of such a fixed character or not, must be a right to something; and, when a man talks vaguely of his vested right, it conduces to clearness to ask: "A vested right to what?" In the present case the plaintiff can have no right to have the contract remain unchanged, because, as we have seen, the contract itself provides that it may be changed. Nor has he a right to remain unaffected by any change that may be made; for, if such right be common to all the members, it is merely another way of saying that no change can be made; and, if the right be not common to the other members, it would be to assert a privilege or superiority over them, of which there is no pretense. If the plaintiff has any right which is so fixed that it is not subject to change, we think it can only be to the fruits which ripened before the change was made; in other words, to such sums as became due before the new by-law was adopted. To express it differently, the change could not be retroactive. This is all that we think can be meant by "vested right" in a case like the present.

Now, under the contract, nothing was due before the sickness actually took place. Benefits do not accrue for future sickness. The right of the plaintiff to benefits for future sickness is not different in its nature from the right of the well members to benefits for future sickness. In the one case the members have a right to future payment in case they become sick; in the other, the plaintiff has a right to future payments in case he continues sick. And if there was no power to change the by-law in the one case, there was no power to change it in the other, which is equivalent to saying that there was no power to change it at all. The cases where a specific sum becomes due upon the happening of a certain event, as upon death, are not like the present. In such cases an alteration in the contract cannot be made after the fact; for that would be to make that not due which had already become due. We are inclined to think that the foregoing would apply if the by-law under consideration had specified that the weekly payments were to continue as long as the sickness continued. But it does not so specify. The time during which the payments were to continue is left indefinite. The substance of the contract is, in our opinion, that, in case of sickness, the member is to receive weekly payments for an indefinite period of sickness, subject to the power of the defendant to change the provision authorizing such payments, so far as future payments are concerned. We think that each defense is sufficient, and we therefore advise that the judgment be reversed, with directions to overrule the demurrer.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment is reversed, with directions to overrule the demurrer.

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81 Cal. 596

LORD v. GOLDBERG *et al.* (No. 12,544.)

(*Supreme Court of California.* Dec. 4, 1889.)

APPEAL—JURISDICTIONAL AMOUNT—MASTER AND SERVANT—DISCHARGE.

1. In California, in an action for a money demand, the *ad damnum* clause of the complaint is the test of appellate jurisdiction, whether appeal is taken by the plaintiff or defendant.

2. An agreement to employ a person "permanently" means nothing more than that the employment is to continue indefinitely, and until one or the other of the parties desires, for some good reason, to sever the relation.

3. Plaintiff represented to defendants that he could bring them a certain amount of trade, and was employed by them on a salary, with the understanding that his employment should be permanent, and that his salary should be increased as the business increased. Afterwards, upon plaintiff's failure to bring to defendants such amount of trade as he had represented that he could bring, or such amount as warranted the salary, defendants offered to make other arrangements with him, giving him a commission on the business he should bring them, which offer he refused. *Held*, that defendants were justified in dismissing plaintiff from their employ

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; JOHN HUNT, Judge.

Jarboe, Harrison & Goodfellow, for appellants. *Henry Perry*, for respondent.

BELCHER, C. C. The plaintiff brought this action to recover damages for his wrongful dismissal from the employment of defendants. It is alleged in the complaint that defendants were carrying on the business of grocers in the city of San Francisco;

that they negotiated with plaintiff to enter into their employment as solicitor for customers for their groceries, teas, wines, etc., and that on the 24th day of November, 1886, it was agreed by and between plaintiff and defendants that in consideration of his entering into their employment as such solicitor, and using all his efforts to secure certain named persons as customers, and to extend their business, "they would give him permanent employment so long as he should use his best efforts to extend their business, paying him at the rate of $20 per week, and increase his salary as the business increased;" that plaintiff performed all the conditions of his contract, procured the persons named and others as customers for defendants, and largely increased their profits, but that defendants, on the 2d day of April, 1887, wrongfully, and without just or reasonable cause, dismissed plaintiff from their employment, to his damage in the sum of $6,000, for which he asked judgment. The answer denied the foregoing allegations of the complaint, and alleged that in November, 1886, they employed plaintiff upon his representations that he could bring to them orders for groceries amounting to between $2,000 and $3,000 per month; that it was then agreed that plaintiff should be paid a salary of $20 per week until it could be ascertained what amount of orders he could bring to defendants; that he continued in their employ until about the 9th of April, 1887; that he did not bring to them orders amounting to $2,000 or to any sum exceeding $400 per month; that the wages paid him at all times exceeded the profits derived from the business brought in by him; that on or about the 1st of April, 1887, defendants proposed to pay plaintiff certain sums, in proportion to the business he should bring them, and that he, after taking time to consider the proposition, declined to accept it, and then voluntarily left their employment. Defendants further set up a counter-claim for $251 money lent. The court found the facts as to the employment and dismissal of plaintiff to be as alleged in the complaint, and that he sustained damage by the dismissal in the sum of $190, for which sum judgment was entered in his favor. There was no finding as to the counter claim, or as to any of the affirmative allegations of the answer. The defendants moved for a new trial, which was denied, and have appealed from the judgment and order.

1. The respondent moves to dismiss the appeal "upon the ground that the demand of defendants upon their counter-claim on file herein does not amount to the sum of $300, and that this court has no jurisdiction to hear said appeal." The motion to dismiss the appeal should be denied. The power of this court to hear and determine the matters in controversy here is in no way dependent upon the counter-claim set up by defendants. Under our present constitution and laws, when an action is brought to recover a money demand the *ad damnum* clause of the complaint is the test of jurisdiction. If the amount sued for is large enough to give the superior court jurisdiction, the supreme court has jurisdiction on appeal; and this is so whether the appeal be taken by the plaintiff or defendant. Dashiell v. Slingerland, 60 Cal. 653; Bailey v. Sloan, 65 Cal. 387, 4 Pac. Rep. 349.

2. It is contended for appellants that the findings were not justified by the evidence, and we think this contention should be sustained. It appears from plaintiff's testimony that he had been in the employment of one Lebenbaum, soliciting orders for groceries, and had been receiving from $40 to $50 per month for his services. About the 20th of November, 1886, he saw defendant Goldberg, and was offered by him $20 per week if he would work for defendants, and get for them certain named customers. He then states the arrangement made as follows: "'Well, now,' says I, 'while it is a very good increase of salary, will it be permanent, Mr. Goldberg?' 'It will,' says he; 'it will last; it will be permanent.'" He further states that he did not go to work for a few days, and that at his request the cashier of defendants drew up and gave to him a written memorandum of the agreement, which reads as follows: "San Francisco, Nov. 24, 1886. To whom it may concern: At the request of Mr. Lord, and to satisfy him, in his own mind, that our intentions are wholly honest as regards his permanency in our employ, we hereby declare that our interests are one, and the greater number of friends and their patronage that he can bring to our store the greater will be his income from us, and his positon is permanent so long as he desires to make it so. [Signed] GOLDBERG, BOWEN & Co." Continuing, plaintiff testified "that he remained in the employment of defendants until the 9th day of April, 1887, and was paid by them $20 per week until said time. That at said time defendants complained that the business introduced by plaintiff was not sufficient to warrant them continuing the existing arrangements with plaintiff, and stated to plaintiff that they would not do so any longer. The defendants at the same time offered to enter into a written contract with plaintiff, to continue until January following, to pay him one-half of the profits which should be derived by them from all hotel, restaurant, and institute business which should be introduced to them by plaintiff, and also 10 per cent. upon the amount of all family trade, exceeding $400 per month, introduced to them by plaintiff. That plaintiff after consultation with his friends, refused said offer, and that the relations between plaintiff and defendants were thereupon severed without further negotiations." He further testified, on cross-examination "that he had not since leaving the employment of defendants made any efforts whatever to obtain any employment, and that he had not earned anything since leaving defendants." For the defendants it was proved that in the negotiations relative to the employment of plaintiff he represented that he could control and introduce to defendants business amounting to between two and three thousand dollars per month, but that the total amount of business introduced to them by him, during the whole time of his employment, was only $1,700, and that the average profits derived from such business

did not exceed 10 per cent.; that defendants intended, when they employed plaintiff, to retain him in their employment permanently; and that the only reason which induced them to refuse to do so was that the amount of business introduced by him was insufficient to pay the salary provided for.

The foregoing is all the evidence given at the trial material to the point in hand, and it will be observed that the plaintiff in no way denies that he made the representations at the time of his employment which were alleged and proved by defendants. It will also be observed that when plaintiff's attention was called to the fact that he was receiving more salary than the aggregate profits arising from the business he had brought to defendants, and when, after taking the matter under advisement for a time, he refused to accept defendants' offer to pay him a reasonable proportion of the profits to be derived from the business he might bring to them, "the relations between plaintiff and defendants were thereupon severed without further negotiations." From this it would seem that the plaintiff voluntarily left the employ of defendants, and that he was not, as found by the court, "wrongfully, and without just or reasonable cause, dismissed from their employment." But, however this may be, it is clear that plaintiff's employment was not intended to be for life, or for any fixed or certain period. It was to be "permanent," but that only meant that it was to continue indefinitely, and until one or the other of the parties should wish, for some good reason, to sever the relation. In Perry v. Wheeler, 12 Bush, 541, the plaintiff was elected permanent rector of a church, and was afterwards, as he claimed, wrongfully dismissed. The court said: "Appellant, by his counsel, insists that he was the permanent rector of Grace Church, and had the right to retain his position during life, unless he should become incapacitated for the performance of clerical duties by age or disease, or unless he should disqualify himself by immoral or unchristian conduct, or by the abandonment of the faith and the practices of the Protestant Episcopal Church. He certainly was elected permanent rector; but we do not understand the term 'permanently,' as used in this case, to mean that the parties were to be bound together by ties to be dissolved only by mutual consent or for sufficient legal or ecclesiastical reasons. * * * We understand that Dr. Perry was called as the rector of the church for an indefinite period, and that it was intended he should continue to hold the place until one or the other of the contracting parties should desire to terminate the connection, in which case the dissatisfied party was to have the right to be relieved of further obligations to the other, upon fair and equitable terms, and after reasonable notice." So in Elderton v. Emmens, 4 C. B. 479, it was claimed that the plaintiff was retained and employed as the permanent attorney and solicitor of the defendant company, and had been wrongfully discharged. But it was held that the word "permanent," as used in the resolution of appointment, denoted no more than a general employment, as contradistinguished from an occasional or special employment. See, also, Newton v. Commissioners, 100 U. S. 548, in which it was held that a county-seat was permanently established in a town when it was placed there with the intention that it should remain there. Moreover, plaintiff's salary was not fixed permanently at $20 per week, but was to be increased as the business increased. This is shown by the complaint and the memorandum of agreement put in evidence. It was fixed at $20 at first, in view of the representations of plaintiff as to the business at his command. These representations, however, proved not to be true, and the salary was more than the business warranted. Under these circumstances, and after trying the experiment for about 20 weeks, the defendants were justified, we think, in refusing longer to continue the plaintiff in their employment, unless he would accept for his services a fair and ratable proportion of the profits arising from the business controlled and introduced by him. But this they offered and he refused. We therefore advise that the motion to dismiss the appeal be denied, and that the judgment and order be reversed, and the cause remanded for a new trial.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion the motion to dismiss the appeal is denied, and the judgment and order are reversed, and the cause remanded for a new trial.

THORNTON, J. I concur in the judgment on the sole ground that the parties severed their agreement by mutual consent.

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82 Cal. 11

BOYLE v. TIBBEY *et al.* (No. 12,455.)

(*Supreme Court of California.* Dec. 10, 1889.)

STREET ASSESSMENTS—FRONT-FOOT RULE.

St. Cal. 1871–72, p. 809, § 8, subd. 8, providing for the assessment of Market street and other streets in San Francisco, other than at right angles with crossings, etc., has reference only to work done on street intersections, and does not affect the right to assess irregular lots fronting on the street, for sewer work in the street between the crossings, under section 3, which authorizes the board of supervisors to order the whole or any portion of any public street sewered, and section 8, subd. 3, which provides for the assessment of property fronting on the work.

Department 1. Appeal from superior court, city and county of San Francisco; WALTER H. LEVY, Judge.

E. J. & J. H. Moore, (*J. C. Bates*, of counsel,) for appellants. *J. M. Wood*, for respondent.

WORKS, J. This is an action to foreclose an assessment for the construction of a sewer on Montgomery avenue, in the city of San Francisco. The court below found for the plaintiff, and rendered a decree foreclosing the lien. A motion for a new trial was denied, and the defendants appeal.

The only question in the case is as to the validity of the assessment. The appellants contend that the assessment on its face was void, for the following reasons: "(1) Said assessment is not uniform, because not all the lots in the assessment district are assessed, but many are omitted. (2) A part of block opposite, about one-quarter of the sewer, not assessed at all. (3) There is no law to assess irregular lots fronting on Montgomery avenue. (4) Not all the lots in the assessment district benefited for the opening of the avenue assessed, and for that reason assessment void."

We think the first, second, and fourth objections are not borne out by the facts as they appear in the record. The resolution of intention and order for the work was for a sewer extending the distance of one block from the intersection of Montgomery avenue and Lombard street to the intersection of said avenue with Chestnut street, and did not include any part of the crossings of said streets, and all of the lots fronting on said block and the proposed work were assessed. This, it seems to us, is a complete answer to these objections.

It is contended, in support of the third objection, that the only provision of the law for making assessments is found in section 8, St. 1871–72, p. 809, subds. 1–11, inclusive; that the statute only provides for the assessment of Market street and other streets other than at right angles, according to certain maps with crossings and spaces colored, and that there being no method provided for assessing Montgomery avenue, which is not specifically named or included in the general designation of streets "other than at right angles," according to certain maps, the assessment was without authority of law. This was held to be so as to Montgomery avenue crossings in Kelly v. Luning, 76 Cal. 311, 18 Pac. Rep. 335; but this was based upon the fact that there was no law authorizing assessments for work done on the intersections of streets running diagonally across the blocks, except Market street, which was specifically mentioned and provided for. But, conceding this to have been so as to these street crossings, it is not so, we think, as to the streets. The right to assess for street crossings was provided for by specific reference to certain streets by name or by description, which did not include the crossings of Montgomery avenue with some other streets. St. 1871–72, p. 810, § 8, subd. 8. This is not true of the street itself, which is included, not only in the work that may be ordered by the board of supervisors, but in the provision of the statute authorizing and providing for the mode of assessment. Sections 1 and 2 of the statute provide: "All streets * * * as laid down on the map now in the office of the city and county surveyor of the city and county of San Francisco, * * * and all other streets * * * now dedicated or open to public use, are hereby declared to be open public streets * * * for the purpose of this law, and the said board of supervisors are hereby invested with jurisdiction to order any of the work mentioned in section 3 of this act to be done on any of said streets * * * when the grade and width of said streets * * * have been officially established. Sec. 2. All streets * * * now open, or which may hereafter be open to public use, shall be deemed and held to be open public streets * * * for the purposes of this act, and the board * * * shall have the same jurisdiction to order work to be done thereon," etc. The complaint alleges, and it is not denied, that Montgomery avenue, between the streets mentioned, was dedicated to public use and laid down on the map, and was an open, public street the width and grade of which had been established. Section 3 of the statute authorizes the board of supervisors to order the whole or any portion of said streets sewered, and subdivision 3 of section 8 provides for the assessment of property fronting on the work as was done in this case.

Judgment and order affirmed.

We concur: FOX, J.; PATERSON, J.

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82 Cal. 14

WHITE v. MERRILL *et al.* (No. 12,224.)

(*Supreme Court of California.* Dec. 10, 1889.)

APPEAL—RECORD—OPINION OF TRIAL COURT—EVIDENCE.

1. Though the opinion of the court below, in overruling a motion for new trial, may be cited in argument on appeal, and may be regarded by the appellate court in arriving at a decision, it forms no part of the record, and may be stricken out.

2. In an action for breach of contract, where the defense is the general issue, statute of limitations, and payment of all indebtedness, a charge authorizing the jury to consider whether plaintiff ratified certain acts of defendants, relied on as constituting a breach of the contract, is erroneous, the question of ratification not being in issue.

3. Where the evidence is conflicting, the order of the trial court granting a new trial on the ground that the evidence is insufficient to justify the verdict, will not be disturbed.

4. Evidence that, after a former trial of the cause, resulting in a verdict for plaintiff, one of the defendants stated that the verdict was just, is competent against such defendant, as an admission tending to show a consciousness of liability.

In bank. Appeal from superior court, city and county of San Francisco; T. H. REARDON, Judge.

Lloyd & Wood, Mesick, Maxwell & Phelan, E. D. Sawyer, and *Jarboe, Harrison & Goodfellow,* for appellants. *T. M. Osment,* for respondent.

FOX, J. Action for damages for breach of contract. Defense, general issue, statute of limitations, and payment of all indebtedness. Verdict and judgment for defendants, motion for new trial made and granted, and appeal from the order granting said motion.

It is unnecessary, on this appeal, to make a detailed statement of the case, as shown either by the pleadings or the evidence; the only question being whether the court committed an error in granting the motion for new trial which calls for reversal of its order. The opinion of the court, given upon determining the motion for new trial, was brought up in the transcript. On the hearing respondent moved to strike this opinion out, as it constitutes no part of the record on appeal, and the motion was granted. The court below may give an opinion, oral or in writing, upon any motion or question that arises in the course of proceedings before it, or upon the final determination of a cause, but such opinion constitutes no part of the record on appeal. No matter what reason the court below may assign for its action, this court is not bound by such reason. If this court finds that upon any ground, or for any reason, the action of the court below was correct, such action will be affirmed, regardless of the reason which the court may have given for it. Counsel may cite it in argument, as they may any other opinion given at *nisi*, and it may sometimes aid the court in a solution of the question upon or to which it is cited; but it is not an act upon which error can be assigned. For this reason—possibly for others, also—the legislature, in adopting the Code, has omitted it from the list of papers required to be brought up on appeal.

It is claimed upon argument that the court granted the motion for new trial because of an error in the charge to the jury, and that it was mistaken in holding that the charge was erroneous, and therefore the motion ought not to have been granted. In its charge to the jury the court referred to certain evidence which had been given on the trial, and which is claimed to have been given without objection, and in very plain terms authorized the jury to consider whether the plaintiff had ratified certain acts of the defendants which were relied upon as acts constituting a breach of the contract. The court held that this was error, because the question of ratification was not within the issues of the cause. We think the court was right in so holding. The only issues were: *First*, whether or not there was such a contract as alleged; *second*, payment of all indebtedness under the contract; and, *third*, whether plaintiff's claim was barred by the statute of limitations. The evidence referred to was admissible as tending to prove whether or not there was such a contract. Being in, it was entitled to be considered for all purposes within the issues of the cause, if admitted without limitation as to purpose; but it was not entitled to be considered in connection with any question not involved in the issues.

But the motion for new trial was made not only on the ground of errors of law, of which a number were assigned, but also on the ground that the evidence was insufficient to justify the verdict, and that the same was against law. The rule adopted in this court, that the verdict of a jury will not be disturbed on the ground of insufficiency of the evidence unless it appears without substantial conflict that there is no evidence to sustain the verdict, has no application to the court below. The judge of that court has the same opportunity to see the witnesses, to judge of their credibility, and of the degree of weight which ought to be given to their evidence, as the jury has, and is often better qualified to determine those questions than the jury itself It has therefore been held by this court, in a long line of decisions, that where the evidence is conflicting this court will not interfere with the exercise of the discretion of the court below in granting a new trial unless there has been abuse. Minturn v. Bliss, 77 Cal. 90, 19 Pac. Rep. 185. An order granting a new trial will be affirmed, if it can be justified on any of the grounds upon which the motion is based, without regard to the reasons for the order expressed in the opinion of the judge; and such order will not be disturbed, unless there has been a clear abuse of discretion, where the motion was made on the ground of insufficiency of the evidence to support the verdict. Nally v. McDonald, 77 Cal. 284, 19 Pac. Rep. 418. This case bristled with conflicts in the evidence; and, under the rule long since established and affirmed in the decisions cited, this court will not reverse the order of the court below in granting a new trial.

We note still one other error of law which it seems to us justified the court in granting the new trial. Plaintiff offered to prove that there had been a former trial of the cause, resulting in a verdict in plaintiff's favor for a large sum of money, and to prove, in that connection, by a witness then on the stand, that on the morning after the verdict one of the defendants admitted to witness, and to others, that the verdict was a just and righteous one. This was excluded, and plaintiff excepted. Simple evidence of the former trial and verdict would not have been competent, but it was offered as merely preliminary to the proof of the admission by the defendant. That admission evinced a consciousness of liability, so far as that defendant was concerned, at least; and, as against him, the evidence was pertinent and competent. Banfield v. Whipple, 10 Allen, 31. Other points made on the motion for new trial need not be now considered. Order appealed from affirmed.

We concur: Beatty, C. J.; Works, J.; Sharpstein, J.

McFarland, J. I concur in the judgment. I have great doubt, however, if it should be assumed here that the lower court granted a new trial for want of sufficient evidence when the order itself, granting the new trial, expressly places it on other grounds. Of course, the opinion or reasoning of the court below is no part of the record; but may not a mere statement in the order, which shows that the new trial was not granted for insufficiency of evidence, be taken as part of the order itself, and therefore a part of the record?

Thornton, J., (*concurring*.) It is immaterial whether the opinion of the court below is in the record or not. This court can notice such opinion whether in the record or not, as far as all questions of law are concerned. Courts can look to the opinions of other courts to enable them to solve any legal question. Such is the common-law rule and the statute of this state. Section 1899, Code Civil Proc. "The reports of the decisions of the courts," as well as "the treatises of learned men," may be looked to to find the unwritten law. See section cited above. Here the report of Judge Spencer's decision in this case on motion for a new trial is before us, and we can look into it. We can look to it to see how he dealt with the motion before his court, and what rule of law guided his judgment. And from this opinion we find that the court submitted to the jury an issue, as to a ratification of certain of defendant's acts by plaintiff, not joined in the action; one entirely *aliunde* and *obiter* in the case, and not embraced by any of the issues joined therein. I can see no reason why this court should not, but the strongest and most convincing reasons why this court should, look to the opinion of the learned judge who presided in the court below for the purpose above pointed out. If the opinion was part of the order denying the motion for a new trial, it would be properly a part of the record; but it would be a construction of the order not justified by anything in it, or any rule of interpretation I am aware of, to hold that the opinion was part of the order referred to. I am of opinion that the court did not err in granting a new trial, and that the order granting it should be affirmed.

82 Cal. 46

WAKEHAM *v.* BARKER. (No. 12,121.)

(*Supreme Court of California.* Dec. 13, 1889.)

SPECIFIC PERFORMANCE—CONTRACT—APPEAL.

1. Specific performance of a contract to sell land, the price of which plaintiff was to pay in work, will not be enforced where the complaint fails to show how much work has been done, how much has been paid in that way, what is the balance due, or that there is any dispute on these points.

2. A contract to pay for a thing in money, and a supplemental contract to pay for the same in work, will not give the alternative right to pay either in work or money.

3. If the action of the court below is well taken on any ground, this court will affirm the ruling, without regard to the reasons which the court may have assigned therefor.

Department 1. Appeal from superior court, Alameda county; N. HAMILTON, Judge.

Action by Samuel Wakeham against James L. Barker for specific performance of a contract for the sale of land, and for damages for non-performance. From a judgment in favor of defendant, plaintiff appeals.

Wm. H. Chapman, for appellant. *Moore & Reed*, for respondent.

FOX, J. This is an action for the specific performance of a contract for the sale of real estate. Plaintiff also prays for damages for non-performance, and, in case specific performance cannot be had, then for judgment for compensation for the payments already made, with damages for non-performance. The complaint shows that the plaintiff and defendant entered into an agreement in writing, for the sale by defendant to plaintiff, who also bound himself to buy a certain tract of land in consideration of $50 paid down, and the further sum of $700, to be thereafter paid in money, in monthly installments of $20 each, with interest on all unpaid balances payable monthly, at the rate of 9 per cent. per annum. If the contract had stopped there, there would have been no difficulty in plaintiff, if not himself in default, enforcing specific performance against the defendant. But, unfortunately for the enforcement of that remedy, afterwards, and on the same day, the parties entered into a supplemental agreement, in writing, whereby they modified and entirely changed the original agreement, as to the mode, manner, and time of payment. By this second agreement the interest was reduced to 6 per cent. per annum, and the defendant agreed to take his pay, and the plaintiff agreed to pay the said $700 and interest, in work and labor, to-wit, in painting and graining, at an agreed price per square yard, the defendant to furnish the plaintiff with painting and graining to do at the price so fixed, and to pay him 50 per cent. of the price so fixed in cash, the remaining 50 per cent. to apply on account of the said $700 and the interest thereon, until the whole amount thereof was paid, "the entire amount to be taken out within one year from September 1 1884."

It is a well-settled rule of law that specific performance will not be enforced against either party if it cannot be so enforced against the other. It is also well settled that specific performance for personal service cannot be enforced. It follows that the moment this supplemental agreement was made specific performance could not be enforced against the plaintiff, and, consequently, so long as the contract was not fully performed on his part, he could not enforce it against the other. Nevertheless, whenever he shows that, without default, he has fully performed on his own part, he may compel the other to convey as he has agreed to, or, if conveyance cannot be had, may recover in damages for the breach. But his present complaint does not make a sufficient showing for this purpose. The complaint is filed December 22, 1885. In it the plaintiff alleges that under this agreement he did perform "certain painting and graining for defendant, all of which was done in accordance with said agreement and prior to the 8th day of April, A. D. 1885." He further alleges that on said 8th day of April, 1885, defendant asserted that plaintiff had not complied with said agreements, and refused to furnish any more painting and graining to be done by plaintiff, and since then had procured his painting and graining to be done by other parties; that up to that time he had done all that was required of him by the defendant, and was, and still is, ready and willing and able to do the balance. But he nowhere tells us how much he had done, how much he had paid on account of the contract in that way, or what balance remained unpaid on account of the purchase price of the land; nor does he allege or show that there is a dispute between himself and the defendant on this point, or that he himself is ignorant on the point, or in any other way lay the foundation for an accounting between the parties. He does allege that on the 18th day of December, 1885, he demanded of defendant a deed of conveyance of said land, and offered to pay him $150 in gold coin, "as the balance in full due him upon said agreements," and that defendant refused to accept said sum and make such conveyance, but gave no reasons for such refusal. In the original agreement, time of payment was made "of the essence of the contract," and provision made for the forfeiture of payments already made, if other payments were in default for the period of 90 days after maturity. In the supplemental agreement this feature was eliminated from the contract, not in express terms, but by necessary implication.

This complaint was demurred to for want of sufficient facts to constitute a cause of action, and also for ambiguity; and the grounds of ambiguity are specifically pointed out. The demurrer was sustained on the ground of want of facts; but, in our judgment, it was well taken on both grounds. If well taken on any ground, this court will affirm the order of the court below, without regard to the reasons which the court may have assigned therefor. Thompson v. Felton, 54 Cal. 547; People v. Crowey, 56 Cal. 39; McCarthy v. Loupe, 62 Cal. 300; White v. Merrill, No. 12,224, ante, 1129, (filed December 10, 1889.) Plaintiff was given 20 days to amend, and it is unfortunate that he did not avail himself of the opportunity; but, instead of doing so, he, upon notice, moved for the default of defendant for not answering, and for judgment thereon, which was denied, when he excepted, and allowed judgment to go against him on the demurrer, from which he appeals.

On the appeal he claims that the two agreements, taken together, gave him the alternative of paying in painting or in money. We do not think the agreements will bear that interpretation, or that his right to relief grows out of the existence of an agreed alternative of which he could avail himself at pleasure. If it did, he would be cut off by the provisions of section 1450, Civil Code, which requires that he should select one or the other of the alternatives in its entirety. The measure of his total liability was fixed by agreement in money value. If he has paid a part in kind, and is now entitled, as he may be, to extinguish his obligation by paying the balance in money, it is not because of any alternative in the agreement, but because of the fact that the other party has put it out of his power to pay the balance in the way in which it was agreed to be paid, and has no right to deprive him of the benefit of that which he has paid by refusing to accept the balance in money. But, for the reasons already stated, he has not made the necessary allegations in his complaint to enable the court to furnish him this relief. Nor has he made his offer good under the statute even if sufficient in amount so as to extinguish his obligation. Id. § 1500. The allegations of this complaint are insufficient to authorize the court to furnish him relief in any of the forms demanded. It follows that the judgment must be affirmed. So ordered.

We concur: Works, J.; Paterson, J.

(3 Cal. Unrep. 193)

Bunting v. Salz *et al.*[1]

(*Supreme Court of California.* Dec. 16, 1889.)

Wrongful Attachment—Damages—Evidence—Instructions.

1. In an action for the alleged wrongful attachment and sale of plaintiff's wagon to satisfy another's debt, evidence of its cost price is admissible to aid in determining its value at the time of the alleged conversion.

2. A memorandum given as a bill of sale of a "4-horse Concord" wagon, executed by the debtor to plaintiff, is competent evidence on the question of the sale, by the debtor to plaintiff, of the Concord wagon in dispute.

3. Where there is evidence that the wagon was sold to plaintiff through her agents, it is competent to show that delivery to and possession by one agent, for plaintiff, immediately followed the sale.

4. A question as to whether the debtor, subsequent to the sale and up to the time of the levy of the attachment, exercised any acts of ownership or control over the property, is not objectionable, as calling for opinion evidence.

5. The plaintiff's theory was that no change of possession was necessary if the property, at the time it was sold, was in the possession of a third party, who held it as plaintiff's agent by agreement of both parties. Defendant contended that the debtor, who was the agent's husband, had never transferred his possession as required by Civil Code Cal. § 3440. *Held*, that instructions on the law applicable, if the jury should find the evidence to sustain the theory of either party, were not contradictory.

6. An appeal from a judgment which is not taken within a year after the entry of the final judgment, as required by Code Civil Proc. Cal. § 939, will be dismissed.

Commissioners' decision. Department 1. Appeal from superior court, Alameda county; E. M. Gibson, Judge.

Thomas C. Huxley, for appellants. *Moore & Reed* and *F. B. Ogden*, for respondent.

Foote, C. This appeal is taken from the judgment and an order denying a new trial. The appeal from the judgment must be dismissed, as it was taken more than one year after the entry of the judgment. Code Civil Proc. § 939; Coon v. Grand Lodge, 76 Cal. 354, 18 Pac. Rep. 384. The action was to recover $750 damages for the conversion of a wagon by the defendants, which the plaintiff claimed to be her property, and taken without her consent. The defendants Salz and Niehaus, and Trefry, a constable, in their answer denied the allegations of the plaintiff's complaint, and justified the alleged conversion on the ground that the property was that of John A. Bunting, and had been seized by Trefry under an attachment, judgment, and execution, in an action brought against Bunting by defendants Salz and Niehaus. The facts disclosed by the record are: That John A. Bunting was the child of Mrs. E. M. Bunting, who appears to have resided in New York. He owned a ranch in Alameda county, Cal., in the year 1883, and with his wife, Fleda O. Bunting, lived there from about the year 1877 until about December, 1883, when, being heavily in debt and apparently unable to extricate himself, he deeded the ranch to his mother, who, as before stated, was living in New York. He received from her at the time of the transfer $2,000 in cash, as part of the purchase price, and she assumed a mortgage for $4,000 already incumbering the land, and, as it appears, before that time, advanced to or paid for him about $3,000. Mr. Overacker, the father of John A. Bunting's wife, seems to have had chief charge of these negotiations for the absent plaintiff, and to have had the deed recorded as soon as executed, at her request; all the parties to the matter appearing at that time to suppose that the wagon and all other farming utensils were sold to the plaintiff by her son. The money received at that time, in cash, was paid out *pro rata* by John A. Bunting to his various creditors, among whom were Salz & Co., who appear to have been cognizant of the fact of the transfer of the ranch to Mrs. M. E. Bunting. After the transfer, the wife of John A. Bunting, as the agent for the plaintiff, assisted by Mr. Overacker, managed and carried on the farm. John A. Bunting does not seem, after that time, to have had any control or management of the farm or its concerns, or any personal property remaining thereon. He was employed as a railroad man, and was absent most of his time, and certainly after March, 1884, did not reside on the place, and claims that he voted in Los Angeles. From his evidence it appears that when he transferred the land to his mother he sold and delivered to her agent the wagon in dispute; but the bill of sale he made to the personal property on the land did not include it. The wagon remained on the place in the apparent and open possession of the wife, as agent of the mother, in pursuance of the sale, until April, 1885, when it was attached as the property of John A. Bunting, at the suit of one Dyer, Trefry, the defendant here, being then, as now, the officer levying the attachment. On this occasion the plaintiff was proceeding through Mr. Overacker and Mrs. Fieda O. Bunting, her agents, to recover the wagon as her property, but came to the conclusion that perhaps she could not establish satisfactorily her title to it, and apparently with a view to avoid litigation over the matter and effectually to secure her title to and possession of the property, paid off the debt, for the recovery of which the attachment was issued, and obtained from her son a memorandum in writing, signed by him, as follows:

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[1] Reversed in banc. See 24 Pac. 167, 84 Cal. 168.

"San Francisco, 4 | 3, 1885.

"Mrs. E. M. Bunting,

"To John A. Bunting, Dr.

"(1) 4-horse Concord (built) $260 00

"Rec'd payment,

"JOHN A. BUNTING."

It was given as and for a bill of sale. The wagon, during the time it rested under the levy made upon it, remained on the ranch in charge of a keeper. When the levy was released, it was left, as before, in the possession of John A. Bunting's wife, who claimed it then, as she had always since the transfer of the land to the mother of her husband, as plaintiff's property. Mr. Overacker and his daughter, Mrs. F. O. Bunting, declared that the wagon was considered by them, (and so, also, says John A. Bunting,) from the time of the transfer of the ranch, as his mother's, and they all treated the conveyance of the land as good and valid in law, and the wife held actual possession of the land and the wagon, openly, as the property of the plaintiff; and after the transfer, having dealings with Salz, one of the defendants, in selling the products of the farm, he never claimed any right to offset any debt he owed for such produce with the indebtedness of John A. Bunting to Salz and Niehaus. But it appears that the wife had, in the year 1883, filed a declaration of homestead on the land, and this had never been abandoned, and she had not joined in the deed from her husband to his mother, but she never asserted any homestead right, and claimed to hold actual possession of the farm as the plaintiff's property. There were some circumstances developed on the trial which strongly induce the belief that the defendants knew this wagon was intended to be sold to the plaintiff when the transfer of the land was made, but there was no positive proof to that effect. The wagon was sold under execution sale at the suit of Salz and Niehaus, and bought by Salz for $160. No question was raised on the trial but what the plaintiff paid full value for the property she purchased, both real and personal. Nor was any claim made that the sale was fraudulent in fact. The main proposition contended for was that there was no such immediate delivery accompanying the sale and followed by an actual and continued change of possession of the property as is contemplated by section 3440 of the Civil Code.

The jury who tried the case found a verdict for the plaintiff in the sum of $525. The defendants contend that the evidence was insufficient to justify the jury in their action. An examination of the record satisfies us to the contrary.

Again, it is said that the court erred in allowing evidence to be introduced as to the cost price of the wagon. The cost price of the property, while not conclusive as to its value at the time of its conversion, is nevertheless a circumstance which is admissible to aid in arriving at the value at the time in question. Angell v. Hopkins, 79 Cal. 181, 21 Pac. Rep. 729. It is further objected that the alleged bill of sale, heretofore set out, was inadmissible in evidence, it being claimed in this connection that it did not purport to be a bill of sale of the wagon in dispute. The objection was not well taken. The memorandum in writing, signed by the party who is alleged to have made the sale of the Concord wagon in dispute, tended to throw light upon the matter of the sale of the wagon, and in that view, if no other, it was proper to go to the jury.

The appellant complains, also, that the trial court committed error in not striking out, upon his motion, the evidence of Mrs. F. O. Bunting, the wife of John A. Bunting, showing that in 1883, just after the transfer of the ranch, she, as the agent of the plaintiff, took possession of the wagon. There was evidence to the effect that the wagon was, at the time of the sale of the ranch, negotiated for and sold to the plaintiff through her agents, Overacker and Mrs. F. O. Bunting, and that it was bought by them for the plaintiff from John A. Bunting. This being so, it was proper to show that the possession and delivery immediately followed to the agent for the principal. It is also assigned for error that the court allowed, over the defendant's objection, this question to be put to and answered by the witness Mrs. F. O. Bunting: "Did Mr. Bunting, subsequent to the sale in 1883, and up to the time of the levy of the attachment by the defendants here, exercise any acts of ownership or control over that property?" The objection to the question was that it called for an opinion of the witness. As it seems to us, the question, fairly considered, called upon the witness to state facts, and was proper.

Further, the appellants claim that certain instructions given for them, and another by the court of its own motion, being correct expositions of the law applicable to the facts of the case, are contradictory to instructions asked by the plaintiff and granted by the court, by which the jury were misled. The plaintiff's theory of the case seems to be, that no change of possession was necessary, if the property at the time it was sold was in the possession of a third party, which party at the request of the vendor and vendee, agreed to retain its possession for the vendee, while the defendant's contention was that the vendor always had possession, and had not transferred it, as the law requires, to the vendee, under section 3440 of the Civil Code. The view of the law taken by the plaintiff is correct, according to the opinion of the appellate court in Williams v. Lerch, 56 Cal. 330. The instructions are not contradictory; they simply tell the jury what the law is, if they should believe the evidence to sustain either the plaintiff's or defendant's theory of the case. While it may be said that some of the instructions given did not lay down the law as broadly as might have been done, yet, when we come to construe them as a whole, we do not find that the court committed any error likely to mislead the jury.

The defendants further complain that certain instructions asked for by them and refused should have been given. Time and space do not permit of the discussion of them in detail, but from a careful inspection it appears to us that such of the principles of law embodied in them as were applicable to the case had already been given in other instructions; the others were not applicable to the case, and were properly refused.

We think the facts of this case are such that a jury may well have found as they did. Perceiving no prejudicial error, we advise that the appeal from the judgment be dismissed and the order affirmed.

We concur: BELCHER, C. C.; HAYNE, C.

PER CURIAM. For the reasons given in the foregoing opinion, the appeal from the judgment is dismissed and the order affirmed.

(82 Cal. 88)

RANKIN v. SISTERS OF MERCY. (No. 10,458.)

(*Supreme Court of California.* Dec. 16, 1889.)

UNDUE INFLUENCE—PLEADING—INSTRUCTIONS.

1. In an action to recover money deposited with defendant by plaintiff's intestate, the answer set up, as new matter, that plaintiff's intestate made a contract with defendant to care for, support, and maintain him during the remainder of his natural life, in consideration of $2,000, which he paid defendant, who maintained him under said agreement until his death, which occurred a little more than a year later. Code Civil Proc. Cal. § 462, provides that any new matter of affirmative defense is deemed to be denied. There was evidence that when decedent made the deposit he was old and weak in body and mind. *Held*, that an instruction as to the unfair advantage and undue influence of defendant over decedent was justified by the pleadings and evidence.

2. An averment that "defendant has neglected and refused to pay" sufficiently avers non-payment.

Commissioners' decision. Department 2. Appeal from superior court, city and county of San Francisco; T. K. WILSON, Judge.

Hassett & Tevlin, for appellant. *T. Z. Blakeman*, for respondent.

BELCHER, C. C. Action to recover money alleged to have been left with defendant on deposit. Verdict and judgment for plaintiff. Appeal by defendant from the judgment and an order denying a new trial. It is alleged in the complaint that one Timothy Collins died on the 29th day of August, 1883; that plaintiff is the administrator of his estate; that defendant is a corporation, organized under the laws of this state, and that at all the times mentioned in the complaint it maintained and conducted a house, known as St. Mary's Hospital, wherein it received, boarded, lodged, and cared for persons for pay or hire; that on the 10th day of July, 1882, Collins became an inmate of said house, to be boarded, lodged, and cared for by defendant, and on the same day deposited with defendant the sum of $2,000 in gold coin; that the purpose of the deposit so made was to have the money safely kept by defendant, and a reasonable portion thereof applied in payment of the board, lodging, and care furnished him, and the balance thereof returned to him whenever he should depart from or cease to be an inmate of the house; that defendant received the money on the terms and conditions aforesaid, and agreed to observe the same; that Collins remained an inmate of the house and was cared for by defendant until he died; that $10 per week would be a reasonable compensation for the board, lodging, and care furnished him while he was an inmate of the house, and "that the balance of said sum of $2,000, to-wit, the sum of $1,400, is due and payable to the plaintiff by the defendant; and the defendant has neglected and refused to pay the same, or any part thereof, though requested to do so by plaintiff." A general demurrer was interposed to the complaint, and "overruled for want of prosecution." The defendant then answered. The answer denied that at the time named, or at any other time, "Collins deposited with the defendant the sum of $2,000 in United States gold coin, or ever deposited any sum of $2,000 with the defendant, except as hereinafter stated;" denies that said sum of $2,000 was deposited with or received by the defendant for the purposes, or on the terms and conditions, stated in the complaint; denies that $10 per week would be a reasonable compensation for the board, lodging, and care of Collins while an inmate of the house, or that $1,400, or any sum whatever, is due or payable to plaintiff by defendant. "And for a further and separate defense to this action" the answer alleges: "That the said Collins, on or about the date and time stated in the complaint, entered into a contract with the defendant whereby the defendant agreed to admit the said Collins into the said hospital, and take care of, support, and maintain him during the remaining period of his natural life, and provide him with a home in said hospital, and in consideration therefor the said Collins agreed to pay and did pay to the defendant the sum of $2,000, and thereupon entered the said hospital as his home under said agreement, and was cared for, boarded, and lodged therein by defendant until the said time of his death, according to the terms of the aforesaid agreement."

1. In support of the appeal it is claimed that the complaint did not state facts sufficient to constitute a cause of action, because there was no averment of non-payment. The averment was that "defendant has neglected and refused to pay," etc. This we think is sufficient. To neglect to do a thing means to omit to do it,—not to do it,—and the averment was therefore equivalent to a statement that defendant had failed and refused to pay. O'Hanlon v. Denvir, 22 Pac. Rep. 407.

2. It is contended that the verdict was not justified by the evidence, and in support of this position several particulars wherein the evidence was insufficient are specified. Testimony was introduced tending to show that Collins was an unmarried man, about 60 years of age, and that he was diseased in body and somewhat shattered in mind. He had been employed as a laborer at the Mare Island navy-yard for several years, and had accumulated something over $4,000. He left Mare island in March, 1882, and in July following entered the defendant's hospital. A few days afterwards he gave into the hands of the mother superior, who had charge of the hospital, the sum of $2,000, in gold coin, and she gave to him a receipt therefor. She also at some time or times entered in a hospital book memoranda as follows:

Timothy Collins,
Paid $2,000 00
Came July 10, 1882. Died September 1, 1883.

In January, 1883, Collins drew from the Hibernia Bank the balance of his money, a little more than $2,000. Of this money he gave to the mother superior $200, to pay his funeral expenses, and to a Catholic priest, Father Maraschi, $200, to say masses. He also gave into the hands of the priest $700, for which he took the latter's promissory note. Speaking of this note, Father Maraschi testified that in August, 1883, "he [Collins] wanted me to keep the note then myself, and keep the money to say masses. Question. Keep all of it? Answer. And he told me he intended to bring $300 more, to make it a thousand. I told him then to keep the note until he would bring the other $300. Q. And you did not take it; and the whole amount was to go to you to say masses,—the whole amount represented by this note? A. Yes, sir. Q. And there was represented in the note at that time $700? A. Yes, sir. Q. Did he tell you where the $300 was? A. He mentioned he had to get it from the sisters." At that time the mother superior, as she testified, had none of Collins' money, except the $2,000 and the $200, placed in her hands as above stated. After Collins died, the note was found in his pocket, and sent to the maker. Father Maraschi testified: "A few days after he died, I don't know whether the same day, or one or two days after, they sent me a notice he had died, and sent me the note." The mother superior testified: "It remained in my hands for several months, * * * and so I just sent it to him." Witnesses were called by plaintiff to testify in regard to the physical and mental condition of Collins before and after he entered the hospital. David Collins, a nephew, stated, in substance, that decedent was a single man, and had never been married; that he left Mare island in March, 1882, to come to the city; that he was sickly then, and the witness thought a little out of his head; that he appeared to be weak; that before he left he lived alone by himself, in a little house, and did his own cooking; that he kept to the house a great deal, and was solitary in his habits; that he was a close attendant on the church. Witness had heard him say on different occasions that he had seen visions of his deceased sister; that he had seen spirits around him lots of times; that somebody came to his room at night, and blew something through the key-hole at him. Mrs. Rankin, a neice of decedent, stated that he was about 60 years of age at the time he was in the hospital, and was a very weak-minded sort of man; that he had consumption, and was very weak physically. "He said the patients had blown sulphur through the key-hole, and would take any money they could find; that he had seen his sister's vision, and that it was blown east,—went due east. You can never get him to talk on any subject, except about spirits and religion. He talked about spirits, and thought some one was going to try to do him harm. His mind was very weak." The plaintiff, husband of the witness, Mrs. Rankin, stated that he had known decedent for about seven years before his death; that he saw him four or five times while he was in the hospital; that he was suffering from disease; he looked old; "I would think he was suffering from consumption, or from general debility of some sort; his physical condition was very bad; he was very much changed from what he was in Vallejo, five years before; he was very weak; whenever he started to converse about anything it always wound up about hell; heard him speak about the death of his sister in the east; said he had seen her vision, and that just then she disappeared from him, and this vision went due east;" thought he must be weak in his mind, when he was always talking about this fear of death. In support of the affirmative defense set up in the answer, the mother superior was called as a witness, and testified as follows: "Timothy Collins came to the St. Mary's Hospital in July, 1882. I have a memorandum in my books showing his coming there. When he came he presented a letter testifying to his good character, and saying he was no longer able to work, and he would like to make an arrangement to remain for life, and asked what I would charge him. I said it depended on what he had and his own circumstances, and without the least hesitation he said: 'I will give you $2,000 if you will keep me as long as I live;' and I had no hesitation, but concluded with him at once, and in a few days he came. Question. Did he do anything that day further than to say he would give you $2,000? Answer. No; he only said that that day, and brought me a few days after— A day or two after, he brought me the money." It is admitted by the answer, and clearly appears from the evidence, that defendant received from Collins the sum of $2,000 about the time he was taken into the hospital. The plaintiff contended that the money was received under certain conditions, and the defendant that it was received under different conditions. The question for the jury to pass upon was, which contention was best supported by the evidence?

It is urged for appellant that the only testimony as to the terms and conditions under which the money was received was that of the mother superior, and that her testimony was therefore controlling and conclusive. But we think there were other facts and circumstances which were properly submitted to the jury, and which tended to contradict the mother superior in important particulars, and to justify the verdict. For example, the statement of Collins, made just before he died, to Father Maraschi, that he would get from the sisters and give to him, $300, when, according to the statement of the mother superior, he had no money subject to his disposal in her hands, is not in harmony with the theory of the defense. It is objected that this testimony was not admissible, but no objection to it was made during the trial, and the objection now comes too late. So it is objected that all the testimony in regard to the mental condition of Collins was inadmissible, because it did not appear that any one of the witnesses who testified upon that subject was an expert or an intimate acquaintance. But the only objection made to the testimony when it was offered was that it was not in rebuttal, and this objection was properly overruled. Looking at all the testimony, we cannot say that there were not sufficient contradictions to create a substantial conflict, and when such is the case the well-settled rule is that the conclusion of the jury will not be disturbed by the appellate court.

3. It is claimed for the appellant that the court erred in instructing the jury in respect to undue influence and unfair advantage. The claim is not, however, that the instruction was erroneous as an abstract proposition of law, but that there was no issue as to undue influence, and no evidence of undue influence. It is objected for respondent that there was no sufficient exception taken to the instruction complained of, and that the point made thereon cannot now be considered. But, waiving that objection, we think that the issues raised by the pleadings were sufficient to justify the instruction. Under our system of pleading the plaintiff is not required to reply to any new matter or affirmative defense set up in the answer, but it is deemed to be denied, and may be met by any competent proof. Code Civil Proc. § 462; Curtiss v. Sprague, 49 Cal. 301; Water Co. v. Raynor, 57 Cal. 588. And we also think that the evidence was sufficient to warrant the instruction. Collins was a religious devotee. He was sick, and the end of his earthly life was evidently not far distant. His mind was flighty, and he appears to have trusted implicitly in the mother superior. Under these circumstances, $2,000 seems a large sum to demand or take from him.

4. There is nothing to show that the damages were excessive, or that they were given under the influence of prejudice. If the plaintiff was entitled to recover at all, we think the amount found and awarded by the verdict not unreasonable, in view of the testimony. We find nothing in the record calling for a reversal, and we therefore advise that the judgment and order be affirmed.

We concur: HAYNE, C.; VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment and order are affirmed.

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82 Cal. 84

WRISTEN v BOWLES. (No. 12,134.)

(*Supreme Court of California.* Dec. 16, 1889.)

VENDOR AND VENDEE—THE CONTRACT.

1. In an action for breach of contract to sell land, it appeared that the alleged contract consisted of letters written by the parties; that plaintiff offered to purchase, and asked the price; that defendant answered he would sell for $16 an acre, to which plaintiff replied asking easier terms; that defendant then wrote that his agent had an offer of $13 an acre cash, and asked plaintiff if he was willing to make the purchase; that to this plaintiff replied, "I am ready and willing to buy," but he still asked easier terms, and concluded the letter by saying: "The money is ready as soon as I can have it sent." *Held*, that there was no agreement in writing for the purchase and sale of the land.

2. On the failure to prove a written agreement, evidence tending to show an oral agreement for the purchase of the land was properly excluded, as such agreement, if made, was void under the statute of frauds.

Department 1. Appeal from superior court, city and county of San Francisco; N. HAMILTON, Judge.

B. McKinne, for appellant. *Reinstein & Eisner*, for respondent.

FOX, J. This is an action for the recovery of the sum of $10,000 damages for the alleged breach of a contract for the sale of land. The case was tried before the court without a jury, and the defendant had judgment. Plaintiff moved for a new trial, which was denied, and plaintiff appealed. There are no findings in the record, nor does it affirmatively appear that findings were waived; but, as no point is made on the want of findings, we pass to a consideration of the case on its merits, assuming that the facts found support the judgment.

Appellant makes two points, the first of which is not very clearly stated, but which practically amounts to this: That the evidence does not support the judgment, but, on the contrary, was such as would support a judgment in favor of plaintiff. The other is that the court erred in excluding and striking out certain evidence.

The contention of appellant is that certain correspondence between the plaintiff and defendant, taken as a whole, was such as constituted an agreement in writing for the sale by defendant to plaintiff, and the purchase by plaintiff from defendant, of certain lands in Fresno county, at $13 per acre, one-half payable in cash upon the execution of the deed, and the balance in two equal annual installments. It seems from the record that 19 letters passed between the parties, 18 of which are given in full in the transcript, and the contents of the other are testified to by the plaintiff, who also testifies that the letter itself had been lost. We have read this correspondence, and the proof of the contents of the lost letter, entire, and find nothing in the whole which amounts to an agreement in writing binding upon either of these parties. It opens with a letter from plaintiff to defendant, dated December 26, 1883, asking for the price and terms upon which defendant will sell the land. The reply to this offers the property upon the terms above stated. Other letters pass without an acceptance of the offer, but proposing, on the part of plaintiff, different terms of payment until January 22, 1884, when the defendant writes to plaintiff advising him that he has another offer of $13, all cash, and asks the plaintiff if he is ready and willing to make the purchase, but concludes by saying: "In the mean time I will see what I can do, although I won't promise anything, as I am afraid Easton & Eldridge will hold me to the contract." (This referring to a contract with Easton & Eldridge, made before this correspondence was opened, by which the latter was authorized to sell the property, and under which they had procured this new offer of $13 cash.) To this the plaintiff replies, "I am ready and willing to buy," but still asks the modification of terms of payment, to which defendant had never acceded, and concludes his letter by saying: "The money is ready as soon as I can have it sent from Yolo. So, hoping to hear from you soon," etc. The preceding correspondence shows that the plaintiff was relying upon money to be sent from Yolo to make the first payment, and that it was insufficient to meet the terms proposed by defendant, and only sufficient to meet the modified terms proposed by plaintiff, and which were never accepted by defendant. Nothing in any of the subsequent correspondence shows that the minds of the parties ever met, or that any agreement was ever reached between them. The court below was therefore correct in holding, as it must have held, to reach the judgment given, that there was no agreement in writing between the parties for the purchase and sale of this property. It is for the court to determine whether letters which have passed between parties constitute an agreement between them. Luckhart v. Ogden, 30 Cal. 547. These letters certainly did not. To constitute a binding contract, made in this form, there must be a proposal squarely assented to. If the acceptance be not unqualified or go not to the actual thing proposed, then there is no binding contract. 1 Whart. Cont. § 4. A proposal to accept, or an acceptance based upon terms varying from those offered, is a rejection of the offer. Bank v. Hall, 101 U. S. 51. An offer imposes no obligation, unless it is accepted upon the terms upon which it was made. Tilley v. County of Cook, 103 U. S. 161. An acceptance must be absolute and unqualified. A qualified acceptance is a new proposal. Civil Code, § 1585. A proposal may be revoked at any time before its acceptance is communicated to the proposer. Id. § 1586. These principles of law are decisive of this case on the evidence.

There was no error in excluding the oral testimony which was objected to or stricken out. Plaintiff having failed to prove an agreement in writing, and there being no pretense of part or any performance on the part of either party, evidence tending to show an oral agreement, or an admission that there had been such an agreement, was incompetent and inadmissible. Such an agreement, if made, was void under the statute of frauds, and furnished no ground of recovery. Judgment and order affirmed.

We concur: WORKS, J.; PATERSON, J.

(82 Cal. 209)

KRANER v. HALSEY. (No. 12,485.)

(*Supreme Court of California.* Dec. 28, 1889.)

ASSUMPSIT—PLEADING—LIMITATION OF ACTIONS.

1. A complaint which alleges that plaintiff advanced money for defendant at his special request, and that defendant refuses to pay the same, sufficiently states a cause of action without averring a promise by defendant to pay.

2. A demurrer on the ground that the cause of action is barred by limitation cannot be sustained when it does not appear from the complaint when the cause of action arose.

3. In California, a demurrer on the ground that the complaint is ambiguous, uncertain, and unintelligible, cannot be sustained unless all of these imperfections exist.

Department 2. Appeal from superior court, city and county of San Francisco; T. H. REARDEN, Judge.

Action by P. H. Kraner against Abraham Halsey to recover money advanced by plaintiff for defendant in the purchase of certain shares of the capital stock of the Great Western Quicksilver Mining Company. Judgment upon demurrer for defendant, from which plaintiff appeals.

T. M. Osment, for appellant. *Garber, Thornton & Bishop*, for respondent.

THORNTON, J. Judgment passed for defendant herein, and plaintiff appealed therefrom. The questions to be considered arise on a demurrer to the complaint. The first ground of the demurrer, that the complaint does not state facts sufficient to constitute a cause of action, is manifestly untenable. The complaint states the payment of a sum of money by plaintiff at the special instance and request of defendant, for which money so paid defendant is indebted to him, and that he (defendant) has failed and refused to pay this money, or any part of it. The law on the facts stated implies a promise by defendant to pay the money to the person paying it at defendant's request, and in such case it is unnecessary to aver the promise. That which is implied by law need not be averred. Steph. Pl. pp. 353, 354; Gould, Pl. c. 3, § 6. The preceding statements are matters of inducement only.

The second ground of demurrer is that the cause of action set forth in the complaint is barred by the provisions of section 337, and by subdivision 1 of section 339, and by section 343 of the Code of Civil Procedure of this state. These sections are a part of the statute law of this state, limiting the period within which actions may be commenced. It does not appear on the face of the complaint when the money was paid by plaintiff at the request of defendant. To hold that the cause of action sued on is barred on a demurrer to the complaint, it must so appear from the allegations of the complaint. Here it does not so appear. The date of the payment is not stated in the pleading. How, then, can any court say that the payment made at request of defendant was not made within 60 days, or 1 day, before the commencement of the action, or that the request of defendant, by reason of which the payment was made, was not made within 10 days before action brought. The demurrer must be determined on the allegations of the pleading before the court. A court is not allowed to speculate on what might have happened, or what might not have occurred, in view of the averments of the complaint. It must decide on the complaint and its averments. See Ord v. De La Guerra, 18 Cal. 75, where it was held that when a complaint shows *prima facie*, upon the facts stated, that the claim is barred by the statute of limitations, the defendant may take advantage of the defect by demurrer; yet it must clearly so appear. It is far from clearly appearing here. In fact, it does not appear at all. The second ground of demurrer is untenable.

A further and third ground of demurrer is "that the complaint is ambiguous, uncertain, and unintelligible," etc., in several particulars, which are specified. The specifications of uncertainty, ambiguity, and unintelligibility are in the demurrer designated by the letters from *a* to *h*, inclusive. As to specification *a*, it clearly appears that the action here is on the implied promise. What precedes this portion of the complaint is mere inducement, which might have been left out of the pleading without impairing its sufficiency. Specifications *c*, *d*, and *h* relate to inducement, and therefore to immaterial averments. The rule is never applied in the English practice to matters of inducement, (Steph. Pl. 292,) and should not be applied with any strictness here. Specification *g* relates to immaterial matter. Specifications *e* and *f* relate to times or dates, and in this regard the complaint may be considered uncertain. We are of opinion that the complaint is neither ambiguous nor unintelligible. It is uncertain in not stating the date or time of several issuable facts averred, and perhaps on other matters. If the defendant had demurred on the ground of uncertainty alone, and this is allowed by the statute, (Code Civil Proc. § 430, subd. 7,) we should hold that the demurrer for uncertainty was well taken. But the defendant has stated his grounds of demurrer conjunctively, "that the complaint is ambiguous, uncertain, and unintelligible." And when, upon a demurrer so framed, this court can see that the pleading is neither ambiguous nor unintelligible, we cannot hold the demurrer properly sustained, though it may in some particulars be so uncertain that a demurrer on such ground would lie. The defects and imperfections must be especially set down, as under the statute of 27 Eliz. c. 5, § 1, and 4 & 5 Anne, c. 16. See Gould, Pl. c. 9, pt. 1, § 9, *et seq.* The plaintiff is not called on, when the demurrer is taken, as in this case, to defend his complaint from each ground, when one of the grounds does not exist. All the defects pointed out and conjoined by the copulative particle "and" must exist, or the demurrer must be overruled. As to the alleged ambiguity of the complaint, we will further observe that "ambiguity" signifies "the quality or state of being ambiguous; doubtfulness or uncertainty, particularly of signification." Webster so defines it. He defines "ambiguous" in these words: "Doubtful or uncertain, particularly in respect to signification; equivocal; as an ambiguous course; an ambiguous expression." As illustrative of his definitions, he quotes the following couplet from Milton:

> "What have been thy answers, what but dark,
> Ambiguous, and with double sense deluding."

He gives as synonyms, "indeterminate; indefinite; doubtful; uncertain; unsettled; indistinct; equivocal." On reading the complaint with ordinary care, we cannot perceive that it can be pronounced either doubtful, uncertain, or equivocal in its meaning. The word "uncertainty" in the statute refers to the uncertainty defined by the authorities in pleading, and such authority does not include "ambiguity." As to what is uncertainty, see Gould, Pl. c. 3, §§ 51-101, and c. 4, §§ 23-37. Also, Steph. Pl. p. 279, § 4. In Salmon v. Wilson, 41 Cal. 595, it was held that a demurrer on the ground of ambiguity should be overruled, if enough appear to render the pleading demurred to easy of comprehension, and free from reasonable doubt. The allegations of the complaint are easy of comprehension, and free from reasonable doubt as to their meaning. We think they are clearly intelligible. The court below erred in sustaining the demurrer to the complaint. The judgment is reversed, and the cause remanded. The court *a quo* is directed to overrule the demurrer to the complaint, with leave to defendant to answer, allowing the plaintiff, should he be so advised, to amend his complaint so as to make it more certain. Ordered accordingly.

We concur: McFarland, J.; Sharpstein, J.

(82 Cal. 163)

White v. Whitney. (No. 12,116.)

(*Supreme Court of California.* Dec. 20, 1889.)

Counter-Claim—Evidence—Book-Entries.

In an action to foreclose a mortgage given to secure a note, where defendant pleads a counterclaim for goods, etc., furnished to plaintiff, defendant's shop-book is admissible in evidence where he testifies that it is his only book of original entries; that he kept it himself; that all the items were correct, and were entered at the time they were severally transacted, except some outside accounts put in at the close of the shop account; and there is no objection to the manner in which the book was kept.

Commissioners' decision. Department 2. Appeal from superior court, Mendocino county; R. McGarvey, Judge.

J. M. Mannon, T. L. Carothers, and *Henley, Swift & Rigby*, for appellant. *C. C. Hamilton* and *J. A. Cooper*, for appellee.

GIBSON, C. This was an action to foreclose a mortgage given to secure payment of a one-year note, dated November 3, 1880, for $450, with interest at the rate of 1½ per cent. per month of 30 days, payable at maturity of note, and, if not so paid, to become part of the principal and draw like interest. The defendant in his answer, in addition to a general denial, set up that he executed the note and mortgage solely in consideration of the promise of plaintiff to pay him the amount of the note; that plaintiff only paid him $250 of the amount, and refused to pay the remainder; and as a counter-claim he averred that plaintiff was indebted to him in the sum of $1,831.69 as a balance due on an account for goods, etc., money paid out to plaintiff's use, and for labor, all furnished, done, and performed at the request of plaintiff. The case was tried by the court, without a jury, upon all the issues except one, which was submitted to a jury in the following stipulated form: "Is the plaintiff indebted to the defendant upon the counter-claim set up in defendant's answer, and, if so, how much?" to which the jury responded, "Yes; $1,000." This special verdict was approved and adopted by the court as a finding upon the issue so found; and upon the other issues it found that the defendant was indebted to the plaintiff, upon the note in suit, in the sum of $909.90, and the sum of $50 for counsel fees for foreclosing the mortgage, and that there was a balance due from plaintiff to defendant of $40.10. Judgment was entered accordingly, from which, and from an order denying a new trial, plaintiff appeals. The following are the only errors assigned in the statement: *First*, that the verdict is not sustained by the evidence; *second*, that the admission in evidence of the shop-book of defendant in his own behalf was erroneous.

The evidence is brief. At the time the note and mortgage were executed the defendant testified that he received $250, and made the note for $450, because the plaintiff gave him a letter of credit to a firm at San Francisco for whatever amount of goods he (the defendant) might purchase. How much he purchased on this letter of credit does not appear. He also testified that subsequently "we had a settlement on the 5th of March, 1882, in which the note and mortgage were not considered, whereby a balance was found and agreed upon between myself and Mr. White, amounting to $1,004.57, in his favor up to that date." This account stated was, by the tacit understanding of the parties, not brought into the case for adjustment,—was, in fact, studiously avoided by both of them. The defendant also testified that the total amount of items shown by his shop account, for which plaintiff became indebted after the statement of account between them March 5, 1882, amounted to $1,303.09; that the other items for goods furnished, services rendered, and money expended, to and for plaintiff, aggregated $218.75; that he kept the debits of the plaintiff, but gave him no credit for anything received from him from the time of their former settlement; and that the amount found due to plaintiff in that settlement was not credited to plaintiff on his shop-books, nor deducted from the said sum of $1,303.09. The testimony of one Davis shows that from March 27, 1882, to June 5, 1886, the plaintiff paid to him the sum of $854.88, for and on account of goods sold to the defendant, which plaintiff agreed with Davis to pay for, in the event of defendant's default. The plaintiff testified that defendant became indebted to him on account of other matters after March 6, 1882, viz.: A check for $320; a bundle of whips, $50; freight on leather, $3.35; twine, $1; rent of shop from March 5, 1882, for two years, at $10 per month, $240; 8½ yards of carpet, $6.37; and check on Hecht Bros. for $100; amounting in all to $720.72. On cross-examination he testified that the $320 check was given to defendant for the purpose of paying plaintiff's indebtedness to one Norton, for which amount he gave defendant credit on his books. Deducting this $320 from $720.72 leaves $400.72, and adding to this remainder $46.77, for items as testified to by plaintiff's witness, Rohrbough, makes $447.49. Deducting this total from the indebtedness of plaintiff to defendant as above shown, and it still leaves $1,074.35 due to defendant. This result is reached by assuming that the testimony of several witnesses is entitled to equal weight, and is sufficient to show that there was ample evidence to justify the special verdict which was adopted by the court. Moreover, as there is a decided conflict between the plaintiff and defendant as to several items in their respective accounts, an additional reason is presented to prevent us from disturbing the verdict.

The second question raised by the appellant must also be resolved against him. "In the United States a tradesman's book of original entries is in most jurisdictions received in evidence as *prima facie* proof, when supported by the trademan's oath." 1 Whart. Ev. § 678; 1 Greenl. Ev. §§ 117, 118. This rule, although not expressly declared, has been sanctioned in the following cases in this state: Lubert v. Chauviteau, 3 Cal. 458; Le Franc v. Hewitt, 7 Cal. 186; Caldwell v. McDermit, 17 Cal. 464; Caulfield v. Sanders, Id. 570; Carroll v. Storck, 57 Cal. 366. See, also, Roche v. Ware, 71 Cal. 375, 12 Pac. Rep. 284, and section 1947, Code Civil Proc.,—while in other cases such books have been regarded as secondary evidence. In Landis v. Turner, 14 Cal. 573, they were held to be competent evidence of services rendered, and of their value, and of specific material furnished and the price thereof, and in Severance v. Lombardo, 17 Cal. 57, to prove the delivery of goods, no higher evidence in either case having been attainable. Regarding his shop-book, the defendant testified that it was his only book of original entries, and was kept by himself; that all the items were correct, and all constituting the shop account were entered at the time they were severally transacted, but some other outside accounts—what they were does not clearly appear—were put in at the close of the shop account. There was no objection to the manner in which the book was kept. It was therefore properly admitted in evidence to prove the shop account. We therefore advise that the judgment and order be affirmed.

We concur: Belcher, C. C.; Hayne, C.

Per Curiam. For the reasons given in the foregoing opinion the judgment and order are affirmed.

(82 Cal. 413)

Mott v. Mott. (No. 13,128.)

(*Supreme Court of California.* Dec. 27, 1889.)

Divorce—Cross-Complaint—Dismissal.

1. An action for divorce is within Code Civil Proc. Cal. § 442, providing that "whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file * * * a cross-complaint."

2. Where plaintiff, after answering defendant's cross-complaint, files an amended complaint, to which a demurrer is sustained, with leave to file a second amended complaint, which plaintiff refuses to do, the order sustaining the demurrer does not operate as a dismissal of the cross-complaint, but leaves the issues joined by it and the answer still pending.

Department 1. Appeal from superior court, Los Angeles county; W. P. Wade, Judge.

Wells, Guthrie & Lee and *Houghton, Silent & Campbell*, for appellant. *Glassell, Smith & Patton, Smith, Howard & Smith, Anderson, Fitzgerald & Anderson, F. H. Howard*, and *Smith, Winder & Smith*, for respondent.

Fox, J. Plaintiff filed his complaint against the defendant for divorce, on the ground of extreme cruelty and desertion. In due time defendant answered, denying all the allegations of cruelty and of desertion, and at the same time filed a cross-complaint, full in all its forms, and containing allegations showing a good ground for divorce[1] against the plaintiff, and also showing that the plaintiff had come into the possession of a considerable sum of money, the separate property of defendant, which he had never repaid to her, and asking, by way of affirmative relief, that plaintiff be required to pay her permanent alimony and support, and to provide funds for her counsel fees and costs of suit, but does not pray in direct terms for divorce, although she does ask for "such other and further relief as to the court may seem proper and just in this behalf." In due time plaintiff answered to this cross-complaint, putting in issue all the allegations thereof as made against himself, and subsequently, by leave of the court, filed an amended complaint on his own behalf against the defendant. To this amended complaint the defendant demurred. When the demurrer came on for hearing the plaintiff confessed the demurrer, and on his confession the same was sustained, with leave to plaintiff to file a second amended complaint within 10 days. This the plaintiff failed, and subsequently formally declined, to do. Afterwards the defendant filed and served a petition for an increase of alimony *pendente lite*, an order having been made, at an earlier stage in the proceedings, allowing her $35 per month, when plaintiff objected in writing to the hearing thereof, claiming to appear specially for that purpose, setting up as the ground of his objection that, by reason of the order sustaining the demurrer to his amended complaint, and of his refusal to file a second amended complaint, "the said action has been and is, by reason of the premises, dismissed, and is not, and has not been since the expiration of said ten days, a pending action, and said defendant is not in court for any purposes of said action." Upon the hearing and consideration of this petition, and the objection so made thereto, the court held that "the cause is not now pending, and the court has no jurisdiction of the plaintiff," to which ruling the defendant excepted. Six months afterwards the plaintiff, upon notice to the defendant's counsel, applied to the court "to enter up the proper judgment in said action, dismissing the same, consequent upon the refusal of the plaintiff to amend his complaint," and the court three months later denied said motion. Seven months later the cause came up regularly on the calendar for trial, when the plaintiff moved that it be stricken from the calendar, on the ground that there was no such cause pending in the court; that it had been thereto fore adjudicated "that the cause is not pending in this court;" and that "if this suit is still pending there is no issue joined." This motion was granted by the court, and thereupon plaintiff's counsel moved the court to dismiss the action, upon which motion it was by the court "ordered, adjudged, and decreed that plaintiff's action herein be dismissed, and the same be hereby finally dismissed, and that the defendant have her execution for her costs in this behalf expended." To which ruling and decision the defendant, by her counsel, excepted. Upon this order judgment of dismissal was duly entered, and the defendant appeals; the whole case coming up on a bill of exceptions.

The real question on this appeal is whether the court had the right or power, on the motion of plaintiff, to dismiss the action. The statute upon the subject is found in section 581, Code Civil Proc. That section, so far as it has any bearing upon this case, reads: "An action may be dismissed, or a judgment of nonsuit entered, in the following cases: (1) By the plaintiff himself, at any time before trial, upon payment of costs, provided a counter-claim has not been made, or affirmative relief sought, by the cross-complaint or answer of defendant." Under this section, if affirmative relief is sought by the defendant, the plaintiff cannot dismiss. Robinson v. Railroad Co., 65 Cal. 266, 3 Pac. Rep. 878; Clark v. Hundley, 65 Cal. 96, 3 Pac. Rep. 131. But, to prevent such dismissal, the counter-claim or cross-complaint must be one upon which the defendant would be entitled to affirmative relief. Belleau v. Thompson, 33 Cal. 496.

This leads directly to a consideration of the main point of discussion in this case, whether a defendant in an action for divorce can file a cross-complaint, and upon such cross-complaint secure affirmative relief. Section 442, Code Civil Proc., provides: "Whenever the defendant seeks affirmative relief against any party, relating to or depending upon the contract or transaction upon which the action is brought, or affecting the property to which the action relates, he may, in addition to his answer, file at the same time, or, by permission of the court, subsequently, a cross-complaint." Counsel for respondent insists, and this seems to be the view adopted by the court below that an action for divorce does not come within the purview of this section; that it is not an action upon a contract; that the transaction relied upon in the cross-complaint is not the transaction upon which the action is brought; and that it is not an action which relates to property. In all three of these propositions, so far, at least, as relates to this case, we think the counsel is mistaken. The action was brought by plaintiff to dissolve the marriage relation. That relation is one arising out of civil contract. Civil Code, § 55. That contract is one "by which a man and woman reciprocally engage to live with each other during their joint lives, and to discharge towards each other the duties imposed by law on the relation of husband and wife." Bouv. Law Dict. tit. "Marriage." It is a contract of so solemn and binding a nature, and which so affects the public weal, that the consent of the parties alone, even though they are capable of consent, will not constitute marriage, or create the relation of marriage, (Civil Code, § 55,) but one to which the consent of the state is also required, (Dyer v. Brannock, 2 Mo. App. 432.) That consent is granted by statute upon the condition of solemnization, (Id.,) or of the mutual assumption of marital rights, duties, and obligations, (Civil Code, § 55.) By the contract the husband and wife bind themselves to "obligations of mutual respect, fidelity, and support." Id. § 155. The object and legal effect of a decree of divorce from the bonds of matrimony, which was the relief sought by the plaintiff in this case, is to annul such a contract, and absolve the parties from the duties and obligations which it imposes. How, then, can it be said that it is not an action upon contract? If there is no contract, there can be no marriage. If there is no marriage, there can be no divorce. In support of the theory of respondent, we are cited to De Haley v. Haley, 74 Cal. 491, 16 Pac. Rep. 248, a case in which there was no cross-complaint, and the question of the right to file a cross-complaint was not involved, but in which Mr. Justice McKINSTRY suggests that "it is at least doubtful whether the Codes provide for a cross-complaint in actions for divorce," and gives as a reason for the doubt that the action is not brought on the "contract" of marriage, but upon certain violations of duties or obligations annexed to the *status* of matrimony. All that was said in that case on that subject was pure *dicta*, for in the case there was no cross-complaint, and the question was not at all involved. Nothing on the subject was necessary to the decision of the case. And, even as argument in support of the doubt expressed, it was speculative and unsatisfactory. Suppose the action is brought "upon certain violations of duties or obligations annexed to the *status* of matrimony." The *status* itself depended upon the contract, and without the contract there would have been no such duties or obligations. As in the case of any other kind of contract, the cause of action, if there be one, is not the contract itself, but the violation of some duty or obligation imposed by the contract, which violation constitutes in law a breach of the contract. It is that breach which gives the cause of action. So here the contract of marriage creates a *status* (as does also a contract of partnership, although a different one) by reason of which the law imposes upon each party to the contract certain duties and obligations, the violation of which constitutes a breach of the contract, and gives a cause of action. In Coulthurst v. Coulthurst, 58 Cal. 239, this court distinctly recognized the right to file a cross-complaint in an action for divorce, although in that case it reversed a judgment rendered on the cross-complaint on the ground, not that such relief could not be granted, but that the cross-complaint did not state the necessary facts to give the court jurisdiction. Again, in Lowell v. Lowell, 55 Cal. 316, the right was recognized, and a judgment affirmed which had been rendered on the cross-complaint; and incidentally the court has recognized this right in several other cases. Recently, in the case of Wadsworth v. Wadsworth, 22 Pac. Rep. 648, the point was directly involved, and, under the constitution, had to be passed upon, for the guidance of the court below. It was then very carefully considered, and a large number of authorities cited from English and American courts in support of the decision made, that a cross-complaint may be filed in an action for divorce. We see no reason for doubting the correctness of that decision; and, if it was a matter open to doubt, the doubt ought now to be resolved in favor of the rule, for it has been a rule of action in this state so long that not only property rights, but personal relations of husbands, wives, parents, and children, are in so many instances dependent upon it that the consequences of a reversal would be too serious for contemplation. In view of what has already been said, it is perhaps unnecessary to consider what the respondent says in reference to the fact that the cross-complaint is not upon the transaction upon which the complaint is brought, or that the defendant's cause of action is not one which affects the property to which the action relates; but we may say briefly, as to the transaction, that one of the grounds upon which the plaintiff brought the action was desertion, and that the cross-complaint refers to and builds upon the same transaction, but sets up facts tending to show that the desertion was on the part of the plaintiff, and not of the defendant. The settlement of property rights between the parties is an incident of every decree for divorce, where there is any property involved. In his complaint the plaintiff prays for such settlement, and in her cross-complaint the defendant also asks the same, and both refer to the same property. Hence it seems to us that in every view of this case the cross-complaint is one authorized by the section of the Code quoted.

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[1] See decision on rehearing, post, 1142.

But it is also claimed that the defendant cannot complain of the dismissal in this case, for that it was entered at her own instance. The record does not so show. It is true that she demurred to plaintiff's amended complaint, and her demurrer was sustained. Since plaintiff refused to amend, that left him with nothing to try as against the defendant; but his answer to her cross-complaint stood, and there was a distinct issue between the parties upon her cross-complaint, and the answer thereto, upon which she was entitled to be heard, and to have such relief as the law and the facts would warrant. There is nothing in the proposition of respondent that the amended complaint superseded all other pleadings in the case, and the case cited in support of the proposition (Thompson v. Johnson, 60 Cal. 295) does not support that position, though the language quoted, when taken from its context, might seem to do so. In that case there was no cross-complaint, and all the issues were framed upon the complaint itself. In this case there was a cross-complaint, distinct and complete in all its parts, and an answer thereto; and these did not fall with the fall of plaintiff's complaint. The order of dismissal was made on plaintiff's motion. The order does not follow the precise language of the motion, but on it a judgment of dismissal of the action was entered. The judgment so entered is against law; and it is ordered that the same be reversed, and the case remanded, to be placed on the calendar of the court below for trial on the issues framed by the cross-complaint of defendant, and the answer thereto.

We concur: McFarland, J.; Paterson, J.

(82 Cal. 413)

Mott v. Mott. (No. 13,128.)

(*Supreme Court of California.* Jan. 29, 1890.)

In bank. Application for rehearing. For opinion in department, see ante, 1140.

Per Curiam. Rehearing denied, but the opinion filed herein is hereby amended so as to read, "good ground for affirmative relief," instead of "good ground of action for divorce."

(84 Cal. 611)

People v. Blake. (No. 13,370.)

(*Supreme Court of California.* Jan. 11, 1890.)

School Lands—Vacation of Judgments.

1. A deed of school land, made before a certificate of purchase was issued to the grantor, passes no interest under the statute (in force in 1869) providing that a subsequently-acquired legal estate shall pass to the grantee, where it does not appear that the grantor had made an application to purchase the land, or had paid anything on it.

2. Where the record is silent as to whether a deed conveying the interest of one who holds a certificate of purchase of school lands was ever recorded as required by Laws Cal. 1867-68, p. 507, the presumption is that it was never recorded.

3. A judgment foreclosing the grantor's interest in the lands conveyed will not be set aside on motion, 16 years after its rendition.

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. B. Campbell, Judge.

Frederick S. Stratton, for appellant. *R. B. Terry, W. D. Tupper,* and *Sayle & Coldwell,* for respondent.

Belcher, C. C. This action was commenced on the 27th day of July, 1872, to foreclose the interest of the defendant, Blake, in a certain half section of school land situate in the county of Fresno, and to annul the certificate of purchase therefor, issued to him on the 12th day of February, 1869. Summons was issued and placed in the hands of the sheriff of the county, and on the 1st day of August following was returned by him, with his certificate "that after due diligence the therein named defendant cannot be found within the county." An affidavit was then made by the district attorney, setting forth "that the name or residence of the holder of the certificate of purchase described in the above-entitled action is unknown to him; wherefore deponent asks that service of the summons in this action be had by publication," etc. Upon this affidavit an order was made by the county judge that the summons be served on the defendant by publication in a weekly newspaper published in the county, and "that such publication be made at least once a week for four successive weeks." The summons was published in the paper designated, as shown by the affidavit of one of its publishers, "four times, beginning with the 7th day of August, 1872, and ending with the 28th day of August, A. D. 1872." The defendant made no appearance, and on the 16th day of October, 1872, judgment, reciting that the defendant had been duly served with process according to law, was entered by default, as prayed for. The appellant, McDonald, on the 20th day of July, 1888, made a motion to have this judgment vacated and set aside, on the ground that it was invalid and void, because when it was entered the court had not acquired jurisdiction of the person of the defendant. At the hearing of the motion, as stated in the bill of exceptions, "counsel for said McDonald produced a conveyance from defendant, Blake, to said McDonald, dated September 24, 1868, for the certificate of purchase and lands described in the complaint, and showed thereby that the said McDonald became, on said date, by grant, the successor in interest of defendant in and to said land and certificate."

1. The first question to be considered relates to the right of the appellant to contest the validity of the judgment. It will be observed that the deed under which he asserts the right was executed nearly five months before the certificate of purchase was issued, and that there is nothing in the record tending to show that when it was executed Blake had made any application to purchase the land, or had made any payment therefor. It is argued for appellant that a fee-simple title is presumed to pass by a grant of real property, and that the deed in question was a grant, and by operation of law any subsequently acquired title inured to the grantee; citing sections 1105, 1106, Civil Code. And it is claimed that by virtue of the deed appellant became the assignee of the subsequently issued certificate of purchase, and the owner of Blake's subsequently acquired equitable interest in the land. When the

deed was made the Codes had not been adopted. The statute then in force relating to conveyances (section 33) provided as follows: "If any person shall convey any real estate, by conveyance purporting to convey the same in fee-simple absolute, and shall not, at the time of such conveyance, have the legal estate in such real estate, but shall afterwards acquire the same, the legal estate subsequently acquired shall immediately pass to the grantee, and such conveyance shall be valid, as if such legal estate had been in the grantor at the time of the conveyance." In Cadierque v. Duran, 49 Cal. 356, it was held that a party, who has only filed an application with the surveyor general to purchase state land, has acquired no right in the land which he can transfer to another. In Stanway v. Rubio, 51 Cal. 41, a claim similar to that presented here was made under the above-cited section of the statute. But in that case it appeared that the application to purchase the land had been made and approved, and 20 per cent. of the purchase money and the first and second year's interest on the balance had been paid before the deed was executed. It was held that the deed vested in the grantee the after-acquired title of the grantor, but the conclusion of the court seems to have depended upon and to have been controlled by the facts above stated. In view of these authorities, we do not think appellant's claim can be upheld.

2. But, however this may be, the case shows that the appellant took no steps to question the validity of the judgment for about 16 years after it was rendered; and the record is silent as to whether or not his deed was ever recorded by the county recorder, or reported to the register to be entered in the books of his office, as required by the sixty-ninth section of the "Act to provide for the management and sale of the lands belonging to the state," passed in 1868, (St. 1867-68, p. 507.) The presumption, therefore, is that the deed never was recorded or reported. This being so, it is apparent that the land in question may have been sold to other parties, who may have purchased it in good faith, and may have improved and occupied it for many years. In People v. Goodhue, 80 Cal. 199, ante, 66, a motion was made on the 31st of December, 1888, to vacate a judgment rendered on the 30th of October, 1865, of the same character as that involved here. This court affirmed the order of the court below, denying the motion, and said: "A judgment cannot be attacked in this informal way years after its rendition." We think that decision should be followed in this case, and therefore advise that the order appealed from be affirmed.

I concur: VANCLIEF, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is affirmed.

(82 Cal. 413)

PEOPLE v. HEMME. (No. 13,371.)

(*Supreme Court of California.* Jan. 11, 1890.)

Commissioners' decision. Department 2. Appeal from superior court, Fresno county; J. B. CAMPBELL, Judge.

Frederick S. Stratton, for appellant. R. H. *Terry*, *W. D. Tupper*, and *Sayle & Coldwell*, for respondent.

BELCHER, C. C. The facts of this case are in all material respects the same as those considered in the case of People v. Blake, ante, 1142, (just decided.) Upon the authority of that case the order appealed from should be affirmed.

We concur: VANCLIEF, C.; HAYNE, C.

PER CURIAM. Upon the authority of People v. Blake, ante, 1142, (this day decided,) the order appealed from is affirmed.

PEOPLE v. HARRISON *et al.* (No. 13,368.)[1]

(*Supreme Court of California.* Jan. 25, 1890.)

VACATION OF JUDGMENTS.

A judgment rendered in 1873 cannot be vacated on motion, in 1889, on the ground of want of jurisdiction of the parties. Following People v. Goodhue, ante, 66.

Commissioners' decision. Department 1. Appeal from superior court, Tulare county; W. C. VAN FLEET, Judge.

W. B. Wallace, for appellant. *Freeman & Bates*, for respondents.

HAYNE, C. This is an appeal from an order vacating a judgment upon the ground that the court had not acquired jurisdiction of the parties. The judgment vacated was for the foreclosure of the interest of the respondents here in a certificate of purchase in certain state lands. It was entered in 1873, and was not void on its face. The motion to vacate it was made in 1889. We understand that the case of People v. Goodhue, 80 Cal. 199, ante, 66, decides that in such a case relief cannot be had upon motion. If prior cases are inconsistent with this, they must be considered as overruled. The Goodhue Case was approved and followed by department 2 in People v. Blake, ante, 1142, filed January 11, 1890. Probably it lays down a more wholesome rule, because, if the party be compelled to resort to a court of equity, conditions may be imposed in a proper case. At any rate it is desirable that the point should be settled. We therefore advise that the order appealed from be reversed.

We concur: BELCHER, C. C.; FOOTE, C.

PER CURIAM. For the reasons given in the foregoing opinion the order appealed from is reversed.

(3 Cal. Unrep. 223)

SMITH *et al.* v. OLMSTEAD *et al.* (No. 13,125.)

(*Supreme Court of California.* Jan. 25, 1890.)

WILLS—OMITTED CHILDREN—POWER OF SALE.

Under Code Civil Proc. Cal. § 1561, providing that "when property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court," and section 1307, providing that children of a testator omitted from a will must inherit from the testator "as if he had died intestate," a power of sale in a will does not authorize the sale of the interests of children not mentioned in the will, without the previous sanction of the probate court required in ordinary cases, and a subsequent confirmation of the sale by the court does not validate it.

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[1] Reversed in banc. See 24 Pac. 311, 84 Cal. 607.

Commissioners' decision. Department 1. Appeal from superior court, Los Angeles county; A. W. Hutton, Judge.

Chapman & Hendricks, for appellants. *C. Edgar Galbraith* and *Anderson, Fitzgerald & Anderson*, for respondents.

Hayne, C. Suit to quiet title. Judgment for plaintiffs. Defendants appeal. In 1880 the owner of the property died leaving a will by which the whole property was devised to the widow, who was made sole executrix without bonds, and it was provided that "she have absolute power to sell any or all of said real and personal property at public or private sale, with or without advertisement, and without application to any court, and without approval or authority of any court whatever." The will was admitted to probate, and letters testamentary were issued to the widow. Acting under the power contained in the will, she sold the property to the defendant Eliza J. Olmstead without obtaining an order of sale from the probate court. She reported her proceedings to the court, however, and an order confirming the sale was made, and a conveyance executed. The plaintiffs are the four minor children of the testator. They were not mentioned or in any way referred to in the will, and claim as pretermitted heirs. The main question argued is whether the power of sale given by the will authorized a sale of the children's interests without the previous sanction of the probate court required by the Code of Civil Procedure in ordinary cases. This seems to us to be a question of construction. The provision of the Civil Code in relation to a child of whom no mention is made in a will is that he "must have the same share in the estate of the testator as if he had died intestate, and succeeds thereto as provided in the preceding section." Civil Code, §1307. The "preceding section" is in relation to children born after the making of the will, either during the life-time of the testator or after his death, and provides that such a child "succeeds to the same portion of the testator's real and personal property that he would have succeeded to if the testator had died intestate." So far as the question in hand is concerned these provisions are in substance the same as those of the statute of wills previously in force. The provision of the Code of Civil Procedure in relation to powers of sale is substantially the same as section 178 of the old probate act, as amended in 1861, and is as follows: "Sec. 1561. When property is directed by the will to be sold, or authority is given in the will to sell property, the executor may sell any property of the estate without order of the court, and at either public or private sale, and with or without notice, as the executor may determine, but the executor must make return of such sales as in other cases; and if directions are given in the will as to the mode of selling, or the particular property to be sold, such directions must be observed. In either case, no title passes unless the sale be confirmed by the court." We do not find that the cases in this state cited by counsel determine the question presented. In Estate of Delaney, 49 Cal. 76, it was held that where the legal title is devised to the executor the provisions requiring order of sale, confirmation, etc., do not apply. In Estate of Durham, Id. 495, it was held that where the legal title is not devised to the executor, and he has a naked power of sale, the provision requiring a confirmation applies, and that such confirmation must be according to prescribed formalities. The latter decision is not in point, because here there was a confirmation, to which no objection is taken. And the former decision is not in point, because it is settled that the legal title descends to and vests in the pretermitted heir, who becomes a tenant in common with the devisees, if there are any valid devises. Pearson v. Pearson, 46 Cal. 627. This latter case, however, while it shows that the rule laid down in Delany's Estate has no application, does not determine the question involved here, which is whether the omitted child takes the title subject to the power of sale or not. In Oregon it has been held that a power of sale in a will does not cover the interest of a posthumous child not mentioned in the will. Northrop v. Marquam, 18 Pac. Rep. 457. In that state, however, the statute provided that so far as such child was concerned the testator "shall be deemed to die intestate," which is somewhat broader language than that of our statute. In New York the statute is substantially the same as ours. And in that state it is held that the share of a child born between the making of the will and the death of the testator, and not mentioned in the will, is not affected by a power of sale contained in the will. Smith v. Robertson, 89 N. Y. 558. The argument in favor of the omitted child seems to be that if the testator had died intestate the interest of such child could only be sold in certain cases, and after certain formalities, and that the statute provides, in substance, that the omitted child shall inherit from the testator "as if he had died intestate." The argument, on the other side, is that the statute only provides that the omitted child shall inherit "the same share" as if the testator had died intestate, and that while such share goes to the child it is subject to the other provisions of the will. Each of these arguments seems to us to assume the real question in dispute. And the case is such that no satisfactory conclusion can be reached from a consideration of the mere language of the statute. But we think that a due regard for the interests of pretermitted heirs requires that the safeguards provided by law against improper sales of their property should only be dispensed within a clear case; that this cannot be said to be a clear case, because the law presumes that the omission of all mention of a child was from accident, misapprehension, or forgetfulness, and it cannot be concluded with any degree of certainty that the testator would have given a power of sale of the child's interest if the fact that it would have an interest had been present to his mind. If, for example, a testator supposes that his child is dead, and under that belief devises his whole property to one not of his blood, it is very natural that he should make such devisee sole executor, and give him unrestricted power of sale. But would he have given such power to the devisee if he had known that his child was alive, and would inherit the whole estate? Upon the whole, though the matter is not free from doubt, we think it better that the rule laid down by the New York case should be followed, viz., that, inasmuch as the devise of the child's interest is inoperative, the power of sale of his interest should be construed not to apply to it. The order of confirmation was not conclusive of the legality of the sale. We therefore advise that the judgment appealed from be affirmed.

We concur: BELCHER, C. C.; GIBSON, C.

PER CURIAM. For the reasons given in the foregoing opinion the judgment appealed from is affirmed.

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82 Cal. 226

LUBBOCK v. McMANN *et al.* (No. 12,053.)

(*Supreme Court of California.* Dec. 28, 1889.)

HOMESTEAD—IMPROVEMENTS.

Const. Cal. art. 17, § 1, provides that "the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families." Civil Code Cal. § 1237, provides that "the homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated," selected according to law. *Held*, that where a lot and house are legally selected, and held as a homestead, a second house, subsequently erected on the lot, which does not increase the value of the entire property beyond the amount exempted as a homestead, is, with the land on which it stands, within the homestead exemption, and not liable to sale on execution, though it is used for renting. PATERSON, J., dissenting.

In bank. Appeal from superior court, city and county of San Francisco; J. V. COFFEY, Judge.

Action by Mrs. Lubbock against McMann and others. From a judgment for plaintiff, defendants appealed. On September 9, 1889, department 1 of the supreme court rendered judgment of affirmance, and the following opinions were filed:

"FOX, J. In 1872, plaintiff and her husband were residing upon a certain lot of land in the city and county of San Francisco, having twenty-five feet front, and extending back eighty feet to an alley. The lot, with the small dwelling-house on the front thereof, was the community property of plaintiff and her said husband. On the 2d of December of that year she recorded the same as a homestead. The regularity of this dedication and recording of the homestead is conceded. At some period after the property had been so dedicated and recorded as a homestead, the Lubbocks built another small house, on the rear of the lot, wholly disconnected from the one in which they lived, and fronting on the alley, which they rented out. Afterwards, one Sobey recovered a judgment in a justice's court against the husband of plaintiff, upon which he took out execution, and placed it in the hands of defendant McMann, then sheriff, who, under the direction of the judgment creditor, levied upon the whole of the lot so recorded as a homestead, and advertised the same for sale. Plaintiff, after notifying the sheriff of the homestead character of the property, and demanding a release from said levy, filed her complaint in this action, setting up the material facts hereinbefore recited, showing the homestead character of the property, alleging that at the time of recording the said homestead claim the property was not, and is not now, of a greater value than $5,000, and praying for an injunction to restrain the defendant from making such sale. An order was issued to show cause why an injunction should not be granted as prayed, and restraining the sale in the mean time. Upon the return-day of the order to show cause, the case was heard upon the complaint of plaintiff, the answer of defendants admitting all the material allegations of the complaint, and setting up in addition the fact of the erection of the second tenement above referred to, after the recording of the homestead, and the fact that the same was not occupied by the homestead claimants as a place of residence, but was rented out, they residing in the original dwelling-house on the lot, and, on demurrer to said answer, that the same did not state facts sufficient to constitute a ground of defense to said action. While the record does not disclose the fact, it is conceded by counsel here that at the hearing it was understood that judgment final should follow the result of the submission of the case on those pleadings and demurrer. The court sustained the demurrer, and judgment went for plaintiff, perpetually enjoining the sale. From this judgment the appeal is taken.

"Appellants criticise the action of the court below in issuing the restraining order, pending the hearing of the order to show cause, without requiring plaintiff to file a bond thereon, but expressly admit that, in view of the final result, no injury resulted to them, and seem to waive any adjudication here as to the regularity of that proceeding. We perceive no error in the order of the court sustaining the demurrer to the answer; and, defendants declining to amend, the judgment followed as a necessary sequence. No question being raised as to the remedy, the plaintiff was thereupon entitled to her perpetual injunction. No bond is required upon granting such relief. It is admitted that the homestead was regularly created. There is no pretense that it had ever been abandoned, or even that it had been enhanced in value beyond the homestead exemption. The claim is simply that it became 'vitiated' *quoad* the rear of the lot upon which the new tenement had been erected. But there is no provision of the statute defining by what means, or under what circumstances, a homestead may become 'vitiated;' nor is any particular part of the homestead tract levied upon as being the part relieved from the homestead lien by this new process of vitiation. The levy is upon the whole tract, an unknown part of which, it is admitted, is still subject to a valid homestead claim. Judgment and order appealed from affirmed.

"I concur: WORKS, J.

"PATERSON, J. I concur in the judgment. The execution was levied upon the whole of the property, including the homestead, which is exempt from execution or forced sale. The remedy of the execution creditor is against that portion of the premises included within the homestead declaration, which has ceased to be part of the homestead. It may be a difficult question to determine how the property which does not belong to the homestead should be described, but the fact that such a difficulty exists does not excuse a levy upon the homestead itself. If there are any natural or artificial boundaries between the dwelling-house of the homestead claimant and that of his tenants, it will be easy to make a proper description of the property subject to sale, or it might be described as that portion of the premises described in the declaration not actually used by the family as a homestead. It is claimed by respondent that, inasmuch as the dwelling-house now occupied by the tenant was placed upon the land subsequent to the filing of the declaration of the homestead, and because the entire property is now under the value of $5,000, no portion of the premises described in the declaration of homestead is subject to execution or forced sale. There is no merit in this contention. The constitution provides that 'the legislature shall protect by law from forced sale a certain portion of the homestead and other property of all heads of families.' Article 17, § 1. Acting upon this provision, the legislature has provided that 'the homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated.' Section 1237, Civil Code. 'The homestead is exempt from execution or forced sale, except as in this title provided.' Section 1240. The question before us is not one of abandonment or vitiation of the homestead in its entirety, but a question of exemption. What property is exempt from execution or forced sale? 'It [the homestead] represents the dwelling-house in which the family resides, with the usual and customary appurtenances, including outbuildings, of every kind, necessary or convenient for family use, and lands used for the purposes thereof. * * * The only tests are use and value. The former is both abstract and statutory; the latter statutory alone.' Gregg v. Bostwick, 33 Cal. 228. 'The mere filing of a declaration of homestead does not of itself constitute the premises embraced within it the homestead of the declarant. The use of the property is an important element to be considered.' Laughlin v. Wright, 63 Cal. 116. Referring to Gregg v. Bostwick, Mr. Thompson, in his work on Homesteads and Exemptions, says: 'This last case very clearly conducts us to the rule that houses built for the purpose of being rented to tenants, thus yielding the debtor a revenue separate from any use immediately connected with his dwelling, form no part of his homestead.' Section 130. In Ashton v. Ingle it was held that, in order to be exempt, the property claimed as a homestead must be 'occupied as a residence by the family of the owner. * * * Any portion of his real estate not so used and so occupied will not be exempt, whatever may be the extent or value of such real estate, great or small. * * * Where houses and lots are rented for a money rent to tenants, who are not servants or employes of the owner, with the intention that such houses and lots shall become the homes and residences of such tenants and their families, and they actually do become the homes and residences of such tenants and their families, the owner, certainly, cannot then claim that such houses and lots are a part of his own home and residence, although they may adjoin the same.' 20 Kan. 670. See, also, Austin v. Stanley, 46 N. H. 51, Kurz v. Brusch, 13 Iowa, 371; Casselman v. Packard, 16 Wis. 114."

On September 27, 1889, the following order was filed by the court in bank:

"PER CURIAM. The parties to this cause having filed their stipulation in writing, by which the respondent waives the point upon which the judgment was affirmed, and the appellants waive all errors by them assigned which are not involved in the single question whether or not the second house mentioned in the record is exempt from execution, and having jointly petitioned for a reconsideration of the cause upon that point alone, it is ordered that the judgment of affirmance heretofore rendered be, and the same is, hereby vacated and set aside, and the cause ordered resubmitted in bank as of this date, upon briefs on file. BEATTY, C. J.; WORKS, J.; PATERSON, J.; FOX, J."

Frank M. Stone, for appellants. *Geo. D. Collins*, (*Sawyer & Burnett*, of counsel,) for respondent.

FOX, J. Judgment was rendered in this case, in department 1 of this court, September 9, 1889, affirming the orders appealed from. Reference is made to the opinion filed at that time for a statement of the case, and for the rulings then made upon the points considered, which rulings are still adhered to. The parties have since, by stipulation, waived all controversy upon the points then discussed; but an orderly and intelligible disposition of the case requires that rulings should be had upon those points, and, after a careful reconsideration of the case in bank, we see no reason to change the decision then made, so far as it goes. Upon the express stipulation, and at the request of counsel on both sides, the case was resubmitted in bank, for the purpose of having a direct opinion of the court upon the single question of whether or not the second house mentioned in the former opinion—the house built on the rear of the lot since the filing of the homestead declaration—was and is exempt from execution; whether it was and is impressed with the character of homestead to the extent of being exempt from execution on that account. And, to avoid future litigation between the parties, it is stipulated that the orders of the court below, from which the appeal was taken, shall be affirmed or reversed according as we shall now decide this question in the affirmative or negative.

There can be and is no question but that this entire lot was fully impressed with the character of homestead before and at the time this second house was built upon it. The building of the second house did not increase the value of the entire property, including both houses, to an amount which is in excess of that which is by law, and as incident to homestead, made exempt from execution as such No part of the tract has ever been abandoned, or the homestead claim thereon released, in the manner provided by law. How, then, if at all, is it made subject to sale on execution? The strict language of the question submitted confines it to the house. Is the house exempt? It certainly is, if the land upon which it stands is exempt; for it has become a part of the realty, and can only be separated from the land with the consent of the owner. But we do not understand the intent to be to limit the question to the house alone, as distinguished from the land upon which it stands.

The constitutional provision is that "the legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families." Article 17, § 1. Here there is no limit to the value of the property thus to be protected. It is left to the legislature to determine what portion, to what limit, and by what means, it shall be protected. Exemption is a constitutional right incident to homestead, (Ham v. Bank, 62 Cal. 138;) but the extent of such exemption, and the means by which it shall be secured, are made by the constitution the subject of legislative enactment. Legislating for the purpose of giving effect to this constitutional provision, it has been in the Codes provided that "the homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated, selected as in this title provided." Civil Code, § 1237. Following this, and in the same title, which extends to and includes section 1269, will be found the provisions as to the mode and manner of selection in order to avail of the exemption; the limitation of such exemption; the mode and manner of abandonment or release; the exceptions to the rule of exemption; and the course to be pursued when the homestead exceeds in value the limit of the exemption. Actual occupation, as a place of residence, at the time of filing the declaration, is necessary in order to impress upon the premises the character of homestead. Section 1263; Prescott v. Prescott, 45 Cal. 58; Babcock v. Gibbs, 52 Cal. 629; Dorn v. Howe, Id. 630; Aucker v. McCoy, 56 Cal. 524. Use at the time of selection, and selection by the making and recording of the proper declaration, are both essential elements in the creation of the homestead character. Neither is sufficient for that purpose without the other. Laughlin v. Wright, 63 Cal. 113; Maloney v. Hefer, 75 Cal. 424, 17 Pac. Rep. 539; In re Allen, 78 Cal. 294, 20 Pac. Rep. 679. If at the time of filing the declaration for record, the two houses now standing upon this lot had been standing as they now do, and occupied as they now are, only the one occupied as the dwelling of the plaintiff, with that portion of the lot used in connection therewith, would have been impressed with the homestead character. As to the other house, and the land used in connection with it, the attempt to dedicate it as a homestead would have been inoperative. Tiernan v. His Creditors, 62 Cal. 286; Maloney v. Hefer, supra; In re Allen, supra. But it has never been held, under our statute, that the subsequent erection of a second house, for whatever purpose such second house was used, operated to relieve the property *pro tanto*, or any separate part of it, of the homestead character which had already attached, so as to make it liable to seizure and sale under execution. On the contrary, the statute expressly provides that the homestead can only be conveyed or incumbered as provided in section 1242, and only be abandoned as provided in section 1243, Civil Code; also, that it is subject to execution only in the cases provided in section 1241, of which this is not one. Even a removal from the homestead, followed by long-continued residence and the acquirement of citizenship in another state, has been held not to operate as an abandonment of a homestead. Porter v. Chapman, 65 Cal. 367, 4 Pac. Rep. 237. See, also, Tipton v. Martin, 71 Cal. 325, 12 Pac. Rep. 244. The whole lot being adapted to use as a homestead, and actually used as such at the time of dedication, it then became, as an entirety, affected with the homestead character. And this is so without regard to the value of the lot, either at the time of its dedication or at any subsequent period. There is no statutory limit as to the value of the property which may be selected, and upon which the character may be impressed. When the attributes of residence and selection according to law exist so as to express its essence, the homestead becomes an estate in the premises selected, exempted by law from forced sale. They may be of greater or less value than the interest in them exempted by law. The excess, if there be one, in value, though it may be homestead in fact, is subject to the *jus disponendi* of the owner and the claims of his creditors. Ham v. Bank, 62 Cal. 139. But it does not follow that the excess in value is subject to seizure and sale at the instance of an execution creditor. If the property so impressed with the character of homestead is worth more than the homestead exemption, and the creditor desires to avail himself of that excess, the proceedings provided by the Code (sections 1245-1259, Civil Code,) must be taken for the admeasurement and application of such excess. Waggle v. Worthy, 74 Cal. 268, 15 Pac. Rep. 831. A judgment creates no lien upon property thus affected; and a levy gives no right, except to inaugurate the proceedings for the admeasurement of such excess. Barrett v. Sims, 59 Cal. 615. It follows that a sale, unless made under order of court, and for purposes of segregation of the excess as provided in the sections referred to, would convey no title. But though the sale of a homestead under execution conveys no title, it may create a cloud, and involve the homestead claimant in litigation, and will therefore be enjoined. Culver v. Rogers, 28 Cal. 520; Eby v. Foster, 61 Cal. 287.

So far as we have been able to discover, no case has before arisen under our statutes where the precise question now submitted has been presented. In every case where it has been held that a second tenement, used for purposes other than the residence of the family, has operated to prevent the homestead character from attaching to such second tenement, and the land used in connection therewith, such second tenement existed at the time of the attempted homestead selection, and was not one constructed after the homestead character had attached to the land. Here the homestead character had attached before the second building was constructed; and, reasoning from the analogy of the statutes and of the cases cited, the construction of such building was not an act which relieved it of such homestead character, and rendered the land subject to direct seizure and sale under execution. If the construction of this second building had increased the value of the tract claimed as a homestead to an amount in excess of the homestead exemption, or if, for any other cause, it had become or was of greater value than the amount of such exemption, the plaintiff would have been entitled to make the levy, as he has done in this case, not for the purpose of proceeding to sale under the execution, but as a basis of application to the proper court for proceedings under the statute for the admeasurement of such excess in value, and then for partition or sale under the order of the court, as in the statute provided. But no provision for such a proceeding has been made, unless there is such an excess in value. And while it is true that, under the rule of law heretofore established, this second house, with the land upon which it stands, would not have taken on the homestead character if it had been there at the time of homestead selection, but that the homestead would then, by reason thereof, have been so limited in extent as to exclude this house and its grounds, it may very well be that the legislature did not intend that the homestead should thereafter be limited in extent by reason of future improvements, even if such improvements were used for purposes of revenue rather than residence, so long as they did not increase the value beyond the limit of exemption. Whether this be so or not, we are compelled to hold that, under the facts of this case, the statute, and the authorities cited, this whole lot is so affected with the homestead character as to be exempt from sale under execution, and there is no authority in this proceeding, or in the case in which the execution was issued, to segregate any part of the lot, and relieve it from such exemption. Whether there is such authority anywhere, we are not now called upon to decide; but, without further legislative action, it would seem to be exceedingly doubtful. The judgment and order appealed from must be affirmed, and it is so ordered.

We concur: BEATTY, C. J.; WORKS, J.; SHARPSTEIN, J.; THORNTON, J.; MCFARLAND, J.

PATERSON, J., (*dissenting.*) I am unable to concur in the prevailing opinion, or in the judgment. It is immaterial, in my opinion, whether the second house was placed on the land before or after the filing of the declaration of homestead. The stipulation of counsel reduces the question before us to the simple inquiry whether or not the house built on the rear of the lot is exempt from execution. The question is purely one of exemption. The question is not whether the whole property, including both houses, is so impressed with the homestead character that it would go to the survivor on the death of one of the spouses. Property selected and improved as a homestead may retain its homestead character for certain purposes, and yet a portion of it be not exempt from execution. This is plain from the provisions of the constitution and the statute bearing upon the subject. The constitution provides that "the legislature shall protect by law, from forced sale, a certain portion of the homestead and other property of all heads of families." Article 17, § 1. Acting upon this provision, the legislature has provided that "the homestead consists of the dwelling-house in which the claimant resides, and the land on which the same is situated." Section 1237, Civil Code. Section 1240, Civil Code, provides that "the homestead is exempt from execution or forced sale, except as in this title provided." This court has decided that the homestead "represents the dwelling-house in which the family resides, with the usual and customary appurtenances, including outbuildings of every kind necessary or convenient for family use; * * * the only tests are use and value," (Gregg *v.* Bostwick, 33 Cal. 228;) that the use of the property is an important element to be considered, (McLaughlin v. Wright, 63 Cal. 116.) Referring to Gregg v. Bostwick, supra, Thomp. Homest. & Ex. says: "This last case very clearly conducts us to the rule that houses built for the purpose of being rented to tenants, thus yielding the debtor a revenue separate from any use immediately connected with his dwelling, form no part of his homestead." Section 130. It has been held uniformly that, in order to be exempt from execution, the property claimed as a homestead must be actually occupied as a residence by the family of the owner,—temporary absences excepted, of course; and that any portion of his real estate not so used is not exempt from execution, whatever may be its extent or value; and that, where houses and lots are rented for money rent to tenants who are not servants or employes of the owner, the latter cannot claim them as a part of his own home and residence, although they may adjoin the same. Ashton v. Ingle, 20 Kan. 670; Austin v. Stanley, 46 N. H. 51; Kurz v. Brusch, 13 Iowa, 371; Casselman v. Packard, 16 Wis. 114. As all other questions are waived by the stipulation of counsel, I think that the rear house, and the land upon which it stands, should be subjected to the satisfaction of the judgment.

LEEK v. MCCLURE *et al.* (No. 12,487.)

(*Supreme Court of California.* Sept. 14, 1889.)

Department 1. Appeal from superior court, city and county of San Francisco; JOHN F. FINN, Judge.

C. H. Parker and *Nagle & Nagle*, for appellant. *M. S. Eisner* and *Spencer & McInerney*, for respondents.

WORKS, J. This is an action to recover certain moneys alleged to have been collected by the respondents as attorneys, and not paid over on demand. The court below found that the respondents had never collected or received the money. The sole question presented on this appeal is whether this finding is supported by the evidence or not. We think the evidence is such that we cannot disturb the judgment of the court below. Judgment and order affirmed.

We concur: FOX, J.; PATERSON, J.

BERNIAUD v. BEECHER. (No. 12,943.)

(*Supreme Court of California.* Sept. 12, 1889.)

In bank. Appeal from superior court, San Joaquin county; J. G. SWINNERTON, Judge.

Action by Rosina Berniaud, by her guardian *ad litem*, J. M. Hogan, against J. L. Beecher, to quiet plaintiff's title to certain land. On allegations and proofs the court found that plaintiff is alive and insane, and J. M. Hogan her duly appointed guardian *ad litem;* that plaintiff is the owner in fee of the land described in complaint, except the west 19½ feet of lot 1, block 229, of which said defendant is the owner, under a sheriff's sale. Judgment for plaintiff, and defendant appeals.

Jas. A. Louttit, (*Louttit, Woods & Levinsky*, of counsel,) for appellant. *John C. Byers* and *L. W. Elliott*, for respondents.

WORKS, J. This is the third appeal in this case. Substantially all of the questions now presented were determined against the appellant on the two former appeals. 71 Cal. 38, 11 Pac. Rep. 802; 76 Cal. 394, 18 Pac. Rep. 598.

Counsel for appellant contend that the decision in the last appeal was upon the judgment roll, and therefore did not determine the question presented here, whether the findings of the court were sustained by the evidence. But on the first appeal the decision was that the evidence, which was documentary, and was the same as is in the record on this appeal, proved the plaintiff's title to the property; and it was further decided that the defendant not having been in the possession of the property, the defense of the statute of limitations was not made out. We do not base this decision on those cases entirely, however. We think the evidence was sufficient to sustain the findings, and that the judgment of the court below was right. Judgment and order affirmed.

We concur: BEATTY, C. J.; SHARPSTEIN, J.; McFARLAND, J.; FOX, J.; THORNTON, J.

SETTLERS' DITCH CO. v. HAYES *et al.* (No. 12,297.)

(*Supreme Court of California.* July 31, 1889.)

In bank. Appeal from superior court, Tulare county; W. W. CROSS, Judge.

Brown & Dagget and *M. Mullany*, for appellants. *Atwell & Bradley, M. S. Babcock*, and *Jarboe, Harrison & Goodfellow*, for respondent.

McFARLAND, J This case is very similar to the case of Lakeside Ditch Co. v. Crane, (No. 12,296,) ante, 76. The issues in both cases were nearly the same, and so was the evidence; and the opinion delivered in the Lakeside Case is applicable to the case at bar, except in one or two respects, and, so far as applicable, is adopted as the opinion in this case. The findings in the case at bar are not so much exposed to the criticism of uncertainty as were the findings in the other case; and, if they were all supported by the evidence, they would probably support the judgment. But, as in the Lakeside Case, we are constrained to say that the evidence does not support the finding that the Hyde ditch of defendants, constructed in 1876, "carried away no appreciable quantity of water," and that neither the defendants nor their grantors "claimed or asserted any right to the waters of Cross creek adversely to the plaintiff," prior to the month of May, 1884. For this failure of evidence, and for the reasons given on this point in the opinion in the Lakeside Case, the judgment must be reversed. There was sufficient proof of the incorporation of plaintiff, the opinion in the Lakeside Case on that subject being applicable here. What was said in that case as to the bearing of the statute creating water commissioners for Tulare county upon the rights of the parties is also applicable to the case at bar; and also what was said there on title by prescription, on rulings about the admissibility of certain evidence, and on the subject of what the findings should be on another trial. Judgment and order reversed, and cause remanded for a new trial.

We concur: PATERSON, J.; SHARPSTEIN, J.

WORKS, J. I concur in the judgment.

BEATTY, C. J. I concur in the judgment upon the grounds stated in my concurring opinion in case No. 12,296.

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